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NOMINAL INDEX

Abdul Aziz v. Anjuman Imdad Bahmi Karza	442	Bano, Mt. v. Ghulam Mustafa Khan	752
Abdul Ghani v. Maula Baksh	670	Barkat Ram v. Suggar Electric Stores, Ludhiana	140
Abdullah v. Narain Das	370	Baru Mal v. Daulat Ram	164
Abdullah v. Shankar Das	502	Basanti Debi v. Official Receiver, Estate of Ghulam Rasul	610
Abdul Rahim v. Abdul Haq	191	Basanti Devi v. Amin Chand	63
*Abdul Rahman v. Emperor	729	Basanti Devi v. Official Receiver	508
Abdul Sattar v. Aziz-ul-Rahman	557	Basant Singh v. Kartar Singh	213
Abdul Sattar v. Emperor	278	Begum Bibi, Mt. v. Raja	205
Agar Chand v. Prithvi Singh	885	Beli Ram v. Municipal Committee, Pindigheb	296
Ahmad v. Mohammad	809	**Benares Bank, Ltd., Saharanpur v. Har Parsbad	482
Ahmad Din v. Mohammad Taqi	365	Banarsi Das v. Ali Muhammad	5
Ahmad Sayyed Khan v. Narain Singh	982	Bennett Coleman & Co., Ltd. v. G. S. Monga	917
Akhtari Begam, Mt. v. Allah Jawaya	543	Bhagat Ram v. Ali Bakhsh	749
Albel Singh v. Narain Dass	675	Bhagwan Das v. Gian Chand	49
Ali Mohammad v. Emperor	913	Bhagwan Das v. Parabh Dial	1005
Ali Mohammad v. Sant Lal	60	Bhagwan Singh v. Balbir Singh	304
Ali Muhammad v. Shah Tamaz Khan	692	Bhani, Mt. v. Ujagar Singh	741
Allah Bakhsh v. Mt. Jiwan	366	**Bharat Insurance Co., Ltd. v. People's Bank of Northern India, Ltd.	322
Amar Singh v. Sundar	662	Bibo, Mt. v. Sampuran Singh	222
Amin Chand v. Duni Chand	923	Bije Singh v. Shib Singh	669
Amir Chand v. Secy. of State	26	Bimal Pershad v. Sital Pershad	682
Amir Husain Shah v. Ghulam Baqir Shah	210	Bindra Ban v. Jaidayal	894
Amrik Singh v. Sant Singh	485	Bishen Singh v. Bakhshish Singh	13
*Amrik Singh-Daya Singh v. Municipal Committee, Jhelum	972	*Boda Ram v. Devi Das-Hari Chand	668
Anant Ram v. Ram Saran Das	209	Brij Lal v. Dhanna Ram	547
Anjuman Dehi v. Kehar Singh	901	**Brij Raj Saran v. Alliance Bank, Simla, Ltd.	946
*Antu v. Mohammad Ibrahim Ali Khan	657	Budha Mal v. Amar Nath	381
Arjan Singh v. Maqbul Ahmad	799	Bundo, Mt. v. Mt. Nihato	660
Arur Singh v. Mt. Santi	405	Bur Singh v. Anjuman Dehi Sohal	725
Asa v. Mt. Bhuran	466	Buta v. Mt. Hapho	156
Asa Nand v. Gian Chand	598	Buta Singh v. Gurmukh Singh	371
*Ashiq Mohamed v. Emperor	330	Central Bank of India, Ltd., Lahore v. (Firm) Jawahir Singh-Harnam Das	65
Atma Ram v. Harnam Singh	793	Chaman Lal v. Emperor	47
Atri Mt. v. Rodhal	864	Chandar Bhan v. Mohammad	962
Badri Shah-Sohan Lal v. Commissioner of Income-tax	856	Chand Kaur, Mt. v. Official Receiver	499
Badri Shah-Sohan Lal v. Commissioner of Income-tax	872	Chandra, O. N. v. Dwarka Das	42
Baghel Singh v. Mt. Dhan Kaur	258	*Chaudhri Fazl Din, Ghulam Qadir, Ahmad Bakhsh & Co. v. Ghulam Rasul	648
Bahadur Khan v. Kundan Lal	267	*Cheda Lal v. Aijaz Hussain	1022
Bahadur Shah v. Zulfiqar Shah	767	*Chhaibar Singh v. Mrs. E. M. Baines	800
Bahali v. Emperor	507	Chhaju Mal v. Multan Singh	996
Baij Nath v. Ram Sarup	827	Chhaju Ram v. Muzaffar Ahmad	845
Baij Nath Bhatnagar v. Muhammad Din	359	Chhutta v. Mohammad Yar	779
*Bakhshan v. Emperor	247	Chiragh v. Emperor	850
Balak Nath v. Charanjit Rai	300	Chiragh Bibi, Mt. v. Umar Din	594
Balanda v. Mt. Suban	418	Chuni Lal v. Jai Gopal	55
Balkishen v. (Firm) Narain Dass-Chela Ram	239	*Chuni Lal v. Maula Bakhsh	6
Balmokand v. Ram Saran Das	519	Commissioner of Income-tax, Punjab v. Hukam Chand Jagadhar Mal	441
*Balmukand v. Punjab National Bank, Ltd. Ambala (FB)	721	Committee of Management of Gurdwaras, Amritsar v. Atma Singh	648
Bal Raj v. Mt. Mahanto	31		
Banarsi Das v. Commissioner of Income-tax, Punjab, N. W. F. & Delhi Provinces, Lahore	489		
Banarai Das v. Commissioner of Income-tax, Punjab, N. W. F. & Delhi Provinces, Lahore	585		

Committee of Management of Gurdwaras, Amritsar v. Central Bank of India, Ltd., Amritsar	766	Ghulam v. Emperor	851
Committee of Management of Gurdwaras, Amritsar v. Hakim Singh	641	Ghulam Aishan Bibi, Mt. v. Mohammad Sharif	1007
Committee of Management of Gurdwaras, Amritsar v. Narain Singh	623	Ghulam Ali v. Qutab Din	477
Conville, H. T. v. Commissioner of Income- tax, Punjab, N.W.F. & Delhi, Provinces, Lahore	595	Ghulam Haidar v. Diwan Iqbal Nath	1000
Co-operative Assurance Co., Ltd., Lahore v. Sachdev	685	Ghulam Mohammad v. Barkat Ali	935
Dalip Singh v. Gian Singh	142	Ghulam Mohammad v. Secy. of State	910
Damodar Das & Sons, Ltd. v. Basheshar Nath	865	Ghulam Mohammad Khan v. Samundar Khan	37
*Deokaran Das-Ram Bilas v. Debi Sahai	7	Ghulam Rasul v. Emperor	238
Deputy Commissioner, Kangra v. Thakar Ramgopal Tempal	129	Ghulam Rasul v. Mt. Mohammad Bibi	349
Deputy Commissioner, Muzaffargarh v. Joint Hindu Family of Tahliaram	545	Ghulam Rasul Khan v. Ali Bakhsh	132
Des Raj v. Fazal Karim	388	Giani v. Emperor	1015
Dhala Bahlak v. Dhala Lakhan	612	Gilani Bakhsh v. Behari Lal	225
*Dhane Ram-Dharam Pal v. Commissioner of Income-tax, Punjab, N. W. F. & Delhi Provinces, Lahore	468	*Girdhari Lal v. Dharam Das	147
Dhani Ram v. Sri Gopal-Lachhman Das	316	Girdhari Lal v. Rattan Chand	293
Dhani Ram-Ram Gopal v. Commissioner of Income-tax, Punjab, N. W. F. & Delhi Provinces	961	Girdhari Ram v. Qasim	461
Dhanjibhoy, S. C. v. Secy. of State	1010	Godar Shah v. Fazal Ilahi	570
Dhanpat Rai v. Badri Dass	759	Gokal v. Hamira	134
Dhuman Khan v. Gurmukh Singh	394	Gopal Das v. Sakina Bibi	307
Dhunda v. Emperor	335	Gopal Singh v. Rao Baldev Singh	512
Dial Singh v. Bhagat Ram	822	Gujjar Mal v. Municipal Committee, Feroze- pore City	1011
*Dial Singh v. Emperor	337	Gulab v. Umar Bibi	403
*Dia Parkash v. Bhana Mal	241	Gulab Singh Johri Mal v. Messrs. Dharm- pal Dalip Singh	588
Digambar Dat Gir v. Bhairon Gir	839	Guranditta Mal Sant Ram v. Labhu Ram Lachman Das	476
Digambar Datt Gir v. Bhairon Gir	228	Gurbakhsh Singh v. Emperor	907
Dilwar v. Emperor	233	Gurbakhsh Singh v. (Firm) Lal Chand Dar- shan Lal	737
*Dist. Bar Association, Hoshiarpur v. Bawa Ram Singh	382	Gurbakhsh Singh v. (Firm) Shankar Das Sadhu Ram	71
Diwan Chand v. Sant Ram	990	**Gurdial Singh v. Khazan Chand	486
*Dogar Singh v. Mt. Parbati	146	Gurdit Singh v. Sher Khan	448
*Dost Mohammad v. Miraj Din	387	Gurmukh Singh v. Sundar Singh	153
Duni Chand-Gokal Chand v. (Firm) Brij Lal & Sons	765	Guru Amarjit Singh v. Dharm sala Darwaza Kitni	218
Durga Das v. Gobind Singh	569	Guru Amarjit Singh v. Shiromani Gurd- wara Parbandhak Committee	936
Dwarka Das v. Rikhi Ram	784	Guru Amarjit Singh v. Shiromani Gurd- wara Parbandhak Committee	939
*Emperor v. Atta Ullah Shah	429	*Hafiz Qamar Din v. Nur Din	136
— v. G, a Pleader, Gujr	732	**Haji Ali Jan v. Commissioner of Income- tax, Punjab	621
— v. Harbans Lal	1013	Hans Raj v. Emperor	341
— v. Jiwan Lal Gauba	730	Hanuman Prasad v. Mohammad Ismail Mohammad	72
— v. Mr. O, an Advocate	717	Harbans Kaur, Mt. v. Nagina Singh	273
*— v. Shera	256	Harchand Rai v. Khairuddin	871
Faiz Ahmad v. Emperor	855	Hardit Das v. Gurdit Singh	819
Faiz Mohammad v. Allah Ditta	878	Hargobind v. Gurdas Mal	70
*Faqir Singh v. Emperor	353	Hari Bakhsh v. Sham Sundar	684
Fateh Din v. Bal Mukand	963	Harikishan Lal & Sons v. People's Bank of Northern India, Ltd.	102
Fateh Mohammad v. Sardar Ali Shah	48	Hari Ram v. Emperor	144
Fatima, Mt. v. Jalal Din	501	*Hari Ram v. Secy. of State	282
Fateh Sher v. Behari Ram	958	*Hari Singh v. Pritam Singh	504
Fazal Ahmad v. Tola Ram Singh	179	Harkishan Lal v. People's Bank of Northern India, Ltd.	608
Fazal Ahmad v. Tola Ram Singh	244	Harnam Das v. Kartar Singh	825
Fazal Din v. Mian Karam Hussain	81	Harnam Kaur, Mt. v. Jagat Singh	108
Fazal Nishan, Mt. v. S. Hukam Singh	1020	Harnam Singh v. Emperor	833
Fazl Karim v. Emperor	580	Harnam Singh v. Mt. Bhagi	261
Feroze Din v. Fazal Qadar	67	Harnand Rai, Harbhagat Rai v. Commis- sioner of Income-tax, Punjab	597
Ganesh Das v. Hari Chand	704	*Hasham v. Emperor	28
Gangi, Mt. v. Atma Ram	291	Hira v. Ram Singh	574
Gauba, K. L. v. Indo Swiss Trading Co., Ltd.	500	**Hira Lal v. Khizar Hayat Khan	168
*Ghazanfar Ali v. Muzaffar Ali	511	Hira Lal v. Mt. Jiwan	145
		Hira Lal Narain Das v. Dharam Chand	367
		*Hira Nand Jai Ram Singh v. Commis- sioner of Income-tax, Rawalpindi	452

*Hirda Ram v. Mohammad Din	895	Labhu Ram v. Bansi Dhar	120
Hiro, Mt. v. Arjan Das	744	Lachhman Das v. Amrik Singh	178
Hitkari Brothers v. Commissioner of In-		Lachu v. Mohan Lal	83
come-tax	510	Ladha Mal-Bishen Das v. Nadar	742
Hoshnak Ram v. Punjab National Bank,		Ladha Ram v. Barkat Ali	672
Ltd.	555	Lakhi Ram v. Parbhal Singh	345
*Hussaina v. Emperor	380	Lal Chand v. Megha Ram	617
Imam Bibi, Mt. v. Abdul Rahman	929	*Lalla Mal-Sangham Lal v. Commissioner	
Imam Din v. Bhag Singh	746	of Income-tax, Lahore (FB)	762
Inam Ali Shah v. Thakar Das	496	Lal Mohammad v. Emperor	471
Inayat Ali v. Mohammad Hussain	346	Lal Mohammad v. (Firm) Khem Chand-	
Indar Pal v. Emperor	409	Radha Kishan	167
Indar Singh v. Nasiba	769	Lal Singh v. Emperor	707
Ishar Das v. Bhagwan Singh	841	Lalu v. Baldev Singh	351
Ishar Das v. Ganpat Rai	530	Laso Devi, Mt. v. Mt. Jagatambha Devi	378
Ishar Das v. Ghulam Mohammad	835	Laul, S. R. v. Ganga Sugar Corporation,	
Ishar Singh v. Allah Rakha	698	Ltd.	904
Ishar Singh v. Sadhu Singh	659	Lok Nath v. (Firm) S. Gopal Singh Hira	
Ismail v. Fazla	97	Singh	215
Jagdish Ram v. Mt. Chinto	138	Lorinda Ram v. Bhawani Mal	783
Jaginder Singh v. Kartara	551	Lyallpur Bank, Ltd. v. Gian Chand	319
Jahan Khan v. Ditta	503	*Lyallpur Bank, Ltd. v. Manobar Lal	152
Jamna Das v. Jalal-ud-Din	561	MacNabb, A. C. v. Commissioner of In-	
Jamna Devi, Mt. v. Official Receiver, Camp-		come-tax, Punjab, N. W. F. & Delhi	
bellpur	598	Provinces	1001
Jan Mohammad v. Amolak Ram	301	Madan Theatres, Ltd. v. Hari Das	33
Jaswant Kaur, Mt. v. Mahant Tipar Chand	443	Magan Nath v. Harbans Singh	965
*Jawahar Mal v. Punjab National Bank,		Maghi Mal v. L. Ganpat Rai	212
Ltd., Sargodha	524	Mahbub v. Kale Khan	756
*Jawahar Singh & Sons v. Jamna Das Shi-		Mahbub Begam, Mt. v. Sher Mohammad	109
karpuria	10	Mahi v. Mt. Barkate	339
Jawala Singh v. Mt. Santi	802	Mahmud Shah v. Pir Shah	858
Jawala Singh v. Thakar Singh	88	Mahomed v. Emperor	264
Jesa Ram v. Ghulaman	816	Mahomed Akbar v. Harbans Singh	532
Jeswant Singh v. Shiromani Gurdwaras		Mahomed Ali v. Ghulam Nabi	290
Prabandhak Committee	567	Mahomed Ali v. Wazir Ali	589
Jhanda Ram Wadhawa Ram v. Allah Yar	857	Mahomed Din v. Municipal Committee,	
Jhanda Singh v. Shib Dev Singh	474	Sialkot	1008
Jiram v. Lokram	206	Mahomed Hayat Khan v. (Firm) Jaspat	
Jiwan v. Sant Singh	575	Rai-Babu Ram	703
Jiwan Singh v. Radha Kishan	747	Mahomed Hussain v. Municipal Committee,	
Jowala v. Dewan Singh	237	Sialkot	689
Jowala Das Govind Ram v. Thakar Das	251	Mahomed Ishaq v. Mt. Sairan	611
*Kahn Chand v. Gurdit Singh	976	*Mahomed Ismail v. Secretary of State	599
Kali Das v. Prabh Dayal	786	Mahomed Nawaz Khan v. Manga Khan	59
Kalsum Begum, Mt. v. Mohammad Ismail	161	Mahomed Rafi v. Qazi Mazhar Hussain	796
Kalu Ram v. Nur Mohammad	571	Mahomed Sadiq v. Mt. Sami-ul-Nissa	618
Kalyan Singh v. K. S. Verma	523	Mahomed Shafi v. Emperor	15
*Kangra Valley State Co., Ltd., Lahore, In		Mahomed Sharif v. Khuda Bakhsh	683
the matter of	350	Mahomed Sharif v. Teja Singh	453
Kanhaya Lal v. (Firm) Devi Dayal Brij		Mahomed Sultan Begam, Mt. v. Saraj-ud-	
Lal	514	Din Ahmad	183
*Kanti Chandra Mukerji v. Badri Das	718	Mahomed Yakub v. Abdul Karim	673
Kanwar Bhan v. Bhagat Jiwan Das	143	Mahomed Yar v. Khalil-ul-Rahman	695
Karam Bhari, Mt. v. Jagan Nath	495	Mahomed Yasin v. Mumtaz Begam	716
*Karam Singh v. Emperor	8	*Mahomed Zaman Khan v. Malik Umar	
Kartar Singh v. Emperor	400	Hayat Khan	792
Kartar Singh v. Mt. Banto	804	Mai Dhan Sita Ram v. Imperial Bank of	
Kashi Ram v. Des Raj	798	India, Rawalpindi	694
Kehr Singh v. Chanda Singh	578	Makhan Singh v. Mt. Mango	192
Kesar Singh v. Achhar Singh	68	*Malan Devi v. Amritsar National Bank,	
Kesar Singh v. Balwant Singh	645	Ltd.	286
Khadija Begam, Mt. v. Nisar Ahmad	887	Mallan, Mt. v. Gora Mal	922
Khair Ali Shah v. Imam Shah	80	Mallan, Mt. v. Parmatma Das	558
Khan Chand v. Nur Muhammad	242	Management Committee, Gurdwara Nan-	
*Kherati Lal v. Janki Parshad	681	kana Sahib v. Hira Dass, Ohela of Gobind	
Khuda Bakhsh v. Emperor	914	Das	298
Kirpal Singh v. Dalip Singh	875	*Manak Chand v. Madan Lal	943
Kishni, Mt. v. Munshi	157	Mangal v. Hakim Behari Lal	263
*Kishore Chand v. Bahadur	(FB) 771	Mangal Singh v. Sagar	873
Koshalia, Mt. v. Riaz-ud-Din	362	Mani Singh v. Anand Parkash	693
Kundan Lal v. Ram Partap	469	*Manohar Dass v. Birandari Sheikhpurain	280

*Manohar Lal v. Rup Lal	712	Nizam-ul-Haq v. Mohammad Ishfaq	361
Mansa Ram v. Khair Mohammad	591	Northern Forest Co. v. Ram Singh Kabuli & Co.	328
*Manzur Hussain v. (Firm) Ram Rattan Shah-Raj Mal	236	Nura v. Emperor	778
*Maqbul Ahmad v. Mt. Afzal-ul-Nisa	1	Nur Mohammad v. Ahmad Ali Khan	815
*Maqsood Ahmad v. Mathra Datt & Co.	1021	Nur Mohammad v. Amir	708
Master Zedpa v. Emperor	828	Nur Mahomed v. Bhawan Shah	465
Matab Mal-Jinda Shah v. Darya Ram Gu-randitta	573	Official Receiver, Delhi v. Kishen Lal	98
Mayya Mal v. Mt. Dhan Devi	150	Official Receiver, Gujranwala v. Abdul Wahid	877
Megh Raj v. Municipal Committee, Abohar	921	Padam Parshad v. Firm Mittar Sain-Ganeshi Lal	690
Mehar Chand v. Pritam Singh	605	Panna Lal v. Emperor	294
*Mehar Bano, Mt. v. Sher Mohammad	969	Panna Lal v. Rama Nand	193
Mehr Das v. Munshi Ram	920	Panna Lal v. Ram Chand	942
Mehr Singh v. Sohan Singh	710	Parkash Chand v. Madan Theatres, Ltd.	463
Mela Mal-Shib Dayal v. Commissioner of Income-tax	546	Parmodh Chand v. Narain Singh	104
Mian Channu Factories Union v. Commis-sioner of Income-tax, Punjab	548	Parshotam Das v. Emperor	919
Misri Lal v. Babu Lal	151	Pars Ram Brij Kishore v. Jagraon Trading Syndicate, Ltd., Jagraon	226
Misri Lal v. Babu Lal	679	*Pars Ram-Brij Kishore v. Jagraon Trading Syndicate, Ltd., Jagraon	739
Mohamda v. Chuni Lal	678	People's Bank of Northern India, Ltd., <i>In re</i>	700
Mohammada v. Emperor	911	——— v. Fateh Chand & Co.	401
Mohan Lal v. Shib Charan Das	891	——— v. Hargopal	268
Mohan Singh v. Narain Singh	379	*——— v. Har Gopal	271
*Moti Ram v. Hans Raj	334	——— v. Harkishen Lal	408
Mukand Singh v. Puran Das	924	*Phullu v. Emperor	731
*Mulhe v. Emperor	859	Phuman Singh v. Mt. Kishno	17
Mulkh Bano, Mt. v. Mohammad Banaras Khan	788	Piara Lal v. Amir Chand	376
*Mulk Raj Bhalla v. People's Bank of Northern India, Ltd.	480	Piara Mal v. Sham Das	76
Municipal Committee, Amritsar v. Mt. Gujri	182	Piare Lal v. Karta Ram	550
Municipal Committee, Amritsar v. Nanak Chand	177	Piare Lal-Moti Lal v. Sri Ram	581
*Municipal Committee, Amritsar v. Ralia Ram	629	Pindi Das v. Emperor	473
Municipal Committee, Sialkot v. Jagat Singh	572	*Pir Shah v. Mahmud Shah	135
Municipal Committee, Simla v. Puran Mal & Sons	983	Praphull Dev v. Sham Lal	406
Muni Lal v. Bari Doab Bank, Ltd., Hoshiarpur	176	*Preman Shah v. Benarsi Das	141
Muni Lal v. Bari Doab Bank, Ltd., Hoshiarpur	368	Prem Das-Radha Kishen (Shop) v. Moham-mad Hussan Khan	51
Munshi Ram v. Mela Ram Wafa	23	Pritam Singh v. Sarjit Singh	112
Mutual Bank of India, Ltd. v. Sohan Singh	790	*Probynabad Stud Farm, Montgomery v. Commissioner of Income-Tax, Punjab	602
Najju v. Mt. Aimna Bibi	493	Punjab and Kashmir Bank, Ltd., Rawal-pindi v. Mt. Damodri	257
Nanak Chand v. Hazari Mal	243	*Punjab National Bank, Ltd. v. (Firm) Nanhemal Janki	246
Nanak Chand v. Mian Mohammad Shabbaz Khan	114	*Punjab National Bank, Ltd. v. Jagdish Sahai	390
Nand Kishore v. Madan Lal	64	Punjab National Bank, Ltd., Amritsar v. Shamsher Singh	696
Nanki Devi v. Habib Ullah	876	Punjab Zamindars Bank, Ltd., Lyallpur v. Madan Mohan Singh	321
Narain Singh v. Malik Ahmad Yar Khan	21	Puran Singh v. Raghbir Singh	847
Narain Singh v. Waryam Singh	18	Radhe Sham Beopar Co., Ltd., Okara v. Prabh Dayal-Ram Dhan	16
Narinjan Das v. Fazal Hassan	30	Raghunath Singh v. Dhumi Mal	100
Narinjan Singh v. Damodar Singh	831	Rama Shah v. Kuldip Singh	986
Narinjan Singh v. Emperor	357	Ram Chand v. Co-operative Society, Kharar	930
Natho, Mt. v. Ghulam Mohammad	687	Ram Chand Manchanda v. H. G. Lush	890
Nathu Shah v. Mulk Raj	470	Ram Das v. Lachhman	853
Nawab v. Charagh	195	Ram Dhan Das, Ramji Das v. Shankar Das, Devi Dayal	492
Nawal Kishore-Kharaiti Lal v. Commis-sioner of Income-tax	897	*Rameshwar v. Mt. Ganpati Devi	652
Nazir Din v. Mohammad Shah	92	Ram Labhaya v. Fateh Ali	801
Newbould, H. A. M. v. Emperor	781	Ram Lal v. Kidar Nath	478
New Delhi Municipal Committee v. Ram Bai	702	Ram Mal Lilo Shah v. Kanshi Ram	649
*Niamat, Mt. v. Emperor (FB)	533	Ram Parkash v. Hukam Chand-Raj Kumar	883
Nihal Chand v. District Board, Mianwali	564	Ram Pati, Mt. v. Santa Singh	1002
Nihalu v. Bhagwana	234	Ram Rakha Mal v. Harnarain Ram Chand	587
Nila v. Punun	385	Ram Rakhi, Mt. v. Bawa Ishar Das	909
		Ram Rup v. Sarn Dayal	283

Ram Singh v. (Firm) Ram Chand-Tirath Ram	78	Siraj Ud-Din v. Mt. Rahiman	978
Ramzan v. Gopal Das	199	Sital Das v. Punjab Sindh Bank, Ltd., Lyallpur	607
Ranbir Sen v. Mohammad Din	497	Sita Ram v. Harbans Lal	374
Rasul Shah v. Diwan Chand	583	*Sita Ram v. Jagan Nath Singh	661
Ratan Kaur, Mt. v. Sobha Ram	794	Sohan Lal v. Teja Singh	971
Raushan Din v. H. Mohammad Sharif	87	Sohan Singh v. Mt. Naraini	540
Richhpal v. Sujan Singh	46	Sohindar Singh v. Shankar Das	166
Roshan Lal v. Mt. Vidya Wanti	838	Sonawala, G. P. v. Lahore Electric Supply Co., Ltd., Lahore	207
Roshan Lal v. Shiv Das Mal	181	Sonepat Co-operative Society, Ltd. v. Kapuri Lal	305
Rup Lal v. Manohar Lal	863	Sri Chand v. Bashambar Nath	1012
Rura Mal v. Ram Chand	200	*Stamp duty on security bond executed by Murad Ali, <i>In the matter of</i> (SB)	45
Sadhu Ram v. Pirthi Singh & Co.	220	Suba Singh v. Hadayat	706
Sain Das v. Tikka Sant Singh	830	*Sultan Asad Jan v. Secy. of State	998
Sajjan Singh v. Mt. Dhanti	130	Sultan Muhammad v. Mehr Khan	285
Salig Ram v. Balak Ram	149	Sundar v. Hiru	138
Sampuran Singh v. Devi Dayal	705	Sundar Das v. Bishan Das	116
Sandhura Singh v. Kehr Singh	1016	Sundar Singh v. Emperor	758
Santa Singh v. Pura Das	216	Suraj Bhan v. Allahabad Bank, Delhi	562
Sarab Krishan v. Firm Shadi Ram-Badri Das	760	*Surjan Das-Gujjar Mal (Firm) v. (Firm) Dawarka Das Raghbar Dayal	123
*Sardar Khan v. Ram Mal Barkat Shah	196	Tara Chand v. Bakhshi Sher Singh	944
Sardar Mohammad v. Mt. Maryam Bibi	666	Tara Chand-Pohu Mal v. Commissioner of Income-tax	836
Sat Narain v. Pheroze Behramji	35	Tarif Singh v. Kanshi Ram	458
Satram Das v. Sadhu Singh	377	Teja Singh v. Emperor	348
Sattan, Mt. v. Janki	139	Tej Bhan v. Sita Ram	627
Sattan, Mt. v. Mt. Saidan	1019	Tilok Singh v. Mohammad Rashid	560
Secy. of State v. Ch. Jamalud-Din	619	Tola Ram Singh v. Fazal Ahmad	785
_____ v. Ishar Das	761	Tulsi Ram v. E. D. Sassoon & Co., Ltd., Bombay	843
*_____ v. Mt. Reshmo	479	*Tulsi Ram v. Fleming Shaw Co., Amritsar	407
*_____ v. Ram Lal Kohli	663	Ude Singh v. Chittar	994
_____ v. Tikka Jagtar Singh	733	Udho Ram Sharma v. Secy. of State	85
**Sewa Singh v. Milkha Singh	727	Ujagar Singh v. Bhagwana	780
Shadi v. Ram Ditta	842	Ujagar Singh v. Emperor	356
Shadi-Khair Din v. Qutba	665	Ujagar Singh v. Mt. Diyal Kaur	991
Shadi Ram v. Mt. Atri	933	Ujjal Singh-Sunder Singh v. Ahmad Yar Khan	985
Shah Mohammad v. Mt. Pairi	202	Umar Hayat v. Nazar Muhammad	373
*Shahzadi Bi, Mt. v. Mt. Rahmat Bi	879	Usman v. Rahmat	797
Shakar Khan v. Ishar Das	568	*Vijaya Baghavacharya v. Commissioner of Income-tax, Lahore	713
Shakuntla Devi v. Kaushalya Devi	124	Vir Bhan-Bansi Lal v. Commissioner of Income-tax, Lahore	750
Shamas-ul-Nihar Fazal Elahi v. Secy. of State	582	Waryam Singh v. Sunder Singh	576
Shams Din v. Collector, Amritsar (SB)	449	Wasanda Ram v. Ram Chand	861
Shankar Das v. (Firm) Desa Mal-Mula Mal	159	Was Deo v. Haidar Hassan	336
*Shanti Lal v. Lyallpur Bank, Ltd.	276	Wazir Khan v. Mukhtar Khan	577
Sheo Ram v. Luta Ram	650	Zainab Bibi, Mt. v. Jamaldin	991
Sher Mohammad v. Mt. Mahbub Begum	905		
Sher Mohammad Khan v. Chuhr Shah	753		
*Sher Mohammad Shahbaz Khan v. Sher Mohammad Banne Khan	208		
Shib Karan Das v. Mohammed Sadiq	584		
Shib Lal v. Sri Kishen Das	404		
Shiv Deo Saran v. Kidar Nath	840		
Shiv Dial Bakhtawar Lal v. Kanga & Co.	369		
Simla Banking and Industrial Co., Ltd. v. Dittu Mal Hardial	521		

SUBJECT INDEX

Abatement — Revival of proceedings — Partition decree—Appeal by *R*—Pending appeal, application by *R* for demarcation — *S* objecting and filing application—Both *R* and *S* absent on date of arguments—*R*'s application dismissed for default—*R* died and appeal abated—*S* applying for revival of proceedings—Court held had no jurisdiction to revive proceedings 618*b*

Accounts—Accounts settled—Settled account gives rise to cause of action and cannot be re-opened except on ground of fraud or mistake 51*b*

* **Actionable claim**—Mortgagor executing usufructuary mortgage and putting mortgagee in possession—Mortgagee not paying consideration — Mortgagor's right to recover consideration is transferable 196

Adjournment—Costs—Pleader asked to admit genuineness of document is entitled to consult client—Pleader demanding short adjournment should not be burdened with costs 705*b*

Administration suit — Court can direct one of parties to hand over assets belonging to estate in possession of such party—Disputed debt is not asset—Meaning of word "asset" 365

Adverse Possession—Three branches becoming entitled each to certain share in property—Branch previously in possession of entire property does not hold in representative capacity subsequently—Its possession becomes adverse to other branches —Right barred by adverse possession—Subsequent entry in Record of Rights about rights of branches does not affect 994

—Question is one of mixed fact and law 741*a*

—Acquisition of title—Defendants entered as proprietors—Plaintiffs entered as tenants not paying rent to landlord—Mere non-payment of rent is not sufficient for adverse possession—Plaintiffs should prove disclaimer of landlord's title 741*b*

—Suit for possession as owner alleging defendant to be tenant—Plaintiff's failure to prove relationship of landlord and tenant and payment of rent by defendant does not justify inference of defendant's adverse possession 673*a*

Adverse Possession

—Suit for possession—Defendant pleading possession as co-sharer but not adverse possession—Statement by father of defendant in earlier proceedings that he had no right in property—Only small portion in occupation of defendant—Defendant not proved to be co-sharer—Defendant's possession held only permissive and not adverse to plaintiff 673*b*

—One co-sharer defraying charge on property—Such co-sharer denying right of others for joint possession until they pay their share of charge—Such denial implies recognition of title when proportionate charge is paid and so cannot amount to adverse possession 290*b*

* —Burden of proof—Plaintiff alleging dispossession — Defendant not bound to prove adverse possession 208*a*

* —Vacant sites — Possession follows title—In vacant sites trespasser can get title only to area actually trespassed—Constructive possession of owner to unoccupied area is not affected — As regards area built upon, it must be shown that it was vacant within twelve years and then constructive possession will be presumed 208*b*

Appeal — Special power of attorney — Appeal is continuation of suit — Special power—Agent's acts to be taken for its executant's—Attorney can engage pleader for appeal 583*a*

—Pleader validly representing party in lower Court—Such pleader can file memo of appeal and prosecute it in lower appellate Court 583*b*

—Judgment — Lower appellate Court need not look into all evidence to give finding of fact 543

—Representative suit—One of plaintiffs dying during pendency of appeal — Surviving plaintiffs can continue appeal 361*a*

—Proper presentation—Claim decreed only in part—Both parties appealing—Lower appellate Court dismissing appeal by plaintiff while allowing appeal by defendant thus dismissing plaintiff's claim in entirety — Plaintiff appealing against dismissal of his appeal in lower Court but filing copy of decree of defendant's appeal in lower Court—Held there was no proper

Appeal

presentation of appeal under O. 41, R. 1, Civil P. C. 293a

—Judgment appealed from not referring to point of adverse possession — Inference is of its having been given up and cannot be allowed to be raised 290c

—Jurisdiction—Lower Court entertaining appeal though incompetent to hear it — Appeal lies to High Court on point of jurisdiction 212a

—Dismissal for default—Judge sending notices of hearing of appeal to party and counsel — Counsel endorsing inability of attendance — Party not served—Appeal should not be dismissed for default 209

—Competency — Order appointing receiver *ad interim* is appealable 102a

—Additional evidence—No party can as of right produce additional evidence—It is only when Court feels its necessity that it can be allowed to be produced 71a

—Additional evidence—Failure to produce evidence on vital issue in suit for some reason or other — Judgment pronounced on available record — Party aggrieved moving appellate Court for permission to produce evidence—Case is not governed by O. 41, R. 27, Civil P. C. 71b

—Forum—Valuation — Objection to—Application under Para. 20, Sch. 2, Civil P. C.—Value for purposes of jurisdiction fixed — Valuation cannot be questioned in execution proceedings 63

Arbitration—Award directing one party to pay certain sum to another periodically does not require registration 794a

—Award—Arbitrator not having power to make portion of award — It is invalid and can be expunged 794b

—Award—Application to file award—Mere prayer to omit certain portion from decree does not make it application to file part of award—Subsequent application to drop prayer made six months after award — Original application held one to file award and prayer superfluous—Subsequent application held application to amend original and not fresh application 682

—No revision lies from an order superseding arbitration 538

—Arbitrator must make inquiry—He need not keep record of his inquiry — Award should be in writing 492b

—Section 89, Civil P. C., covers all references to arbitration—Words "by any other law for the time being in force" in

Arbitration

S. 89 cannot cover O. 23, R. 3—Court superseding arbitration—Course left open is to proceed under Sch. 2, Para. 8 374

—Agreement to refer—Arbitrator looking into account books of one party before agreement to refer was written — Parties heard and award delivered—Award not vitiated 345

—Arbitrator fully empowered to make award — Party cannot challenge award because given in particular way 136d

Arbitration Act (9 of 1899), S. 13 — Award—Question remitted by Court for consideration — Arbitrator giving final award—Directions included in award to carry out provisions—Directions incidental and consequential—Award is valid 865a

—S. 19 — Application to stay suit — Complicated question of law likely to arise — Trial Court in exercise of jurisdiction rejecting application—High Court in revision will not interfere 904

Attachment—Precept—Object of S. 46, Civil P. C., explained — Indefinite order making permanent attachment is not contemplated by S. 46 486a

—Application for attachment before judgment — Court should be fully satisfied on proper affidavit or other materials before it takes any action 33a

—Application for attachment before judgment—Issue of notice under O. 38, R. 5 (1) is absolutely necessary — Court must strictly carry out stringent procedure laid down in O. 38, R. 5 33b

—Order granting application for attachment before judgment without notice to defendant under O. 38, R. 5 (1) is appealable 33c

Attestation — Attesting witness signing documents—No proof of his knowledge of their contents nor is he consenting party to transactions embodied therein—Onus lies on persons who rely on documents to prove such knowledge and consent 978d

Auction-purchaser—He is representative of judgment-debtor 18a

Award—An award though unregistered is still admissible in evidence 877

—It extinguishes claims in submission — Award submitted—Award alone is basis of right of parties 865c

—Stamp duty — An award effecting partition is not admissible unless properly stamped under Art. 45, Stamp Act 838

Award

—Agreement to refer future disputes to arbitration — Agreement and consequent award are valid 492a

—Arbitrator considering vouchers said to have been signed by minors—Objection not raised before arbitrator—Arbitrator not bound to decide legality—Failure to make enquiry is not judicial misconduct 492c

—Validity of — Arbitrator submitting award beyond date fixed — Parties submitting to arbitration and conducting case before arbitrator after due date—Consent of parties can be inferred—Award is valid though filed out of time 466a

—Validity of — Court referring to arbitration can alone decide question of validity of award—Decree passed on award after disposing objections under Para. 15, Sch. 2, Civil P. C. — Decree is final, not open to appeal or revision 466b

—Revision—Order on award — Reference to arbitration during pendency of suit — Purpose of—Order on award is interlocutory order not open to revision 466c

—Difference settled by arbitration — One party held liable to other assigning a pro-note to other — Adjustment in discharge of award—Subsequently obtaining of decree by filing award in Court—Adjustment of award not affected by decree following it — Suit on pro-note assigned during adjustment of award is maintainable 319a

—Compromise pendente lite differs from adjustment of award—Decree on award is decree of domestic Court reaffirmed by Court of law — Award if completely adjusted, bars execution of decree based on it 319b

Banker and Customer — Deposit — Implied agreement to repay on demand may be presumed — Suit within three years of demand is in time 587c

Bengal Land Redemption and Foreclosure Regulation (17 of 1806), Ss. 7 and 8—Proceedings under, carried out—Foreclosure automatic and title passed to mortgagee—Any suit brought thereafter is not foreclosure suit under Civil Procedure Code, but is one for possession as owner (*Obiter*). 982a

Burden of Proof—Suit under O. 21, R. 63, Civil P. C., by alienees of judgment-debtor — Alienees must prove not only transfer deed but also consideration and good faith 72a

Cantonment (House Accommodation) Act (6 of 1923), S. 4—S. 4 not applicable to licenses given under General Order No. 179 unless both parties give written consent 582b

Charge—Mortgage suit — Bank claiming prior charge in pursuance of prior deed executed in good faith by mortgagors—Bank not claiming equitable mortgage — Document itself held could not create charge 251a

Charitable and Religious Trusts Act (14 of 1920), S. 3 — Order under S. 3 is revisable 695a

—S. 3 — Mosque built by public subscription and used by Mahomedan public — Admission by person in prior suit to be religious trust—Mosque held public trust 695b

Civil Procedure Code (5 of 1908), S. 2(11) — Term 'next of kin' is not same as 'legal representative' (*Obiter*) 578a

*—S. 11 — Representative character—Decree against Municipality in respect of Government land transferred in trust and vested in Municipality — Decree held operated as res judicata in subsequent suit by Government 998a

*—S. 11 — Property identical in two suits—Mere fact that its value has arisen in interval between two suits cannot affect question of res judicata 998b

—Ss. 11 and 60 — Application raising objection under S. 60 does not operate as res judicata unless there is finding deciding question one way or other 930b

—S. 11, *Expl. 6* — Representative suit under O. 1, R. 8—Former suit not in compliance with O. 1, R. 8 and non-compliance not being inadvertent—Decision in former suit cannot operate as res judicata 965a

—S. 36—Civil Court can grant, in execution proceedings, farm of land belonging to judgment-debtor—Order of Court making lease money payable by instalment although indiscreet is not illegal—S. 36 applies — Court can enforce payment of money by applying provision relating to execution of decrees 696a

—Ss. 47 and 151—Substance of application and not section quoted should be examined to find out true nature—Decree held to be fully satisfied before executing Court—Application to inquire what money was due by judgment-debtor headed under S. 151, Civil P. C.—Application falls under S. 47 and not under S. 151, as it relates to matters of discharge or satisfaction, and hence order is appealable 725

Civil P. C.

—S. 47 — Order setting aside sale for want of attachment—Order is decree and second appeal is competent 573b

—S. 47 — 'Parties to suit' is not restricted to parties on opposite sides 116b

—S. 47—Applicability — Dispute between representatives of one party—Other parties having no interest — Decree satisfied—S. 47 is not applicable 116c

—S. 47 (3)—Sub-s. 3 is ancillary to sub-s. 1 116a

—S. 48 — Application for execution of decree by attachment — Judgment-debtor raising certain objections—Execution suspended until decision of objections—Request by decree-holder for re-attachment after period of limitation—Request for re-attachment held to be in continuation and ancillary to original application 843a

—S. 48—Instalment decree for money — Provision in it that on default of any instalment whole decree would become payable at once—Execution of such decree is governed by latter part of S. 48 (1) (b) 159a

—S. 48 (1) (b)—Instalment decree giving option to decree-holder to execute full decree on default—He may not exercise this option 159b

—S. 48 (2) (a)—Fraud—Dishonest circumvention is fraud—But mere raising of objections so as to prolong execution proceedings beyond the period of limitation is not necessarily fraud 843b

—S. 60—Judgment-debtor objecting to attachment of his house — House is exempt from attachment unless there is definite finding that judgment-debtor is not agriculturist or that property does not belong to him 930a

—S. 60—Agriculturist disclaiming right to object to attachment of his land—Whether decree-holder is entitled to attach in spite of S. 60 (*Quaere*) 737e

*—S. 60 (1) (c) — Non-ancestral house of judgment-debtor attached in his lifetime — Judgment-debtor not an agriculturist — His heir inheriting same — He cannot claim exemption from attachment on ground that he is an agriculturist 895

—S. 60 (1) (c) — Agriculturist—Main source of income not proved to be agriculture — Land not situated near house in dispute—Area of land owned not proved — Judgment-debtor not agriculturist within the meaning of S. 60, Proviso (c) 532

Civil P. C.

—S. 60 (1) (c)—Person not tilling land and earning livelihood thereby wholly or partly is not agriculturist 737d

—S. 60 (1) (k)—Amount standing to Imperial Bank employee's credit in Provident Fund is exempt from attachment 694

—S. 60 (1) (n) — "Maintenance" — Meaning—Sum reserved in will as "pocket money" amounts to right of future maintenance and cannot be attached 944a

—S. 100—Legal effect of proved or admitted facts is question of law 104a

—S. 102 — Cases covered under S. 102 — Court is not in favour of entertaining revisions 293b

—S. 110 — Suit property worth less than Rs. 10,000—Decree for mesne profits of suit property obtained in separate suit — Decretal amount sought to be added to increase value in appeal — Amount held could not be so added not being within Cl. (2), S. 110 31a

—S. 110—Words "amount or value of the subject matter of the suit in the Court of the first instance" mean amount or value at institution and not at time of decree 31b

—S. 110—Claims indirectly connected with subject matter of main suit—Adding claims to make up prescribed valuation—Indirect relation must not be too remote — Phrase "directly or indirectly" refers to existing suits — Indirect relation must be decided from actual circumstances — Possible further suits may be considered if res judicata affects them 31c

—S. 115, O. 43, R. 1 (m)—Trial Court holding that there has been compromise between parties — It should record separate order recording compromise and then pass decree in accordance with it — No separate order recorded—Party appealing from decree — Appellate Court dismissing appeal holding decree to be consent decree — No finding as to compromise given—Appeal must be assumed to be one under O. 43, R. 1 (m) — Second appeal does not lie from appellate order—It is open to revision 963

—S. 115—Finding of fact that party is not competent to sue — No revision lies 783

—S. 115—Failure to apply obvious law — Revision lies 746b

—S. 115—Proceedings abated — Order of restoration and order refusing to grant review of same constitute "case" within S. 115 618a

Civil P. C.

- S. 115 and O. 21, R. 52 — Custody Court has jurisdiction to decide question of priority — No revision lies even if decision is erroneous in law especially where aggrieved party has remedy of suit 521
- S. 141, O. 9, R. 9 and O. 43, R. 1 (c) — Provisions of O. 9, R. 9 are applicable to probate proceedings — Application for grant of probate dismissed on default — Order is appealable under O. 43, R. 1 (c) or under S. 299, Succession Act 863
- *—S. 141 and O. 9, R. 9 — O. 9, R. 9 applies to probate proceedings — Application for probate dismissed for default — Application to set aside dismissal dismissed — Appeal is competent 712
- S. 145 — Decree against judgment-debtor can be executed against his surety to the extent of his liability even if his name is not mentioned in the decree 463
- S. 151 and O. 9, R. 8 — Dismissal of suit in default owing to mistake of Court — Court has inherent power to restore it 759
- S. 151 — Application for preventing orders of Judicial Commissioner from taking effect during pendency of appeal under O. 41, R. 5 — O. 41, R. 5 and O. 39, R. 2, Civil P. C., inapplicable — Applicant not coming with clean hands — Injunction not granted 567
- O. 2, R. 2 — Lease — Surety for lease amount — Default — Suit against both sureties and tenants in Revenue Court — Suit as against tenants decreed and amount partly realized — Suit in civil Court against surety for balance — Default in payment of another instalment in meantime not included in such suit — Subsequent suit against surety in respect of second default held not barred by O. 2, R. 2 379
- O. 3, Rr. 1 and 2, and Punjab Courts Act (1918, as amended by Act 4 of 1919), S. 46-A — Rules under, R. 26 — Rule cannot be construed to override provisions of O. 3, Rr. 1 and 2, Civil P. C. 894
- O. 3, R. 4 — Pleader appearing for another pleader engaged by party — No document required by O. 3, R. 4 executed in his favour — Such pleader can only plead and not 'act' on behalf of party — Presentation of appeal amounts to acting — Appeal presented by such pleader is not properly presented 500
- *—O. 7, R. 11 (a) — Note appended to an issue, in effect rejecting the plaint to

Civil P. C.

- the extent of interest as not showing cause of action — Note does not amount to rejection of plaint, there being no provision in the Code for rejection of plaint in part — Order therefore not being appealable, revision is only remedy 1021
- O. 7, R. 14 (2) — Suit on promissory note for cash consideration — Defendant denying receipt of consideration — Plaintiff, in answer, producing documents not included in list of documents filed with plaint — Adverse inference could not be drawn against plaintiff 1016b
- *—O. 17, Rr. 2 and 3 — Hearing — On date of hearing of suit, Judge should either take evidence or hear arguments or do something enabling adjudication — Date of return of Commissioner's report is not date of hearing 280
- O. 20, R. 1 — Court not bound to communicate decision to party 742c
- *—O. 20, R. 13 — Suit for administration — Court after preliminary decree making order determining dispute but refusing to frame final decree — Such order amounts to final decree to that extent and is appealable — Contents of final decree in such suit are nowhere stated — Form in Civil Procedure Code can be varied and adopted 879b
- O. 21, R. 2 — "The decree" means decree of any kind — Adjustment must be certified within ninety days 842a
- O. 21, R. 35 (2) — Decree for joint possession — Joint possession must be delivered in particular manner prescribed by O. 21, R. 35 (2) — Possession given in any other way is of no legal effect — It is not effective for purposes of limitation and does not provide first starting point for limitation 749
- O. 21, Rr. 38 and 57 — Decree directing property to be considered as under mortgage and judgment-debtor prevented from alienating it — Attachment before sale is not necessary 573a
- O. 21, R. 57 — Death of decree-holder pending execution — Application by some of representatives for substitution — Application not amended by including other heirs — Court consigning execution to record room — Order held though erroneous not tantamount to dismissal, nor did it terminate prior attachment 873
- O. 21, Rr. 58 and 63 — No appeal lies against order under O. 21, R. 58 830a

Civil P. C.

*—*O. 21, R. 63* — Declaratory suit — Right claimed in property in dispute and not title thereto is to be established — Suit by decree-holder claiming right to attach property — Suit by objector claiming release from attachment — In either case title to property in dispute is not to be proved 524a

*—*O. 21, R. 63*—Person getting declaration for release of goods from attachment — Suit for damages for wrongful attachment—Plaintiff need not show mala fide of defendant in resisting such suit—Goods sold under Court's order — Difference in price due to fall of selling rate can be claimed by way of damages — Such person also need not prove his ownership to property in dispute—Possession is good as against wrongdoer 524b

—*O. 21, R. 65*—Sale is complete when property is knocked down to highest bidder — It is not open to Court to offer property to person offering higher amount 555b

—*O. 21, R. 89 (as amended by Lahore High Court)*—Person taking mortgage of property under attachment—Property put to sale—Mortgage can under R. 89 save property 561

*—*O. 21, R. 90, O. 43, R. 1 (j) and Ss. 47 and 104 (2)*—Execution sale — Appellate order setting aside sale on grounds of failure of auction-purchaser to make preliminary deposit and officer conducting sale accepting improper bid — Order is under *O. 21, R. 90* and not under *S. 47* — Second appeal is barred 969

—*O. 21, R. 90* — Auction-purchaser arbitrarily closing auction at 4 o'clock, although another bidder is willing to purchase property for larger sum—It amounts to material irregularity in conducting sale — Applicant applying for setting aside sale not sustaining substantial injury by reason of irregularity—Sale will not be set aside 555a

—*O. 21, R. 103*—*A* succeeding in getting his title proved as against *C*—*B* mortgagee from *C* while *C* was in wrongful possession — In execution of decree by *A* against *C*, *B* resisting execution—*A* bringing suit against *B* under *O. 21, R. 103*—*B* not showing adverse possession for 12 years—*A* held entitled to decree for possession 530

—*O. 22, R. 2* — Jat agriculturists owning property enjoy it as tenants in common—One of five Jat brothers owning property transferring it—Suit for posses-

Civil P. C.

sion against transferee by all brothers — One brother dying during pendency of suit — His legal representative not brought on record—Suit abates as regards his share only 578b

—*O. 22, R. 6* — Court making local inspection during interval of last date of hearing and date of judgment—Suit cannot be said to have concluded on that hearing 578c

—*O. 22, R. 10* — *R. 10* is a residuary rule under *O. 22* 652e

**—*O. 22, R. 10*—Suit by presumptive reversioner challenging alienation by limited owner — Period of 12 years from date of alienation over before Act 2 of 1929—Death of reversioner—Sister of last male holder as being included in list of heirs by Act of 1929 cannot continue suit of reversioner on ground of devolution, creation or assignment of interest 652f

—*O. 22, R. 10*—Power under, is discretionary—Delay not explained—Discretion not to be exercised 652g

*—*O. 22, Rr. 12, 11, 8, 4 and 3*—Appeal from order in execution is not execution proceeding within meaning of *R. 12*—Death of respondent—Legal representatives not brought on record—Appeal abates 1022

—*O. 24, R. 3* — Defendant depositing money in Court but stipulating impossible conditions cannot escape payment of interest from date of deposit 76b

*—*O. 30, R. 9* — Partner of firm doing business with firm on his own behalf — Balance struck in favour of firm after settling accounts—Suit by firm for balance is competent 648

—*O. 32, R. 4*—Partition suit—Interest of each litigant is exclusive—Minor sister cannot ordinarily be represented by step-brother 161a

—*O. 32, Rr. 11 and 15* — At time of institution defendant of unsound mind represented by his brother defendant as guardian-ad-litem—Suit dismissed — Appeal—Both defendants impleaded as respondents but omission to describe one of them as guardian-ad-litem — Death of guardian-ad-litem pending appeal — No fresh guardian appointed — Decree held was nullity and not binding on defendant of unsound mind: 38 P L R 320=161 IC 987, REVERSED 861

—*O. 34, R. 2* — Applicability — Some portion of property with mortgagor and another with mortgagee—Terms of Bengal Regulation do not apply and hence no

Civil P. C.

foreclosure under it — General remedy under O. 34, R. 2, Civil P. C., applies: 982b
 —O. 34, R. 5 — Auction-purchaser is not necessary party—Decision on application under O. 34, R. 5 falls within S. 47, Civil P. C., and is appealable — Auction-purchaser is not necessary party to appeal from an order on application under O. 34, R. 5 562a
 —O. 37, R. 3—Leave to defend—Court not satisfied with bona fides of defendant —Leave should be granted only conditionally 584
 —O. 41, R. 4—Pre-emption suit—Pleas raised by vendees defendants common to all—Appeal by one of them — Appeal alleged to have been filed under O. 41, R. 4—Appellant is entitled to appeal in his own name — Success of appeal enures for benefit of all vendees 612d
 —O. 41, R. 20—Appellate Court informing appellant about wrong person being impleaded and giving time to implead right person—Right person not impleaded within time—No sufficient cause within S. 5, Lim. Act—O. 41, R. 20 held not applicable 793
 *—O. 41, R. 22—Time for filing cross-objection—Term "within" fixes two limits —Cross-objection filed before that limit is no cross-objection at all 362a
 —O. 41, R. 27 (1) (b) — Additional evidence can be admitted only when appellate Court requires it 37b
 —O. 47, R. 1 — Appeal dismissed on preliminary ground, as barred by limitation—Counsel for appellant subsequently discovering that rules of Financial Commissioner requiring payment of copying fees along with application, were not being enforced — Appellant had paid copying fees, according to practice prevailing, when demanded—Appellant, according to practice prevailing found entitled to more time as being time requisite for obtaining copies, which brought appeal within limitation—Case held fit for review of judgment dismissing appeal 650b
 —Sch. 2, paras. 16, 17 and 19 — Para. 16 is made applicable and no appeal lies against decree passed on award under para. 17 except so far as it is at variance with award 617
 —Sch. 2, Paras. 20, 21 — Application to file award without intervention of Court — Invalid portion separable from valid portion — Valid part can be filed 794c

Companies Act (7 of 1913)—S. 101, sub-s. 3—Any allotment made without payment of at least 5 per cent of the nominal value of shares is invalid 790b
 **—S. 152—S. 152 is enabling and not mandatory—It is not obligatory on company governed by Arbitration Act to make reference, only in pursuance of Arbitration Act and file award in Court of District Judge—Reference made outside Arbitration Act is valid—Award filed in Court of Senior Sub-Judge—Decree passed on basis of award is valid (FB) 721
 —S. 156—Interest — Liability created by S. 156 is new and no interest can be awarded prior to payment order 739b
 —S. 156—Shares forfeited for non-payment of call — Even such share-holder is subject to new liability created by S. 156 and he is liable as past member but not for interest 226a
 *—S. 156 (1) (iii) — Winding up—Existing members not called upon to contribute unpaid amounts of their share money—Past member is not liable to contribute till this is done : *A I R 1936 Lah 226=163 I C 126, REVERSED* 739a
 —S. 171—Suit instituted by company under liquidation without leave of Court—Leave obtained within period of limitation for such suit — Suit should not be dismissed 401a
 —S. 171—Interpretation of — Meaning of words 'or commenced' — Meaning of commencement and institution is same 401b
Company—Allotment of shares—Applications for, forwarded as enclosures to letter containing conditions to be fulfilled by Chairman before shares were deemed to be purchased—Allotment made without fulfilling conditions held to be invalid 790a
 —Purchase of shares conditionally—Conditions carried out—Subsequent breach of condition—Remedy is action for damages and not for removing name from share-holders' register 700a
 —Purchase of shares conditionally—Conditions not satisfied—But share-holder acquiescing, receiving dividends and authorizing company to sell his shares — Held he was not entitled to have his name removed from share-holder's register 700b
 —Share-holder — Right to have name expunged from register—No action taken for seven years—Right is barred 700c
 *—Shares transferred to person as qualification for directorship — Such person holding out that he is share-holder and

Company

member of company—Liquidation of company—He is estopped from denying that he is share-holder or member of company 480

—Chairman of Bank taking money from bank in illegal and unauthorized way—Money converted to personal use by purchase of property — Bank going into liquidation — Chairman held trustee of Bank's moneys — Liquidator held could claim such property—Court is entitled to give possession of property although its title is in dispute 408

—Company authorized to manage estate can act as liquidator—Company appointed and acting as liquidator — Legality of appointment cannot be questioned in proceedings of payment order under S. 186, Companies Act 276a

* —Directors—Suit against—Loss caused by wilful breach of their obligation — Art. 90 and not Art. 36, Lim. Act, applies 271a

* —Directors — Loss caused for loan by directors tainted with dishonesty — Directors are liable for it 271c

—Reference to arbitration — Reference in writing and according to provisions of Arbitration Act — No appeal lies from award—Reference to arbitration by Court — Appeal does lie from such award 257

—Calls made by company but not paid — If such debts are time barred, even liquidator cannot recover them 226b

—Slight delay in according sanction for transfer of share—Company is not justified in paying dividends to non-members — Company is not liable for damages 207

—Liquidation proceedings—Application for shares—Allotment not made within reasonable time held to be invalid—Letter for allotment money held highly suspicious since company resolved to go into liquidation next day 16

Compromise — Admissibility in evidence — Compromise not recorded under O. 23, R. 3, Civil P. C.—Deed is registrable 605

***Confession**—Confession made to police officer, whether before commencement of investigation or after it, is entirely inadmissible 380

—Person in authority—Accused making confession to servant of his landlord—Servant held is a person in authority 264

—Retracted—Oral confession is admissible — Weight of such confession will depend on facts of each case and corro-

Confession

borative evidence — Such confession has not same weight as one recorded under S. 164, Criminal P. C. 8a

Contempt—Plaint reflecting severely on defendant's conduct — Its publication is contempt 917a

Contempt of Courts Act (12 of 1926), S. 2, sub-s. (3)—Sub-s. (3), S. 2, Contempt of Courts Act, means that the contempt must be punishable as a contempt under the Penal Code and not punishable only because it otherwise is an offence 917b

Contract—Novation— Mere agreement to substitute new contract in future is not sufficient 476

—Surety—Mere laches or non-exercise of right of superintendence or gratuitous agreement on part of obligee does not release surety 305

—Wager — Nature of transaction — Court should gather intention of parties from surrounding circumstances besides contract 215

**—Tender—Tender must be made in current coin—But objection as to form can be waived — If it is rejected on other grounds without making any objection as to its form, such objection must be deemed to have been waived 168f

—Tender under protest is not bad 168g

—Tender of more than what is due is good 168h

—Tender—Offer accompanied by condition which prevents it from being perfect or complete in itself—Tender is not good 168i

—Breach — Mortgage of mortgagee rights for sum due on previous account— Claim to recover sum barred — Mortgage not completed — Suit for recovery of amount held not to lie, there being no consideration for mortgage 164a

—Novation—Essentials of—Subsequent contract has to be complete and valid 51a

*—Consideration — Threat of bringing false suit is not good consideration for contract 6

Contract Act (9 of 1872), S. 25 (3) — Agreement under S. 25 (3) will be enforced if consideration is shown to be barred debt, even though no reference is made to it in document 1016d

Co-operative Societies Act (2 of 1912), S. 43—Rules under, R. 18 — Award — Execution held time-barred by executing Court — Subsequent dispute relating to

Co-operative Societies Act

discharge of award is decidable only by executing Court—Second award on it held not within scope of Act and rules under S. 43—Suit could lie to have it declared void 901a

—S. 43—Rules under, R. 18 — Arbitrator giving award on matter decidable only by executing Court—Civil Court can entertain suit to give relief and that even before aggrieved person exhausts remedies provided by Act 901b

—S. 43—Rules under, R. 18 — Rule excluding jurisdiction of civil Courts whether ultra vires of local Government (*Obiter*) 901c

—S. 43—Rules under, R. 18 — Dispute between members of society A, B, C, relating to money alleged to have been borrowed by A from Society but in reality misappropriated by B and C — Dispute held was concerning business of Society — Executing Court declining to execute award—Revision could lie 786

Costs—Purchase of property subject to mortgage—Suit by mortgagee—Purchaser in possession of property putting off mortgagee and making profit out of delay in action — Purchaser should bear half costs of suit 705a

*—Witnesses — Witnesses summoned but not examined — Costs cannot be claimed by party summoning them 681b

—Bar Association declaring certain persons touts — Inquiry by District Judge thereon—Association invited to assist in inquiry—Persons not found touts — Association ordered to pay costs of inquiry to persons—Association held not party, hence order illegal 382c

—Assignee of equity of redemption not paying mortgagee but putting off payment on flimsy excuses but making pretence of readiness to pay money — No sufficient funds to pay at time of making so-called offers—Held he was liable to pay costs incurred by mortgagee in suit to enforce mortgage 76a

Court-fees—Suit for declaration and injunction—Jurisdiction value and value for purposes of court-fee are same 990b

—Appeal—Suit for possession — Appellant defendant admitting plaintiff's title but claiming charge of Rs. 700—He should pay ad valorem court-fee on Rs. 700 for appeal 935a

—Appeal—Suit for administration and accounts of estate—Suit valid at certain figure—Parties agreeing to such valuation

Court-fees

—Appeal in such suit should be valued at that figure 879a

*—Cross-objections for future interest

—Court-fee stamp of Rs. 10 is sufficient 668a

—Limitation—Time granted to make up deficient court-fee — Court-fee made up within time—Document dates back to date of original presentation 564b

—Partnership—Suit for dissolution — Plaintiff providing whole capital for business—Amount claimed in final adjustment — Court-fee need not be paid on entire amount 458c

—Refund — Power of Court—Fees paid on presentation of memorandum of appeal — Appeal converted into revision — Fees can be refunded 301e

—Appeal against mortgage decree — Appellant praying for declaration that he is agriculturist—Appeal cannot be against one finding but should be against whole decree—Court-fee stamp on memorandum of appeal should be under Art. 1, Sch. 1, Court-fees Act 179

Court-fees Act (7 of 1870), S. 7 (iv) (c)—Suit for declaration that plaintiff is owner of the house in suit and for declaring mortgage deed executed by defendants ineffective against him—Suit valued at certain amount for jurisdiction and court-fees of Rs. 10 paid—Suit falls under S. 7 (iv) (c)—Ad valorem court-fees must be paid on the value for jurisdiction 703

—S. 7 (iv) (c) and Sch. 2, Art. 17 (iii) — Mortgage decree and property sold—Suit for declaration by minor son that mortgage-decree and sale are invalid and not binding on him involves consequential relief and suit falls under S. 7 (iv) (c) 166

—S. 7 (iv) (f)—Provisions apply to appeals 458d

Criminal Procedure Code (5 of 1898), S. 145 (5)—In absence of denial by parties or persons interested there can be no question of cancellation of order passed under sub-s. (1) 1012

—S. 145 (6) — Mere fact that land is shamlat does not preclude Court from making enquiry and taking proceedings under S. 145 1015a

—S. 162—Report to police cannot be used as positive evidence—It can only be used under S. 157, Evidence Act, to corroborate or contradict person making it 833a

—S. 164—Confession to zaildar—Accused minor and villager—Inducement to

Criminal P. C.

accused that he would be let off if he confessed, being minor—Confession under S. 164 after going through necessary formality—Inducement operated to defeat confession 855

—Ss. 164 and 364—Oral confessions—Magistrates telling accused that they are Magistrates—Omission to record same in memos—Precautions under Ss. 164 and 364 not observed—Such confessions are of little evidentiary value 707a

—S. 164—After recording confession, Magistrate should avoid handing over document to police in charge of prisoner—No prejudice caused to accused by sending it through police—S. 164 (2) held complied with substantially 341b

*—S. 164—Confession should be recorded with precaution, and as provided for by S. 164—If otherwise Court will be entitled to presume accused's denial to commit himself in writing 8b

—S. 195 (1) (b)—S. 195 applies to cases of false report made in investigation of police with intention that there should be trial in consequence of it 238

—S. 197—Sanction to prosecute—Authority to appoint or remove public servants delegated to lower authority—Still sanction to prosecute such public servant must be from Local Government or still superior authorities 781

—Ss. 235 and 439—Joint trial under S. 457 and S. 324 read with S. 34, Penal Code, is illegal and void 507

—S. 250—Prosecution by Municipal Committee—Action not grossly careless or vindictive—Committee not called upon to show cause why order of compensation should not be passed—Compensation order held not proper 702a

—S. 257—Accused summoning witness—Witness cannot refuse to attend Court when summoned—Fees of expert witness—Accused should not be burdened with costs of expert (if his demand is unreasonable) especially when Magistrate is empowered to enforce attendance of witness and to pay him reasonable dues 919

—S. 423—Powers of appellate Court—Appeal by accused—Sentence of fine cannot be enhanced by reducing imprisonment 729a

*—S. 423—Powers of appellate Court—Second Class Magistrate passing sentence of fine—Accused members of same family—Appellate Court cannot pass sentence of fine for aggregate amount beyond

Criminal P. C.

the maximum allowed to Second Class Magistrate 729b

—S. 439—Illegality and not mere irregularity—Still Court has discretion 1015b

—S. 476-B—Complaint filed under S. 193, Penal Code—Prosecution ordered by trying Magistrate—Appeal lies under S. 476-B 828a

—S. 497 (5)—Proceedings under—Accused, released on bail, misusing concession given to him—He by seeing prosecution witness impeding, minimising and destroying evidence against him—He is liable to be re-arrested under S. 497 (5): 730

—S. 526—Transfer—Grounds—Magistrate, recording entire prosecution evidence, being rather busy—This is no good reason for transfer of case 827

***Criminal Trial**—Accomplice—Woman cognizant of intention of her paramour to kill her husband, not disclosing it to her husband—Her testimony is of no higher value than that of accomplice 731

*—Appeal—Joint appeal by accused with common interests is valid 859

—Approver—Corroboration is necessary—Corroboration should connect accused with crime itself—Certain person giving threats of death—Evidence corroborating approver's evidence regarding threats available—Accused cannot be connected to offence of murder through such threats only 400

—Benefit of doubt—Plea of alibi—Plea, although not established on record, taken at early stage of investigation—Presence of accused at place of offence appearing doubtful—He should be given benefit of doubt 473

—Case by police against accused—Accused filing cross-complaint—Arguments heard in challan case—Orders in challan case should be postponed till hearing of evidence in complaint case 356b

—Certificate under S. 339, Criminal P. C.—Public Prosecutor conducting case can grant certificate—Public Prosecutor need not be Public Prosecutor when granting certificate 409a

—Charge—Accused must know precise accusation against him before entering on defence 409b

—Concerted attack by two accused armed with deadly weapon—Weapon used with fatal result—Both are guilty of murder 341c

Criminal Trial

—Confession— Person making confession should not be sent back to police custody 357a

—Confession recorded under S. 164, Criminal P. C.—Confessor should not be returned to police custody 278

*—Confession — Confession recorded without questioning accused as to its voluntary nature—Defect is not curable under S. 533, Criminal P. C.—Such confession is inadmissible under S. 80, Evidence Act—Such confession, however, can be proved as admission under S. 21, Evidence Act—Magistrate can use such irregularly recorded confession to refresh his memory while proving confession as admission under S. 21 247a

*—Confession — Initial presumption—Confession not regularly recorded should not be admitted into evidence unless it is proved that it does not offend provisions of S. 24, Evidence Act 247b

*—Confession—Weight to be attached—Confessions classified into five classes—Amount of weight to be attached to each class is different—Court, with due regard to cumulative effect of evidence, should decide weight to be attached to any confession 247c

—Cross-cases—Judgment — Two separate trials—Judgment only one document—Decisions separate and distinct — Findings in each based on evidence in each—Judgment in one case based on its own evidence—Procedure held not illegal and accused not prejudiced thereby 294a

—Defence—Alibi should be raised at first chance 233a

—Duty of prosecution—It must make out its own case—Gaps cannot be filled by statement of accused 28a

—Duty of prosecution — Deceased receiving fatal injuries while stealing—Assault by three persons armed with lathis—Grievous hurt 28c

—Evidence—Accused refusing at first to cross-examine prosecution witnesses but subsequently requesting to re-call witnesses for cross-examination — Non-compliance with such request is justifiable 914a

**—Evidence—Sessions trial—Evidence not produced in trying Magistrate's Court can be produced in Sessions Court—Witnesses not examined in trying Magistrate's Court cannot be bound down to appear and give evidence in Sessions Court—Summary of evidence proposed to be ten-

Criminal Trial

dered in Sessions Court should be given to Court and accused before commencement of Sessions trial : 15 Lah 331=A I R 1934 Lah 667=152 I C 673, OVER-RULED (FB) 533

—Evidence—No prosecution in Court is not evidence that action was not taken by police 429d

—Evidence—Evidence recorded under Chap. 18, Criminal P. C.—Taking on record of such evidence by Sessions Court—There need not be any corroboration—It is, like all other evidence, to be believed or not and to be valued 357b

—Evidence — Charge only of murder and attempt to murder—Evidence as to accused being members of terrorist association is irrelevant and unnecessary 341a

—Evidence—Bloodstain—Discovery of bloodstained article is not by itself enough for conviction 335

*—Evidence—Court determines guilt or innocence of accused—Prosecution should not deceive Court by "padding" cases—Person procuring false evidence runs risk of punishing innocent persons 330

—Evidence in murder case—Prosecution witnesses related to deceased victim—Unless enmity is shown towards accused evidence of relatives should not be discarded 233b

—Forfeiture of pardon — Certificate under S. 339, Criminal P. C., need not give particulars of forfeiture 409c

—Fresh complaint — Inquiry under S. 202—Complaint dismissed—Fresh complaint on same facts should not be entertained 47

—Identification parade—Use of policemen can be made with caution 409e

—Judgment — Expunging remarks in judgment—Jurisdiction is of extraordinary character to be exercised with caution—Lower Courts should generally be allowed to exercise their jurisdiction freely and fearlessly 429a

*—Judgment—Expunging remarks from judgment — Jurisdiction how should be exercised—Passages based on no or little evidence and remarks against persons who are not party or who are not heard should be deleted — Jurisdiction, is not limited to such cases only — Remarks damaging character and wholly irrelevant to point in issue, so also judgments couched in injudicious language should also be deleted 429b

Criminal Trial

*—Judgment—Proceedings assuming communal aspect—Language should not promote communal enmity—Proceedings and judgment should be careful 429c

—Murder—Rest of evidence rejected—Solitary statement of one witness implicating accused—Accused should be given benefit of doubt 778

—Murder—Circumstantial evidence—Accused leaving one village for another, one afternoon along with his wife who has been unfaithful to him—Woman not subsequently seen alive by anyone—Body of woman discovered in neighbourhood—Burden is on accused to explain what happened to his wife—Accused not giving any explanation—There is strong circumstantial evidence against him 580a

—Murder—Sentence—Wife murdered with deliberate pre-meditation—Wife unfaithful is no ground for lesser sentence 580b

**—Pardon—Case against co-accused withdrawn by Government—Magistrate not tendering pardon *suo motu*—Government withdrawing case through Magistrate—Provisions of S. 337, Criminal P. C., not applicable 353

—Possession of incriminating article—Possession should be actual and conscious 758

—Prosecution should be confined to simple and true evidence—It should not hide facts and embroider case 341d

—Recorded statement can be used for trial of offence not under investigation when it was made—Record of statement heard by police officer and recorded in diary forms unpublished official record—Evidence derived from it, when can be produced—Court not bound to give copies of such statements 359b

—Sentence—One element in awarding sentence is element of vengeance—Such element absent—Main reason of awarding punishment being to punish accused for having done a thing which is wrong—Severe punishment is not called for 833c

—Sentence—Fine—Imprisonment and fine—Full term undergone—Release on undertaking to pay fine by instalments and offering security for same—Imprisonment in default of fine cannot be subsequently inflicted 348

—Sentence—Offences under Ss. 460 and 366 read with S. 149, I. P. C.—No harm done to girl—Girl rescued—Grievous

Criminal Trial

injury to one person caused—Very heavy sentence held not proper 15a

—Sentence—Lorry engaged for abducting girl—Driver ignorant of purpose—Not participating in crime in initial stages—Becoming *particeps criminis* afterwards—Compelled to continue by circumstances—One year's imprisonment reduced to six months 15b

—Statement made to police officer during investigation not reduced to writing relevant and not privileged under S. 123 or S. 124, Evidence Act, can be used 359a

—Transfer—Application for—No affidavit—Application cannot be entertained 356a

*—Voluntary written statements by accused can be used to fill up gaps in prosecution 28b

Custom (Punjab)—Adoption—Customary adoption is appointment of heir—Gift to such person is valid 465

—Adoption—Chima Jats of village Gojra—Adoption of daughter's son in presence of collaterals of third degree is invalid 371

—Adoption—Dhillon Jats of Tarn Taran Tahsil, Amritsar District—Adoption of daughter's son is valid 261d

—Adoption—Entry in *Riwajiam* as to person who can be adopted is merely indicative and not mandatory—Adoption of collateral in fourth degree among Jats of Mauza Hussainpur, Tahsil Nakodar, Jullundar District, held valid 237

—Adoption—Custom requiring adoptee to be of same *got*—It can be shown that stranger also could be adopted 218a

—Adoption—Jats of Jullundur District—Person outside *got* cannot be adopted 218b

—Adoption—Right to adopt—Adopter cannot ignore custom by merely adopting Dattaka form of adoption 218c

—Adoption—Among the Sayads of village Kotli Khadam Shah in Tahsil Pasrur of the Sialkot District adoption of daughter's son is not valid in the presence of collaterals of the third degree 80

—Adoption—There is no custom of adoption among the Awans of Garhi Awanan, Gujranwala District 67

—Agriculturist—Main source of livelihood, agriculture—Some members supplementing income by Government service—Family retains status of agriculturist and is bound by customary law 986a

Custom (Punjab)

- 'Ala malik' and 'talukdar', differences explained 37g
- Ala maliks—Mere provision for payment of dhauri and juti tax is enough to confer status of ala maliks 37j
- Alienation — Necessity — Transferee before advancing money must make reasonable enquiry as to its necessity—He need not look to its application—Mere recital in deed as to existence of necessity is feeble evidence 769a
- Alienation — Necessity — Only small portion of consideration not applied for purposes of legal necessity — Alienation should not be set aside—Alienee is not liable to pay such portion of consideration to person challenging alienation 769b
- Alienation—Sale of reversionary right in widow's estate is void—Principle of S. 6, T. P. Act, is applicable 753a
- Alienation — Alienation of 1/10 part of property to raise funds to go to Mecca — Transaction is not extravagant and is within rights of alienor 665
- Alienation — Valid necessity — Payment of Government revenue is valid necessity — Mortgage executed for raising money to make payment of Government revenue is valid and binding on reversioners 577
- Alienation — Abadi—Village Sangat-pura, Amritsar District—Non-proprietors cannot alienate 474a
- Alienation—Sale of land by resident — Objection not taken by proprietary body—Proprietors do not lose their right to object to further sale 474b
- Alienation—Widow—Income of property sufficient for necessary purpose—She is not entitled to alienate estate for such purpose 453c
- Alienation—Abadi—Pinanwal village — Non-proprietor has no right to alienate house sites 394a
- Alienation—Abadi—Village developing into town—Proprietors retain right to control alienation in Abadi Deh unless it is shown that they have renounced it 394b
- Alienation by non-proprietors — Acquiescence by landlord—No implication of renunciation of right to object to subsequent alienation 394c
- Alienation—Abadi — Non-proprietors not able to alienate village site—Absence of provision in wajib-ul-arz—No presumption in favour of right of alienation 394d

Custom (Punjab)

- Alienation — Ancestral property—Legal necessity—Debt raised by agriculturist by mortgage of ancestral property for carrying on manufacture of sugar is one for legal necessity 304
- Alienation — Village Basi Kalan, Hoshiarpur District—Non-proprietors can sell or mortgage their houses 267a
- Alienation — Town — Distinguishing features of town from village, explained 267b
- Alienation — Chanauli, District Ambala—Non-proprietor can dispose house site 263
- Alienation — Sodhi Khattris of Lyallpur District are governed by Hindu law 258
- Alienation—Non-ancestral property—Mother of last male holder gifting property with consent of next heir—Collateral cannot challenge alienation 192a
- Alienation of ancestral property to pay off mortgage effected to pay previous old creditors is for necessity 112a
- Alienation — Small sum of Rs. 50 raised to purchase cow held for necessity and no enquiry by alienee held needed 112b
- Alienation for discharging decretal debt — Outsider alienee is not bound to make further enquiry, unless his suspicions are likely to be aroused or he has actual knowledge of bad faith of decretal transaction 112c
- Alienation—Suit filed by alienor dismissed with costs—Alienation to pay such costs is one for necessity 112d
- Alienation — Antecedent debts — Alienor man of loose character—Initial onus lies on alienee to show that debts are due—If he discharges this, onus shifts to opposite party to show that alienee made no proper enquiries—Enquiry should be with regard to existence of debt and also as to their nature 112e
- Alienation — Alienor merely keeping mistress but not guilty of reckless extravagance or wanton waste—If alienee pays off debts which are due to third parties, persons challenging alienation should prove that those debts are tainted with immorality 112f
- Alienation—Ancestral land—Tiwanas of Punjab—Unrestricted right of alienation doubtful (*Quære*) 21b
- Alluvion and Diluvion—Makhan Bela village, Alipur Tahsil — Wajib-ul-arz—Adna Malik regains land submerged on

Custom (Punjab)

- paying Haq Jhuri—Amount of Jhuri is to be determined in consideration with land and capacity of Adna Malik 143
- Ancestral land—Reversioner or major son not liable for debt of last holder—Ancestral land cannot be attached or sold to meet debts 21h
- Ancestral property — Person appointed heir dying without lineal descendant — Property reverts to heirs of adoptive father 920a
- Ancestral property — Includes both lands and houses—Exempt from attachment 737b
- Ancestral property—Nature of—Fact that common ancestor founded village is not sufficient 346a
- Ancestral property—Historical note showing village founded by *P*—*P*'s sons dividing village—People leaving village because of famine—Returning years afterwards — Dividing lands into halves, one being land in suit—Inference that original proprietors returned and not descendants held not legitimate — Hence land not established as ancestral 108a
- Ancestral property — Among the Awans of Tallaganj Tahsil, Attock District, a proprietor cannot make an unequal distribution of ancestral property amongst his sons 59
- Ancestral property — Ancestral property sought to be attached—Litigant can prove that holder is legal representative 21f
- Applicability—Brahmins are presumed to be governed by Hindu law 627b
- Applicability—Telis are distinct tribe and are true caste—All Teli Chohans are not Rajputs 60b
- Applicability—Decision on custom is not final—It is only relevant instance under S. 13, Evidence Act 21a
- Arains of Mozang—Daughters have no power to alienate property except for necessity 594
- Brahmins of Kale *got* of village Jhang Saidan are governed by Hindu law 627a
- Burden of proof—Person claiming to be member of statutory agricultural tribe must prove that he himself or his relatives or his ancestors have held land within living memory 910
- Burden of proof—Person alleging to be governed by particular custom must prove such fact—He must also prove particular custom 540b

Custom (Punjab)

- Cases under Customary law cannot be decided on analogy 920c
- Caste—Fakir—Fakir is not caste but class—Revision to High Court maintainable 496
- Customary law of Lahore District by Mr. Bolster—Questions 61, 62 and 63—Answers of questions deal with rights of succession of both married and unmarried daughters 687b
- Custom cannot be proved by analogy 878
- Gaur Brahmins of Chiragh Delhi—Remoter kindred are not excluded by nearer kindred 679
- Gaur Brahmins of village Chiragh, Delhi Province—Succession to property—They are governed by custom which admits right of representation so far as collateral succession is concerned 151a
- Gift—Delivery of possession necessary—Gift by simpleton with no one to advise is not valid 351
- Gift—Arains of Nakodar Tahsil, Jullundur District—Sonless proprietor can gift ancestral property to daughter of pre-deceased son 156
- Ferozepore District — Riwaj-i-am, answer 32—Decree obtained against father—Ancestral property in hands of son not liable to attachment or sale 167a
- Jats of Garhshanker Tahsil, Hoshiarpur District—Non-ancestral property—Whether daughters preferred to collaterals of 5th degree in succession (*Quære*) 157
- Ludhiana District—Hindu Jats—Gift to daughters — Collaterals beyond 4th degree cannot challenge gift 108b
- Marriage—Jats of Garhshankar tahsil—Jats are regarded as Sudras—Among Sudras marriage of father-in-law with his daughter-in-law is valid—"Factum valet" applicable to marriage—Marriage accepted by brotherhood—Long cohabitation raises strong presumption of marriage amongst Jats—Daughter-in-law comes from different *got*—No objection to such marriage 551
- Marriage—Jat Sikhs—Strict principles are inapplicable to them 453b
- No presumption of custom—If custom is not proved personal law applies 627c
- No such thing as general custom in Punjab—Custom and that parties are governed by such custom should be proved in every case 418b
- Proof—Custom can be proved by general evidence given by members of

Custom (Punjab)

- family or tribe—Proof of special instances is not necessary 540c
 —Rattigan's Digest, Para. 23 (1)—State-ment is wrong 809c
 —Religious endowment—Succession to Gaddi of mahantship proved to be from Guru to Chela for eight generations—Gaddi is maurusi Gaddi 839
 —Reversioner—Title is derived from common ancestor and not from father—Ineffective alienation by father of his reversionary right—Father never inheriting property—Alienation cannot be enforced against son 753b
 —Reversioner—Rights—His right is deferred and is vested interest 21c
 —Reversioner—Rights of—Reversioner inherits from common ancestor 21e
 —Riwaj-i-am—No direct question on point of custom—There should be no presumption 991b
 —Riwaj-i-am and Wajib-ul-arz—En-tries not specifically referring to non-ancestral property refer to ancestral pro-erty only 809a
 —Riwaj-i-am of 1913 of Gurdaspur District—Answer to question 16 is not quite correct 68a
 —Special custom—Rajputs of Jagadhri Tahsil of Ambala District—Mother is natural guardian of property of her minor sons 220b
 —Succession—Kaler Jats—Daughters succeed in preference to collaterals 991a
 —Succession—Khatris and Brahmins of Gujrat District—Succession and inher- itance governed by custom and not by Hindu law 986b
 —Succession—Arains of Amritsar Dis- trict—Self-acquired property—Daughters are preferred to collaterals of third degree 931
 —Succession—"Chela"—His position is not like that of an appointed heir 920b
 —Succession—Non-ancestral property—Mikans of Shahpur District—Married daughters exclude collaterals—Collaterals have prior right in succeeding to ances- tral property 809b
 —Succession—Self-acquisition — Aulak Jats of Amritsar District—Collaterals ex- clude daughters 804
 —Succession—Amritsar District—Col- laterals are not entitled to succeed in preference to daughters 802
 —Succession—Sayads of villages Kotlo Sayyadin near Shahpur—Pagwand rule prevails 767

Custom (Punjab)

- Succession—Kangra District—Sister and sister's son do not succeed to deceased proprietor 660a
 —Succession—Maini Khatris of Kasur Tahsil, Lahore District, are governed by custom and not by Hindu law 540a
 —Succession—Gujjars of Shakargarh Tahsil—Daughters succeed to non-ances- tral property in preference to collaterals 493
 —Succession — Arains — Self-acquired property—Chunian Tahsil, Lahore Dis- trict—Collaterals exclude daughters of last male holder (*Per Addison and Cold- stream, JJ.; Jai Lal, J. contra*) 418a
 —Succession—Dillu Jats of Sialkot Dis- trict—Married daughters cannot inherit in presence of collaterals 403
 —Succession—Nekokara Qureshis of Jhang District—Sister succeeding brother is succeeded by her sons and not by her husband—Self-acquired property of sister — Husband succeeds in absence of sons 373
 —Succession—Self-acquired property— Sayyads of Sialkot District—Daughters succeed in preference to collaterals 346b
 —Succession—Self-acquired property— Kalon Jats of Sialkot District—Daughter excludes collaterals 339
 —Succession—Self-acquired property— Jats in Lyallpur District emigrants from Jullundur District — Daughters exclude collaterals 273
 —Succession—Jats of Hissar District— Daughters are preferred to collaterals 206
 —Succession—Ranjhas of Bhalwal Tah- sil, Shahpur District—Self-acquired pro- perty of father—Married daughters do not exclude 3rd degree collaterals 205
 —Succession — Randhawa Jat—Village Khunda, District Gurdaspur—Son formally adopted can succeed collaterally 178
 —Succession — Jats in Phillaur Tahsil, Jullundur District—Collaterals up to fifth degree exclude daughters—No distinction between ancestral and non-ancestral pro- perty 180a
 —Succession to house in village abadi— House in abadi devolving on deceased from his father's maternal grandfather—Col- laterals of latter are entitled to it and not proprietors 97c
 —Succession—Randhawa Jats of Am- ritsar District—Non-ancestral property— Daughters oust collaterals beyond 5th de- gree 88a
 —Succession—Randhawa Jats of Gur- daspur — Ancestral or self-acquired pro-

Custom (Punjab)

party — Collaterals within four degrees generally exclude daughters — Collaterals of fifth degree do not 68b

— Succession — Tiwanas — Widow — Widows do not take absolute interest 21d

— Succession — Ancestral property — Reversioner—Reversioner does not succeed as legal representative 21g

— Tenancy — Person in possession of land without ostensible title — Revenue authorities in Punjab recording him as cultivator — No presumption of tenancy arises—On facts held presumption could be raised 461a

— Weight of judicial decisions to prove custom—Decision is not judgment in rem

— Decision merely instance relevant under S. 13, Evidence Act 418c

— Widow—Forfeiture — Ludhiana Jats — No forfeiture for unchastity if husband's house is not left 17

— Will — Customary law of Lahore District by Mr. Bolster, Question 106, states that a sonless proprietor can make a will of self-acquired property 687c

— Will — Wilson's Customary Law, Ss. 8 and 10—Shahpur District—Sayyads cannot dispose of property by will to daughter's son 210

Declaratory Suit—Suit for mere declaration that plaintiff is legitimate son of defendant—Plaintiff having no present interest in defendant's property—Suit does not lie : 38 P L R 455=A I R 1936 Lah 135=161 I C 837, REVERSED 858

Decree—Construction—Property attached before judgment by order of Court—Attachment to continue till decision of case — Parties entering into compromise and inserting clause to the effect that attachment was to continue in case of default in payment—Default taking place — Held that clause created no charge on property in dispute 610

— Setting aside of—Defendants filing separate applications to set aside ex parte decree—Decree set aside against one defendant only — Decree being indivisible held should be set aside against all 243

— Construction—Instalments— Amount and period of instalments is matter of discretion of Court—It should be exercised within reasonable bounds 51c

Deed—Material alteration—Rule that document is void applies only to documents which are basis of claim and not to documents evidencing pre-existing liability 1016c

Deed .

— Admissibility — Document executed between strangers not parties to suit— Parties to suit cannot rely on it 1005a

— Binding—Non-parties to transaction are not bound by it even if they are relatives of transferor and have not protested against it and no estoppel or acquiescence arises 978b

— Proof of—Endorsements by Registrar are admissible 946a

— Proof — Finger-print expert giving evidence not on scientific comparison of thumb-impressions in Court concerning document—Evidence held inadmissible to prove document 681a

— Alteration—Bond not requiring attestation—Alteration by substitution of attesting witness is not material—Liability of executor is not affected 659a

— Construction — Crude document — Each party trying to put his own interpretation—Interpretation promoting substantial justice should be put upon it 587a

— Construction — Intention should be gathered from deed itself 508d

— Construction—Nature of transaction must be decided by looking at substance— Sale cannot be converted into exchange by mere addition of trifling non-pecuniary consideration of price 234

— Setting aside — Limitation — Donor executing gift deed of property—Possession not given to donee—Donor instituting suit to declare gift invalid—Time commences to run when donee attacks donor's title to property 49b

Defamation — Election campaign — Accused issuing poster against rival Barrister headed "Hollowness of Mr.—'s capacity as Barrister is exposed"—Accused held not justified in giving publicity to rival's position as Barrister and calculated to lower him in public eye—Hence was not within Excep. 9 to S. 499, I. P. C. 294b

— Vulgar and abusive epithets not sufficient in themselves for criminal prosecution 294c

Document—Admissibility — Appeal—Document produced after arguments—Opposite party absent — Notice to opposite party held necessary, hence document not properly received in evidence 138a

Easement—Inference that land is dedicated for use as public road, on account of continuous user as such, is one of fact—It is open to rebuttal 921b

Easement

—Easement and right of public path-way—Difference between—Right of easement attaches to land and is exercisable over another's land—Exercise of right of passage does not require person to be owner of some land—User of way for fixed period is not necessary 797

*—Dispute about insufficiency of light—Light acquired by grant or prescription can be taken into account—Other sources of light excluding sources in dispute should be taken into consideration : 159 I C 702 = *AIR 1935 Lah 865, REVERSED*: 792

—One party executing deed of relinquishment of certain rights over property—Parties not concerned with any right of easement that may accrue in future 109b

Estoppel—Agreement to exempt judgment-debtor from personal liability in consideration of making all his property liable—Judgment-debtor cannot raise plea that property is ancestral in execution proceedings 737c

*—Mortgagee in Punjab not getting his mortgage recorded in revenue records—Mortgagor making alienations—Transferees finding property unencumbered from revenue records—Mortgagee is estopped from challenging such transfers on account of his negligence 405

Evidence—Admissibility of—Fresh evidence—Discretion in allowing production of additional evidence should be exercised only when inherent lacuna becomes apparent—No lacuna found—Court without giving reasons sending for fresh and additional evidence of its own accord—No application by party to fill up gap in evidence—Such evidence must be discarded 933a

—Secondary evidence—Oral evidence to explain document when admissible 508c

—Presumption in favour of official acts being done properly—Investigating officer not acting in straightforward manner and making false statements—Presumption stands destroyed 409d

—Identification of accused—Evidence should be carefully scrutinized 409f

—Approver in police custody—Approver not subjected or threatened with ill-treatment—Statement is admissible 409g

—Admissibility—Entries in Pandas' books—No evidence as to by whom entries are made—Entries held inadmissible 261a

—Recitals—Recital in documents between third parties is altogether irrelevant 114a

Evidence

—Relevancy—Omission to object to admission of irrelevant evidence does not make it relevant 114b

—Admissibility—Document in two parts—One admissible and other not—Document cannot be rejected as a whole: 81b **Evidence Act (1 of 1872), Ss. 13 and 42**

—Right of public nature claimed in previous suit—Judgment is relevant in subsequent suit involving same question though not between same parties 929b

*—S. 30—Confession by accused implicating co-accused made at close of prosecution can be considered as against co-accused—Value of such confession depends on facts and circumstances of case 337b

—S. 35—No statutory obligation on officials to make enquiries regarding ownership—Register containing report is not admissible 965b

—S. 35—Entries in revenue record showing certain land to be thoroughfare are relevant under S. 35 921a

—S. 35—Age—Entries in school register are of little value 598

—S. 35—Documents containing mere opinion of Government officers who have held no personal inquiries are not admissible 37a

—S. 35—All views expressed before final stage is reached are not admissible—Only final decision is admissible—Other requirements necessary mentioned 37i

—S. 54—Evidence of bad character of accused is irrelevant—But previous conviction may be considered in awarding sentence 914c

—Ss. 65 and 90—Certified copy not 30 years old—Presumption under S. 90 cannot be drawn 788a

—S. 90—Entry in school register—Register over 30 years old produced from proper custody—Genuineness is presumed—Person making entries not produced as witness is immaterial 104b

—S. 92—Promissory note reciting cash consideration—Promisee may prove that actual consideration was something different 1016e

—S. 92—Suit for dower amount mentioned in kabinnama—Defendant pleading that writing was mere sham and was not agreement between parties—Oral evidence to prove such plea—(Per *Agha Haidar, J.*)—Is not admissible—(Per *Tek Chand, J.*)—It is admissible. 183f

—S. 114—Police Officer asked to remember certain date refusing to refresh

Evidence Act

memory—Adverse inference can be drawn 707b

—S. 115—Mortgagee having two mortgages against same property—Decree for sale in suit on second mortgage—Existence of prior mortgage mentioned in suit—Private purchase of property from mortgagor free from incumbrances and without mortgagee's knowledge, and decretal amount deposited in Court—Mortgagee held not estopped from suing on prior mortgage 1020a

Execution—Property liable to attachment—Right of residence, although not attachable under S. 60 (1) (n) can be dealt with by way of equitable execution, by appointment of receiver to realize proceeds for satisfaction of decree 830b

—Decree binding — Decree, though passed without jurisdiction, unless it is set aside by proper remedies, is binding on executing Court 766

—Validity of—Decree-holder, desirous of executing decree at another place, obtaining certificate of non-satisfaction from Court passing decree—Certificate wrongly addressed to Senior Sub-Judge and not to District Judge—Defect in certificate is formal and is cured by its presentation to District Judge and subsequent transfer of case by him to Subordinate Judge—Objection cannot be raised unless taken at earliest opportunity 765

—Notice for attachment of salary of Government servant—Objection raised by Secretary of State—Court holding salary to be attachable — No appeal filed by Secretary of State—Revision is not competent 761a

—Exemption from attachment—Jagirdars promised freedom from attachment of property by Board of Administration—Such immunity held did not apply to property of their successors 737a

—Decree binding—Executing Court cannot go behind decree 704

—Executing Court—Orders of—Court granting farm of land belonging to judgment-debtor—Lease money made payable by instalments—On failure to pay instalment Court ordering lessee to deposit balance in Court—Order not appealed against—Order is conclusive and binding on lessee 696c

—Abatement—O. 22, Rr. 3, 4 and 8, are not applicable to execution proceedings 519b

Execution

—Agent competent to execute decree—Agent can remove objections to execution in both appellate and execution Court 508a

—Property attached before judgment—Suit compromised and compromise decree passed—Compromise provided that property should remain under attachment till payment was made—Such compromise held created no lien or charge on property 508b

*—Attachment—Money attached in execution of one decree—Another decree-holder subsequently attaching it—Money cannot be paid over to such decree-holder—Attachment under precept lies only for sixty days—Money attached under precept can be paid to another after expiry of two months: *161 I C 418 = A I R 1935 Lah 914, REVERSED* 486b

*—Limitation—Dismissal of appeal for non-prosecution after admission and appearance of parties is not final decree or order—Limitation for execution runs only from date of decree 479

—Appeal—Application to set aside sale dismissed—Order confirming sale—Auction-purchaser necessary party to appeal from such order—Auction-purchaser not made party within time—Appeal should be dismissed 478

—Execution Court attaching land of judgment-debtor—Land left with judgment-debtor not sufficient for his maintenance—Court can lease out lands 448b

—Decree binding — Executing Court cannot question validity of decree—Court executing award under Co-operative Societies Act cannot question validity of award 442b

—Transfer of decree—Certificate need not be signed by Judge who passed it 369a

—Order of payment made by Bombay High Court in favour of solicitor—Order made under R. 874 of rules made under S. 129, Civil P. C.—Such order can be executed as decree 369b

—Appointment of receiver merely to receive daily earnings of judgment-debtor's theatre after collection and keep accounts, but not to actually collect at doors—Order held was not ultra vires 239

*—Legal representative—Decree against estate of deceased—Estate in the hands of heirs—Income accruing after death—Income is liable to be sold in execution of decree 236

Execution

*—Decree transferred to another Court for execution—Decree-holder going into liquidation—Official Receiver taking his place applying to transferee Court for execution—As decree does not vest in Official Receiver and he is not transferee of decree, he can apply to transferee Court for execution of decree 152

—Executing Court must proceed at decree-holder's instance till decree is satisfied—Full satisfaction should not be refused in absence of statutory bar—Land not saleable—But executing Court empowered to lease same—Judgment-debtor cannot claim exemption of sufficient area for maintenance 30

Execution sale—Property sold but sale not confirmed—Confirmation cannot be refused on any other ground except as provided in Civil P. C.—Fact that after sale but before confirmation, judgment-debtor declared to be agriculturist whose property could not be sold, held no ground for not confirming sale 191

***Fatal Accidents Act (13 of 1885), S. 1**—Expectation of life—Actuarial tables provide good basis of calculation 362b

Fraudulent Transfer—Suit for declaration that gift by person to his wife is fraudulent and fictitious—Onus of proving that donor was in embarrassed circumstances lies on plaintiff 222a

—Voluntary settlement by person owing no debts in favour of wife or children cannot be set aside merely because some years later it defeats or delays subsequent creditors 222b

—Wife securing gift in her favour as provision for future maintenance—Donor not shown to be in debt or in embarrassed circumstances at time of gift—Transaction does not amount to transfer made with intent to defeat or delay creditors 222c

General Orders by Governor-General in Council, No. 179, S. 7—Land given under license resumed under S. 6—S. 7 has no application 582a

Government of India Act, (1915, 5 & 6 Geo. V, Ch. 61), S. 107—Inquiry under S. 36, Legal Practitioners' Act, on Bar Association's resolution—Subjects of inquiry not found touts—Bar Association's petition to High Court against order—Objection that Association had no right to present petition—High Court held could take cognisance of proceedings on information from any

Government of India Act

person—High Court held could allow Association to supply material to it for doing justice though Association not entitled to appear as of right 382d

Guardian—Guardian of person and property appointed—Ward is minor till he attains age of twenty-one—Another guardian should be appointed if minor is below twenty-one and if guardian appointed resigns 142b

Guardian and Ward—Appointment of guardian—Two parties claiming to be entitled to guardianship of person and property of minor—Dispute compromised—One party appointed guardian of property and other of person of minor—One party withdrawing suit instituted by him, relying on compromise—It is not open to other party to appeal against order of appointment—It can also be assumed that Court giving effect to compromise considered interests of minor 1019

Guardians and Wards Act (8 of 1890)—Act does not deal with lunatics 142a

—S. 29—Money advanced under sanction of Court—Minor's property taken as security—Inquiry as to necessity is unnecessary 946d

High Court—Jurisdiction—Existing jurisdiction cannot be taken away by legislature without express words 608d

Hindu Law—Alienation—Father—Alienation by adoptive father made prior to adoption—Adopted son cannot challenge it 946c

—Alienation—Widow—Alienation to meet expenses of litigation—Necessity is not established unless widow has no sufficient funds to carry on litigation—Onus is on alienee to show that alienor's income was insufficient 98a

—Applicability—High caste Hindus in the Punjab—The first presumption is that they follow Hindu law and not "Punjab Customary law or Agricultural Customary law" 151b

—Debts—Hindu incurring debt during his life time dying, leaving son and widow—Son dying later leaving his widow—Property in hands of widows is liable for debt—Even widow's rights of maintenance are subject to obligation to pay debt 558

—Debts—Father's pre-partition debt—Decree—Decree-holder can proceed against son's shares in execution—Regular suit to enforce his right is not necessary 193

Hindu Law

—Debts — Father — Decree against—
Creditor can proceed against joint family
property—Right is not lost by subsequent
partition 64

—Gift—Delivery of possession not es-
sential—Property capable of being deli-
vered—Donee capable of taking possession
—Possession must be delivered 49a

—Guardian—Contract by father not
for son's benefit is void 831c

—Guardianship—Joint family—Mother
is natural guardian of separate property
of minor after father's death—Joint family
property can be brought under guardian-
ship in absence of adult member 220a

—Impartible estate—Express renuncia-
tion by junior members of rights of succes-
sion—Incident of joint family will not
apply 55b

—Joint family — Manager mortgaging
co-parcenary property for necessity—As
manager he is competent to do so and
mere fact that he did not describe himself
as guardian of minor co-parceners will
not render mortgage void 996a

—Joint family—Ancestral business—
Business not heritable asset—It is not
ancestral business—Contractual partner-
ship may be joint family property—Such
partnership will not be governed by Hindu
law but by provisions of Contract Act
514a

—Joint family—Presumption of joint-
ness—Presumption varies in each case—
It becomes weaker and weaker as one goes
away from founder of family 514b

—Joint family—Managing member en-
tering into partnership with stranger—
Other members of family as unit do not
become partners but only those who enter
into partnership—Partnership is governed
by Contract Act 514d

—Joint family—Co-parcenary property
situated in village—Member of joint fami-
ly being co-parcener becomes co-proprietor
and can retain possession of village
common land 404

*—Joint family — Debts incurred by
manager of joint business—Adult co-
parceners operating upon account and
participating in business are liable per-
sonally and not merely to the extent of
their interest in joint family property
390e

—Maintenance—Grandfather in posses-
sion of joint family property—He is not
personally liable to maintain minor mem-
bers whose father is alive 853b

Hindu Law

—Partition—Amount claimed should be
shown to be existing asset 504a

*—Partition—Minor member institut-
ing suit for partition—Severance of status
takes place when decree is passed—Ren-
dition of accounts should be from date of
preliminary decree 504b

—Partition—In the Punjab son cannot
enforce partition during lifetime of his
father 390d

*—Religious endowment — Failure of
succession to trusteeship — Right of
management reverts to founder and fol-
lows line of inheritance from founder and
not merely descends to his heirs (*Obiter*)
241b

—Religious endowment — Sanyasi —
Nanga Sadhu can revert to ordinary
sanyasi sect—Reverted sanyasi can be-
come Mahant of non-nanga sanyasi insti-
tution 228

—Reversioner—Representative suit by
presumptive reversioner for declaring
alienation by widow ineffectual as against
reversioners—On his death, right to sue
survives to next presumptive heir and not
personal heirs of deceased reversioner
652a

—Reversioner—Right of—Reversioner
not inheriting estate of intestate male due
to existence of widow—Reversioner dying
before widow—Estate goes to heirs of
intestate person and not to heirs of rever-
sioner 124e

—Succession—Sister's son's widow or
sister's son's daughter is not heir 652b

—Succession—Adoption by husband—
Daughter of wife not associating in adop-
tion is only half-sister of adopted boy but
not sister (*Obiter*) 652c

—Succession—Widow — Inheritance is
never in abeyance—Reversioners have no
vested interest when widow is alive—
Succession opens at death of widow but
estate goes not to her but to her husband's
next heir—No question of retrospective
effect of Hindu Law of Inheritance (Amend-
ment) Act comes in if widow dies after Act
even if husband had died before 124d

**Hindu Law of Inheritance (Amendment)
Act (2 of 1929)**—Male governed by Mi-
takshara dying before Act—Widow alive
when Act came in force—Act applies : *AIR*
1933 Lah 777, REVERSED 139

—Application of—It applies to case of
person dying before it came into force but
having widow alive who inherits him at
its enforcement 124a

Hindu Law of Inheritance (Amendment) Act

—Preamble — "Dying intestate" does not refer to time of death of person—It is mere description of status of deceased—It is intended to signify that law is to be modified as to intestate and not testamentary succession 124b

—S. 2—Half-sister—Whether sister in S. 2 of Act 2 of 1929 includes half-sister (*Quære*) 652d

Husband and Wife—Restitution of conjugal rights—Suit for—Relief is discretionary—Question should be decided according to personal law and principles of equity—Relief should be refused, if there is long delay in bringing suit and delay is not explained 752

Immoveable Property—Flour mill is not immoveable property 242

Income-tax—Evidence—Vouchers not produced to enable checking of account books—Value of account books is not greater than assessee's mere word 856

—Profits—Money from branch in foreign country remitted to head-quarters in British India is profit and not capital unless contrary is proved 836b

—Assessment of—Books of account unreliable—Income-tax Officer adding certain sum for omissions held justifiable : 836c

—Partnership consisting of firms and undivided Hindu family—Shares of members of firm not mentioned in partnership-deed—Partnership is trading concern and not firm within meaning of Income-tax Act—Such partnership is classed as 'other association of individuals' 548

—Firm acquiring income as firm changing into company on day of assessment—Profits should be calculated as that of firm—Rate should be as that of company 510

*—Capital expenditure—Criterion of—Money spent in defending suit is capital expenditure 350

Income-tax Act (11 of 1922)—Interpretation—Assessment can be attacked only in manner prescribed by Act 621b

—S. 2 (1)—'Dharat' income is agricultural income 602a

—S. 2 (1)—Rent of flour mill is not agricultural income 595b

—Ss. 2 (1), 4 (3) (vi)—Lambardari fees given as remuneration for collection of land revenue is not special allowance within meaning of S. 4 (3) (vi) and S. 2 (1) does not apply to such income 595c

—S. 2 (1)—Agricultural income—Scope

Income-tax Act

—The net profit from commission, charged to tenants for sale of their produce, does not fall within definition of agricultural income under S. 2 (1) of the Act 595d

*—S. 4 (2)—Assessee receiving in United Kingdom payments of pension granted under Civil Service Regulations—Payments not brought in British India—They are not income accruing or arising in British India 713b

*—S. 4 (3) (i)—Stud farm—No trust-deed—Officer commanding operating on Stud fund given discretion in disbursement—Money spent for non-charitable purposes—Fund held not exempt from income-tax under S. 4 (3) (i) 602b

**—S. 9 (2)—Annual value—Annual value includes amount paid by tenant on account of Municipal house tax : 5 I T C 36=32 P L R 517=A I R 1931 Lah 320=131 I C 193 (FB), *OVERRULED* : (FB) 762

—S. 10 (2) (iii)—Assessee getting income by way of interest on fixed deposit—Capital borrowed for investment outside British India—Interest on such capital is not deductible under S. 10 (2) (iii) 100I

—S. 10 (2) (iii)—Assessee's own capital invested in income-producing business—Interest on capital borrowed for purposes of paying land revenue etc., is not exempted from income-tax under S. 10 (2) (iii) : 595a

—S. 10 (2) (ix)—Assessee firm advancing large sums of money to contractor—Accounts between parties settled and certain amount found to be due—Debtor agreeing to make payments by cheques recovered from Government—Debtor absconding without making full payment—Loss held to be loss pertaining to money-lending business and not loss of capital invested in contractor's business—Debt held to have become bad debt three years after adjustment of accounts and held liable to be allowed under S. 10 (2) (ix) : 597

—Ss. 10 (3) and 13—Bad debt—Personal decree obtained in year 1928—Appeal against personal decree dismissed in year 1931—Amount due on personal decree claimed to be bad debt during accounting period of 1932-33—Held, that debt did not become bad debt in year 1929 441

—S. 13—Method of accounting—Provisions of section explained 546

*—Ss. 22 (2), (3) and 29—Return after assessment but before service of demand notice is not valid return 468

—Ss. 22 (4), 23 (4) and 34—Income-tax Officer, having received certain infor-

Income-tax Act

mation, serving assessee not assessed for the year with notice under S. 34—Return submitted by assessee found to be incorrect—Account books found to be full of omissions and discrepancies—Assessee served with notice under S. 22 (4) calling upon him to produce all account books and documents—Assessee denying their existence and not producing them in spite of two more notices under S. 22 (4)—Assessee assessed under S. 23 (4)—S. 34 held applicable to circumstances of the case—Notice under S. 34 held to be legal—Assessment held to have been rightly made under S. 23 (4) 750a

—Ss. 22 (4) and 23 (4)—Books of accounts and other documents not produced in accordance with notice under S. 22 (4)—Income-tax Officer is entitled to make assessment to best of his judgment under S. 23 (4) 750c

—S. 23 (4)—Partial default in complying with notices under S. 22 (4) or S. 23 (2) of the Act—Consequences are those of complete default 489a

—S. 24—Loss in business—Loss incurred in transaction not part of business—Such loss cannot be taken into account 872

*—S. 24—Assessee, salt trader, depositing securities with Salt Commissioner for deferring payment for salt purchased—System of deferred payment abolished and salt sold for cash only—Assessee selling securities and incurring loss—Claim that loss was in business—Buying securities held not compulsory as cash could be paid—Hence loss was not in course of business 452

—Ss. 25, 33, 66 (2)—Order setting aside finding of discontinuance and directing enquiry into succession in cases pending against propounded successors is not one prejudicial to predecessor assessee 961

—S. 25-A (1)—Assessment as joint family—Application by assessee for registration of family as firm under alleged instrument of partnership—Registration without enquiry under S. 25-A (1)—Later, status of assessee still found to be of joint family—Wrong decision in previous year can be corrected in a subsequent year: 836a

—S. 27—"Sufficient cause" or "reasonable opportunity"—Income-tax Officer as matter of law can find as matter of fact that assessee has not established "sufficient cause," etc. 489b

Income-tax Act

—Ss. 28 and 30 (1)—Assistant Commissioner upholding assessment under S. 23 (4)—Proviso to S. 30 (1) coming into operation—Assistant Commissioner refuses to admit appeal—Thereafter Assistant Commissioner cannot proceed under S. 28 (3) 585a

—S. 28—Penalty—Appeal to Commissioner against imposition of penalty—Commissioner himself cannot impose penalty—Penalty cannot be imposed without issuing notice 585b

—S. 30—Order under sections not mentioned in S. 30 are not appealable and are final 621c

**—Ss. 30, 26-A and 66 — Question arising out of refusal to register firm under S. 26-A—Order is final and Commissioner cannot refer to High Court under S. 66 621d

—Ss. 32, 33 and 34—Order of assessment—Appeal by assessee—Commissioner disposing of appeal under S. 32 can enhance assessment but only subject to limitation of S. 34 897b

—Ss. 32 (3) and 33—Appeal under S. 32—Commissioner can pass orders only with respect to subject matter of appeal—He cannot *suo motu* enhance assessment which he has power to do under S. 33: 897c

—S. 34 — Order of assessment by Income-tax Officer relying upon accounts of assessee firm—Commissioner is not entitled to enhance income without issue of notice within one year—Difference between two estimates is income which has escaped assessment 897a

—S. 34—Notice under S. 34 issued—Another notice under S. 22 (2) is not necessary 750b

—S. 60 — Notification under S. 60 exempting pay, leave salaries paid outside India and in case of persons residing outside India, is superfluous 713a

—S. 66 — Income-tax Officer is sole arbitrator on question of possibility of deducting income, profits and gains from method of accounting employed by assessee—Correctness is question of fact which cannot be challenged by application under S. 66 621a

Inherent jurisdiction—Court exercising inherent jurisdiction—No appeal lies 212b

Injunction—Suit for injunction that obstruction in public street be removed—Plaintiff should prove injury—Amount of injury is immaterial 132b

Insolvency — Application by creditor —
 Date of actual transfer and not date of
 mutation is date of act of insolvency 923
 — Date of admission of insolvency peti-
 tion is date on which applicant was asked
 to furnish security 885a
 — Partnership — Agreement — Insolvent
 entering into agreement but appointing
 minor son ostensibly as partner — Inten-
 tion to defeat provisions of insolvency law
 — Agreement is void 831b
 — Sole proprietor of firm bona fide sell-
 ing assets and liabilities of his firm to new
 firm — He becomes creditor of new firm
 and no notice of sale transaction is neces-
 sary to old creditors — On insolvency of
 new firm transfer of business from old to
 new firm cannot also be fictitious transac-
 tion 760
 * — Person made insolvent under Punjab
 Laws Act and order of discharge not ob-
 tained — Fresh application for adjudication
 under Provincial Insolvency Act is not
 barred 407
 — Generally Court should not take
 action under S. 4, Provincial Insolvency
 Act, after property is sold — Minor ad-
 judged insolvent — Such order is illegal —
 Minor unable to take proceedings due to
 minority — In such case Court can take
 action under S. 4. 376
 — Judgment-debtor declared insolvent
 during execution — Insolvent has no *locus*
standi to appeal from order confirming
 sale 368
 — Partition effected by debtor with his
 undivided brother without making provi-
 sion for debts held to be act of insolvency
 336
 — Practice — Intention is to be inferred
 from circumstances of each case — Person
 carrying on extensive business disappear-
 ing in an unaccountable manner — Inten-
 tion to defeat creditors, within the mean-
 ing of S. 6 (d), Provincial Insolvency Act,
 is clear 176
 — Fraud practised upon receiver —
 Receiver applying for setting aside sale —
 Action of Receiver falls within S. 4, Pro-
 vincial Insolvency Act — Sale can be set
 aside even after two years 149
Instalment Bond — Creditor passing receipt
 to debtor stating that "what has been due
 to the creditor upto the date of receipt
 has been fully satisfied" — Some instal-
 ments becoming due after date of such
 receipt — Bond held is not completely
 wiped off — Instalments due after date of
 such receipt can be recovered 801

Instalment Bond

— Suit on — Bond providing that in case
 of default of three consecutive instalments,
 creditor entitled to sue for recovery of
 defaulted instalments or for whole amount
 — Creditor taking no action on default be-
 ing made by debtor — It amounts to waiver
 — Creditor can sue for instalments within
 three years of suit and for balance due —
 Proof of waiver is not necessary — It must
 be assumed 570

Insurance — Language of policy ambigu-
 ous — Interpretation beneficial to assured
 should be favoured — Rules of company,
 at time of issue of policy providing that
 policy would be forfeited, if assured com-
 mitted suicide — Rule subsequently modi-
 fied providing that there would be forfei-
 ture in case of suicide after period of two
 years from date of policy — Policy granted
 subject to rules for time being in force —
 Words "Rules for time being in force"
 held to mean rules in force at time of
 maturity of policy — Assured committing
 suicide after period of 12 years — Heirs
 held entitled to amount due under policy
 685a

Interest — Future interest — Judge not
 applying his mind to question — There is
 no exercise of discretion 668c

— 12 per cent held was not unreason-
 able 629g

* — **Mortgage** — Part of principal money
 payable to another by mortgagee forth-
 with paid only subsequently owing to un-
 expected events — Such money cannot be
 deemed to have been paid on date of mort-
 gage to mortgagor nor can mortgagee be
 considered as agent of mortgagor — Interest
 on such money accrues only from date of
 actual payment and not from date of
 mortgage 168c

Interpretation of Statutes — Courts
 should put liberal interpretation upon
 fiscal statute, such as would lessen bur-
 dens of litigation and not add to them
 990a

— Intention of legislature — It is to be
 gathered from language used 698a

— Restrictive legislation — Construc-
 tion though strict must be harmonious
 545a

— Principles of English law are to be
 referred to only in case of ambiguity in
 language in statute 337a

— Courts should not discover intention
 of Legislature but should endeavour to
 interpret the Act 298b

Interpretation of Statutes

—Retrospective effect — Unless expressly provided therein, a statute cannot be made to have retrospective effect 124c

Jurisdiction — Waiver — Court having jurisdiction over subject matter — Irregularity in commencement of proceedings — Objection not taken at proper stage — Defect of jurisdiction is waived 891a

—Person residing within jurisdiction of one Court — But occasionally going to another place — Former Court has jurisdiction to try suits — Onus of proof that such Court has no jurisdiction lies on him who alleges it 853a

* — Civil and Revenue Courts — Application by occupancy tenants for being adjudicated insolvents — Occupancy rights included in details of property — Tenants declared insolvent and Official Receiver taking possession of all their property — Occupancy rights sold by receiver without objection from tenants — Landlord obtaining possession of land after getting sale cancelled — Suit by occupancy tenants for possession of land held to be cognizable by civil Courts — Ss. 50 and 77 (3), Punjab Tenancy Act, held inapplicable 657

— Civil and Revenue Courts — Landlord and tenant — Tenant becoming liable to enjoyment by reason of his tenancy having been terminated by notice which is not contested under Punjab Tenancy Act — Suit for ejectment is cognizable by revenue Courts 571

— Objection to, cannot be taken in appeal or revision — Same principle applies to execution proceedings 442a

— Small cause — Hissedars of village common entitled to share offerings in temple — Offerings at temple with many claimants farmed to highest bidder by Government — Thekedar was to give surety — Mortgage by co-sharer of his share — Thekedar refusing to pay amount of share to mortgagee — Suit by mortgagee against thekedar held cognizable by Small Cause Court — Art. 13 or Art. 11, Sch. 2, Provincial Small Cause Courts Act, held did not apply 100a

Lahore High Court Rules and Orders

Copying rules — Rules very complicated — Amendment of rules suggested 550b

— Vol. 1, Ch. 12-L, Para. 20 — Execution sale — Commission of auctioneer — Sale set aside — Commission must be refunded 523

— Vol. 5, Ch. 6-B — Pleader cannot act

Lahore High Court Rules and Orders

for any person unless they are empowered under O. 3, R. 4, Civil P. C. — Pleader can plead without power of attorney but must file memorandum of appearance 199a

Land acquisition — Appeal against award — Secretary of State is an essential party 564c

Land Acquisition Act (1 of 1894), Ss. 9 and 25 — Particulars of claim must be given 733a

— S. 9 — Service on servant held good 733b

— Ss. 23 and 11 — Tenure of vendor in land compulsorily acquired, uncertain — Vendor, mere licensee liable to be ejected at any time — Measure of his interest is amount of compensation he can claim if his license is determined 1010

* — S. 23 (1) — Market value must be determined with reference to date of notification — It cannot be reduced by Government announcing in advance intention to acquire and taking possession 599b

— S. 23 (1) — Market value need not necessarily be determined on present disposition 599c

— S. 23 (2) — Provisions for payment of 15 per cent are mandatory 599a

— S. 23 (2) — Sale of lands influenced by religious and charitable motives or at much earlier time is no criterion for determining market value 599d

— S. 23 (2) — Possession by Government with intention of acquisition — Notification and acquisition after eight years — Owner benefited by such delay — No compensation for prior possession is necessary 599e

Landlord and Tenant — Sale of Adna Malkiyat lands — To see whether shamilat land is sold or not Court has to look into circumstances and conduct of parties 816a

— Non-payment of rent by tenant — No cessation of relationship — Tenant's possession is not adverse 461b

— Limitation — Tenant mortgaging his property — Mortgagee bringing property for sale under mortgage decree — Landlord knowing of mortgage for long time but not taking any step to challenge it — Landlord objecting to sale under mortgage decree — Objection dismissed — Dismissal of objection does not give fresh time for claim which is already barred 394e

— Limitation — Deed of alienation executed by tenant — Deed subsequently registered — Landlord challenging alienation by filing suit — Suit is in time if brought

Landlord and Tenant

within proper period which commences to run when deed is executed 394f

—Refund—Lessee paying to lessor's decree-holder — Lease failing — Lessee can get refund from decree-holder of lessor 212c

—Trees on holding—Wajib-ul-arz allowing tenant to cut one tree for marriage or funeral with lambardar's permission—Chil trees allowed to be cut on payment—Terms held not compelling landlord to preserve trees for tenant's use—They could not restrain landlord by injunction to cut trees 138b

Lease — Validity — Term of lease — Tenancy, for period during which tenant is to remain in station, is not bad for uncertainty — Term need not be for fixed period so long as it is definite 890

—Two lessees executing joint lease—One lessee put in possession — Other lessee not requesting lessor to be put in possession—Such other lessee not being obstructed by lessor is liable for rent 815

—Construction—Lease for use and occupation of buildings—Lease is of immoveable property falling under S. 17 (1), Registration Act — Such leases are not exempt under S. 90 (1) (d) 26a

Legal Practitioner — Pleader's clerk writing false letter to client—Letter not proved to be written under pleader's instructions — Pleader held not guilty of improper conduct 1013

—Misconduct — Pleader attempting to bring influence on Judge through his relative is guilty of gross misconduct — Serious notice should be taken of such acts — Pleader concerned, inexperienced, admitting his guilt and expressing penitence — Offence not viewed with disfavour by public — He need not be punished so severely as he deserves 732

—Power to compromise is inherent in Advocates in India—Pleader only authorized to appear can compromise—Power of attorney is not necessary 199b

Legal Practitioners' Act (18 of 1879),

—S. 13—Advocate of 19 years' standing convicted of criminal breach of trust—Offence held grave — Serious notice of conduct recommended—But dismissal held too grave punishment 717

—S. 36—District Judge's inquiry on resolution of Bar Association declaring certain persons touts—Members of Association, as witnesses, stating inability to

Legal Practitioners' Act

say whether they adhered to resolution even after considerations before them as witnesses—Statement held did not amount to repudiation of resolution 382a

*—S. 36 — District Bar Association's meeting resolving unanimously declaration of certain persons as touts—Contention in inquiry before District Judge that all members present were not entitled to vote, hence resolution invalid — Matter held domestic concern of Association and contending party had no concern—Hence resolution not invalid 382b

Legal Representative—Liability of—Remedy for wrongful act, which is not mere tort but breach of quasi contract, done by deceased person—Property misappropriated by deceased and added to his own—Suit against his legal representative held competent—S. 306, Succession Act, applies 268c

***Legitimacy**—Legitimacy is question of legal character—Suit for declaration of legitimacy is valid 135

Letters Patent (Lahore), Cl. 9—"Suit" includes proceedings in insolvency 608a

—Cl. 10—Order registering decree of civil Court as that of Revenue Court—Order is not judgment—Letters Patent appeal from such order is not competent 785

—Cl. 10 — Appeal — Objection not specifically raised before single Judge cannot be raised 555c

Limitation — Exclusion of—High Court rules—Second appeal — Delay in getting copy of trial Court's judgment permissible under S. 5, Limitation Act, though not under S. 12 of the Act 1007a

**—Appeal—Computation of period—Exclusion of time in obtaining copies—Decree not drawn up within period of limitation—Time commences to run from date on which decree is drawn up 976

—Plea under S. 5, Limitation Act—High Court will interfere in second appeal if discretion is not judicially exercised 742a

—Condonation of period—Application under S. 151, Civil P. C., is not competent when some other provision of Civil P. C. is available—Delay caused by wrong prosecution of such application cannot be condoned under S. 5, Lim. Act 672

—Copy—Person should not suffer for delay of copying section—Copying department is not agent of public 550a

Limitation

*—Application for restoration of suit dismissed for default—Art. 163, Limitation Act, applies—Having recourse to S. 151, Civil P. C., cannot help limitation—No notice necessary to plaintiff of date fixed for hearing after setting aside of ex parte decree 495

**—Right to light and air—Obstruction to light and air is continuing wrong—No period of limitation as fresh period starts running every day 334

—For application of Art. 54, Limitation Act, allegation of non-execution of hundis is necessary—Defence should make clear allegation of limitation in written statement 328

*—A executing pro-note in favour of B—A selling some immoveable property to B and asking him to appropriate sale price towards part payment of pro-note—Document though unregistered can be relied upon as acknowledgment and part-payment of liability and can save limitation of pro-note 276b

—Acknowledgment—Actual amount need not be mentioned—Acknowledgment of liability written and signed by debtor is required 276c

—Fresh cause of action—Claim barred—Only express promise provides fresh period of limitation 164b

*—New party—Misdescription—Person intended to be sued described wrongly—Plaint amended by correcting proper defendant—Defendant is not new substitution within meaning of S. 22, Limitation Act 147

—Delay in getting copies attributable to copying department—Benefit of S. 5, Lim. Act, should be given 132a

*—Copy of judgment applied for—No deposit made with application—No demand by copying department made therefor—Preparation of copies not held up for want of deposit—Copying charges paid on date of delivery—Applicant held entitled to deduct whole time for copies 123b

—Person continuing in possession in spite of adverse entry in revenue papers—No question of limitation arises 37f

Limitation Act (9 of 1908), S. 5—Deficient court-fee—Application for extension of time to make up deficiency not made till after about 7 months after its discovery—Appeal barred during that time—Mistake of counsel not bona fide—No extension should be granted 935b

Limitation Act

—S. 5—Application for copy made personally to copying department and accepted by it without objection and without demand for copying fee—Endorsement by copying department that certain number of days have been requisite for supply of copy—That number must be presumed to have been so necessary—Applicant is entitled to deduct that time from period of limitation prescribed—Appellate Court refusing extension of period of limitation errs in exercise of its jurisdiction 693

—S. 5—Delay in copying department due to wrong practice—Copying department is not agent of applicant—Delay in filing appeal due to delay in copying department—There is sufficient cause within S. 5 200a

—S. 5—High Court does not interfere with discretion of trial Court 200b

—S. 5—Appeal lying to High Court filed in District Court—Lower Court decree also not beyond doubt—Respondent also first filing his appeal in District Court—Time during which appeal remained in District Court held should be excluded 168a

—S. 12—Time "requisite"—Applicant presenting application for copy with insufficient payment for costs—Further demand for deposit made—Delay of two or three days in making necessary deposit—No negligence on applicant's part—Delay construed as time requisite within meaning of S. 12, Limitation Act, and hence excused 1007b

—S. 12—Copying agent is not private agent of applicant (FB) 771a

**—S. 12—What is valid application stated : *A I R 1935 Lah 625=160 I C 788* and *A I R 1935 Lah 889=160 I C 897, OVERRULED* (FB) 771b

**—S. 12—Period between date of presentation of application and date on which full costs deposited can be excluded if deposit is made with reasonable diligence as and when required by copying department : *A I R 1935 Lah 625=160 I C 788* and *A I R 1935 Lah 889=160 I C 897, OVERRULED* (FB) 771c

—S. 12—Application before signing of decree for copy of it—Period between the day of application and day on which copy of decree was supplied was excluded for appeal 670

—S. 12—A applying for copy of judgment on 4th January 1934—Copying agent making note on application on 9th

Limitation Act

that A was required to deposit Rs. 10 as advance copying fee—Order not communicated to A—A calling for copy on 16th and depositing advance copying fees as required—Copy obtained by A on same day—Practice of copying department not to accept advance copying fees till probable cost of copying was ascertained—A held entitled to allowance of period from 4th January to 16th January as time requisite for obtaining copy 650a

—S. 12 (2)—Application for copies made direct to copying department—Copying department is not private agent of applicant—Delay by it in giving copy cannot be attributed to applicant 120a

—S. 12 (2) — 'Time requisite' — No negligence or want of bona fides on part of applicant or his counsel — Delay in giving copies due to negligence of copying department—Period noted on application is to be regarded as 'time requisite' 120b

—S. 14—'Care and attention'—Exercise of — Deputy Commissioner without taking proper care filing proceedings in wrong Court—He being in position to know the correct Court on slightest care and attention but not exercising it—His case does not come under S. 14 and no exclusion of time can be granted 857a

—S. 19—Bond executed in favour of some persons having equal shares — Acknowledgment in favour of only one person—Other persons are not entitled to benefit of S. 19 659b

—S. 19—Bond in favour of persons having equal shares—Acknowledgment of liability in favour of only one—Obligee having benefit of S. 19 is entitled to recover his share only and not whole amount 659c

*—S. 19—Name of creditor and identity of debt can be proved *aliunde*—But for seeing whether document is acknowledged, extraneous evidence is not permissible 629d

—S. 19—Question as to whether there was acknowledgment by Municipality—Entire record of proceedings including certain resolution and not merely resolution held should be looked into 629e

—S. 19—Acknowledgment of outstanding unsettled account is valid 629f

—S. 20 — Payment of part of debt if sufficient for extension of time—Fact that debt exceeded amount paid can be proved *aliunde* and need not appear in writing 629b

Limitation Act

—S. 20 — Payment of part of debt "without prejudice" gives fresh limitation 629c

—S. 22—Omission to record all partners as defendants according to R. 3, O. 30, Civil P. C., amounts to not naming defendants and not misdescription under S. 22 485

—S. 26 — Permissive enjoyment of access and use of light or air for more than 20 years—User being not as of right there can be no prescriptive right under S. 26 905b

*—Arts. 7 and 102—Motor-driver is artisan and household servant within meaning of Art. 7—Suit for wages is governed by Art. 7 and not by residuary Art. 102 661

*—Arts. 59 and 60—Money deposited with banker and payable on demand—Art. 60, Limitation Act, applies for suit to recover such money 718

—Arts. 61, 96 and 120 — R and N borrowing Rs. 5,000 on promissory note from J and M—J alone realizing amount by draft on R and N—Suit by J and M against R and N for recovery of Rupees 7,700 on basis of promissory note—Payment by draft alleged to have been made on another account—Court holding payment to have been made on account of promissory note, but decreeing suit in favour of M only for half the amount on ground that J had no authority to receive payment on behalf of M—Decree passed on 10th April 1926 and appeal finally dismissed on 29th January 1931—M executing his decree and recovering Rs. 1,200 from R and N in 1932—Suit by R and N in April 1933 against J for recovery of Rs. 1,200—Suit held to be governed by either Art. 61 or Art. 96 or Art. 120—Suit held to be within time whichever article applied 747

—Art. 106—Partnership dissolved by death of partner—Suit against son for debts due from deceased partner is governed by Art. 106 514e

—Art. 115 — Hundi drawn by A in favour of B on C—C accepting Hundi but getting discharge from B by executing document to him—Suit by C against A—Limitation runs from date of discharge obtained by C and not from date of acceptance of Hundi 668b

—Arts. 120 and 141—Suit by reversioners for declaration that alienation by sonless proprietor should not bind them,

Limitation Act

decreed, subject to proviso that they would take possession after death of certain widow, on payment of certain amount to alienees—Reversioners paying the amount and obtaining possession after death of widow—Suit for declaration of their ownership to land is not one for possession and is governed by Art. 120

835

—*Arts. 120 and 134 and S. 10*—Mortgagees of endowed property—Suit for their ejectment more than six years after dates of mortgages is barred by Art. 120

—*S. 10 or Art. 134* does not apply 784

—*Art. 144*—Alienation by manager—Suit by minor co-parceners on attaining majority for possession of property is governed by Art. 144 and not by Art. 44 or Art. 91 996b

—*Art. 152*—No question of knowledge of party regarding date of judgment 742b

Lis Pendens—Sale during proceedings for ejectment—Doctrine of *lis pendens* applies—Involuntary sale makes no difference 512a

Mahomedan Law—Divorce—Parents of wife securing agreement from husband that he would lead respectable life, maintain his wife and live in house approved by wife and her parents—Wife entitled to divorce husband in case of default—Agreement is not invalid or opposed to public policy—Wife is entitled to divorce in case of default 716

—Divorce—Divorce in writing and customary form—No notice to wife legally necessary 611

—Dower—Dower deed stipulating condition against relinquishment of any portion to safeguard wife's interests and to avoid underhand dealings—Condition is valid and relinquishment without compliance with such condition is not binding 887b

—Dower—Onus of proving that dower publicly announced was not intended to be paid lies on person asserting it 183d

—Dower—Settled dower must be paid—That such amount is large or beyond means of husband is no reason for decreeing suit for smaller sum 183e

—Dower—Merely because claim for dower has not formed subject matter of suit, right to recover cannot be said as not existing 183g

—Dower—Suit for dower—Mere fact that widow does not go into witness-box is not circumstance against her 183h

Mahomedan Law

—Gift—Undivided shares of agricultural estate can form subject of gift—Donor and donee related as grandfather and grandson—Donor need not physically part with possession—Mere intention on his part to treat property as that of donee and to divest himself of his own ownership is sufficient 92a

—Gift—Gift of *Mushaa* is valid if donor has done all that law requires him to do to separate himself from property—Tests indicated 92c

—Gift—Delivery of possession of any part of property makes whole gift operative 92d

—Marriage—Minor daughter given in marriage by mother in presence of her first cousin—Marriage is not void but invalid 683a

*—Marriage—Minor girl given in marriage by mother in presence of first cousin—Suit by latter for declaration of invalidity of marriage and injunction—Form of decree 683b

—Marriage—Dissolution of—Wife embracing Christianity during subsistence of marriage—Marriage is dissolved—Intention of conversion is immaterial 666

—Marriage—Dissolution of—Suit for dissolution because of husband's impotency—Suit should be adjourned for one year to ascertain if the defect can be remedied 501

—*Mushaa*—Rigidity of rule has been considerably relaxed in British India 92b

—*Mutwalli*—Decree declaring person as *Mutwalli* is not capable of execution—Remedy of *Mutwalli* is not under S. 144, Civil P. C. 48b

—Religious endowment—Suit for removal of *Mutwalli*—District Judge in appeal can settle scheme under S. 92, Civil P. C., with sanction of Collector 361b

—Succession—Daughter is co-sharer with brothers in property left by father—She is entitled to possession unless her claim is barred by some law—Even after marriage she retains her possession in such property till loss of her title by ouster and adverse possession—Her residence in father's house is in her own right as heir and not as a mere visitor to family 978a

—*Wakf*—Platform reserved as private place of worship for Mahomedan tenants of *ahata* is not public place of worship 876

—*Wakf*—Writing not necessary in Punjab 283c

Mahomedan Law

—Wakf—Burial ground — Wakf may, in absence of direct evidence of dedication, be established by evidence of user—Evidence must be of public user 87

—Wakf—Will dedicating property for benefit of community — Unequivocal intention of testator clear — Object held definite and charitable, hence valid wakf was created 81a

—Wakf—Property of small value left to wakif after wakf—No condition in wakf showing pious intention — Wakf mainly for maintenance of dependants—Wakif maintaining control over income during his lifetime—No provision for payment of debts—Wakf held not valid 72b

Maintenance — Attachment — Right of maintenance in the form of annuity and in lieu of share in estate is not exempt from attachment 55a

Marriage—From long cohabitation the presumption of marriage can be raised 261b

***Master and Servant**—Person engaged on footing of monthly servant—Month's notice given and service terminated—This amounts to only discharge and not dismissal or removal 663

—Suit for wages—Servant committing theft—He is not entitled to damages and is liable to discharge with notice 581

***—Government servant** — Contract of service made under Government of India rules — Service is not at His Majesty's pleasure 282

—Master's liability — Master, as agent of bank, supporting servant's loan application fraudulently — Loan was in reality for benefit of master's firm — Servant becoming bankrupt and unable to pay loan — Master held liable for payment due to his own fraud 268b

—Temporary employees—Extension of privileges regarding pension, leave, etc., does not raise their status to permanent ones — One month's notice is sufficient to dispense with their services 85a

***Minor**—Minor suing for getting transaction entered by him declared as null and void — Suit not for getting possession of immoveable property — Court cannot ask minors to refund benefit obtained by him under transaction 943

—Next friend agreeing to relinquish claim on special oath by opposite party—Oath is only certain method of proof and is not compromise — Interests of next

Minor

friend identical with minor — Sanction under O. 32, R. 7, Civil P. C., is not necessary 235

****Mortgage**—Formalities — Property at one place and transaction at another — Law of *lex loci contractus* determines forum of transaction 946b

****—Unpaid balance of mortgage** consideration in hands of mortgagee cannot be attached in execution of decree against mortgagor as debt due to mortgagor 727

—Suit for redemption—Mortgagors appearing before Collector and requesting him to stay further proceedings—Collector refusing request and proceedings ordered to be consigned to record room—No order on merits passed—Subsequent suit for redemption more than one year after Collector's order—Art. 14, Lim. Act, held did not apply 692

—Costs of suit—Prior mortgagee suing his mortgagor impleading puisne mortgagee—Puisne mortgagee contesting claim — Costs can be saddled on puisne mortgagee 607

—Sale of property in execution of mortgage decree — Sale taking place after 1st April 1930—O. 34, R. 5 as amended coming into force on 1st April 1930—Amended law applies — Judgment-debtor can set aside sale before its confirmation 562b

***—Charge** — Distinction between — Charge creates right *jus ad rem* — Mortgage creates right *in rem*—Difference between charge and mortgage is very slight—Charge restricts right to specific fund on property — If personal liability is created charge amounts to mortgage 482b

***—Interest** — Suit under O. 34, R. 6, Civil P. C.—Claim for personal decree for principal amount barred by time—Interest for six years preceding suit cannot be passed 387

—Equitable—Essentials of — To establish a mortgage by deposit of title-deeds, it is necessary to prove (1) a debt, (2) a deposit of title-deeds and (3) an intention that the deeds shall be security for the debt 251b

—Equitable—Creation of — Title-deeds must be documents creating title and not merely evidencing title 251c

—Equitable — Deposit of jamabandi copies — No equitable mortgage is created — Equitable mortgage sought to be created by deposit of receipts and mutation copies — Clear evidence that no better document

Mortgage

available is necessary — Receipts must definitely relate to property to be charged 251*d*

—Redemption — Person purchasing equity of redemption with full knowledge of mortgage in which term of redemption is fixed as 25 years — Term by itself is not clog on equity of redemption 168*b*

—Redemption—Part of principal money made payable by mortgagee to another forthwith and mortgagor entitled to redeem within 20 years — Actual payment made subsequently and not forthwith — Mortgagor is entitled to redeem within 20 years from date of payment 168*d*

—Sale of mortgaged property in execution of mortgage decree— Rights of mortgagee are not extinguished 153*a*

—Suit by prior usufructuary mortgagee auction-purchaser for possession of mortgaged property as of right— He has claim over puisne mortgagee — Full court-fee need not be paid even if suit is on footing of mortgage 153*b*

—Equitable mortgage — Letter offering title-deed as security — Title-deed not accompanying letter — Held, letter did not create equitable mortgage and was not compulsorily registrable 65

—Recitals — Burden of proof— Mortgagor stating in mortgage-deed that they have proprietary right in land mortgaged and that they are entitled to make the mortgage — Suit on basis of mortgage — Mortgagors denying proprietorship in land on date of mortgage and contending that they were not entitled to make it — Onus is on them to prove that their statements in mortgage-deed were untrue 60*a*

—Mortgage with possession — Mortgagee's suit against lessees of mortgagor for rent—Decree—Failure to execute decree—Mortgagee was in position of lessor, hence held responsible for execution of decree though lease effected by mortgagor 42*a*

—Interest—Mortgage with possession—Mortgagee to take income in lieu of interest— Balance to be paid by mortgagor — Compound interest chargeable if failure to pay as stipulated—Income of property insufficient to cover interest — Mortgagee's failure to inform mortgagor accordingly — Mortgagee held not entitled to compound interest 42*b*

Municipality—Powers of — Municipality can exercise powers conferred on it by Act — Municipality cannot bind itself by contract beyond its scope 296*a*

Murder — Weapon used to break every limb—Case is of murder 233*c*

Negotiable Instruments Act (26 of 1881), S. 93—Cheque dishonoured—Failure by assignee of cheque to give notice of dishonour to endorser — Endorser is discharged from liability 796

****Notice**—Document relating to immovable property executed at Delhi — Registered at Lahore under S. 30 (2), Registration Act — Notice will take effect only when memorandum is filed in Registrar's office at Delhi under S. 51 of the Act: 482*a*

Onus of proof— Evidence of both parties considered by Court — Question of onus is of no particular importance 1016*a*

Partition—Transfer — Partition is transfer 220*c*

*—Court should pass decree in favour of all co-sharers whether plaintiffs or defendants — It cannot make payment of court-fee condition precedent to passing of decree in favour of defendants 1*a*

—Final decree in partition suit — Execution by defendant— Defendant need not pay court-fee to have his share separately allotted to him (*Obiter*) 1*b*

Partition Act (4 of 1893), S. 4 — Undivided family does not mean only joint-Hindu family — Person belonging to undivided family can claim advantage of S. 4 291*a*

—S. 4 — "Transferee" includes auction-purchaser— S. 4 affects auction-purchaser also 291*b*

Partnership — Minor partner not contributing capital, labour or skill — His guardian receiving separate wages for his labour — S. 239, Contract Act, implies personal labour of partner—No valid partnership 831*a*

—Accounts—Principal and agent—Rendition of accounts—Suit for—Plaint reciting *D* as agent of firm — Firm having no legal existence — *X*, one of partners, alone not entitled to claim rendition of accounts from *D*—Plea of return of documents, relief incidental to rendition of accounts, not granted 831*d*

—Firm is not person— One firm cannot become partner in another firm 514*c*

—Suit for dissolution and accounts — How effected 458*a*

—Suit for dissolution— Appointment of Commissioner— Dispute regarding possession of account books — Court should de-

Partnership

cide on evidence—Commissioner is only to examine accounts and settle them 458b

—Partnership dissolved—Notice of dissolution not given—Person having dealing with undissolved firm advancing money to partner in the name of firm—Such person not having any notice of dissolution—Retired partner is also liable for such advance—Notice on old customer and new customer, difference between 316

*—Suit for accounts—Partnership dissolved—Account-books in possession of person claiming accounts—Such person can lay suit for accounts 146

*—Arbitration—Partnership unregistered—Partners referring to arbitration—S. 69 (1), Partnership Act, excludes "suits" by unregistered firms—Application by unregistered firms under Sch. 2, Para. 20, Civil P. C., is not excluded by the provisions of Partnership Act 136a

—Dissolution of—Application to arbitration for dissolution of partnership of unregistered firm under S. 69 (3) (a)—Provisions of S. 69 (1), Partnership Act, do not affect proceedings of dissolution 136c

—Dissolution—Firm cannot become partner in another firm—Suit for dissolution—Declaration of partners made—Suit can proceed though originally plaintiff described themselves as firm 78a

—Partnership suit in name of firm can lie—Shares of partners can be determined in such suit 78b

—Suit for accounts—Preliminary decree—Court may determine accounting party—Court may instruct to facilitate and regularise account 78c

Part Performance—Sale-deed of a house not registered—Purchaser put in possession—Document could be admitted in evidence for collateral purposes—Transfer of Property Act not applicable to Punjab—Doctrine of part performance is applicable to Punjab 366

—Applicability—Doctrine applies to lease—Previous lessee in possession of land under lease and regularly paying rent—Suit by subsequent lessee to dispossess him does not lie 5a

Pauper—Appeal—Appeal can be only against decree as a whole and not against orders which are not decrees 406

Penal Code (45 of 1860), S. 99—Bailiff entering house with party and breaking open kothi of grain to attach grain of

Penal Code

judgment-debtor—No right of private defence arises 851

—S. 193—Hearsay statement recorded by Magistrate cannot be made subject of prosecution 828b

—S. 211—Giving evidence does not amount to institution of proceedings 828c

—Ss. 302/34, 304-1 and 460—Number of persons jointly entering house at dead of night with intention to abduct woman and after some of them having mortally wounded inmates by lethal weapons quitting house by scaling courtyard wall—Offence is under S. 460 and not under S. 302/34 or 304-1 911

—S. 302—Sentence—Two accused equally guilty—One sentenced to death and another to lesser penalty—Appeal by both—That one is given only lesser penalty is no consideration for commuting extreme penalty of other 341e

—Ss. 304, 326—Accused hitting deceased with axe causing incised wound on left forearm with compound fracture of both bones—Death found to be due to gangrene—Conviction under S. 304 cannot be upheld—It should be altered into one under S. 326 833b

—S. 307—Accused drunk and on provocation inflicting slight injuries with sharp edged weapon—Offence held to be under S. 324 and not under S. 307 914b

—S. 330—Sentence—Difference between Ss. 323 and 330—Beating person to extort confession from him is serious offence—Offence under S. 330 is and can be seldom proved—Courts should pass deterrent sentence 471

—S. 366.A—Offence under—Resemblance with S. 362—Offence under S. 366.A is continuing offence 850

—Ss. 376, 377—Cases should be tried by Magistrates with S. 30, Criminal P. C., powers 256a

*—S. 377—Crime committed with violence—Sentence of whipping in addition to penal servitude is proper 256b

—S. 409—Accused charged under S. 409—It is not open to him to put a defence that prosecution have failed to prove embezzlement of particular sum with which he is charged, although they have succeeded in proving embezzlement of other sums—Such defence cannot hold good 907

Pensions Act (23 of 1871), Ss. 4 and 11—It applies not only to political but to all pensions 85b

Pleading—Party cannot approbate and reprobate—Two interdependent conditions in deed—They become operative from same date 168e
 —Particular passage should not alone be looked into to determine nature 37c
Possessory Suit—Plaintiff in possession of property—Defendant having no right therein contesting plaintiff's right to be manager—Suit for declaration by plaintiff and to restrain defendant from interfering with his possession must be decreed 241a
Practice—Appeal—Technical defect—Presenting of appeal amounts to acting on behalf of appellant—Person presenting appeal must be duly authorized 195a
 —Appeal—Technical defect—Presentation of appeal by clerk—Pleader must have signed it and authorized his clerk to present it—It amounts to presentation by himself—Person cannot be clerk or agent when he only signs memorandum of appeal 195b
 —Appellate Court—Evidence already on record—Appellate Court can itself weigh and discuss it and need not remand case for finding on such point 213b
 —Court-fees—Time fixed by lower appellate Court already expired and appeal dismissed for want of payment of court-fees—High Court, even then, can extend time 909
 —Death of parties—Number of parties very large—Death of some of them—Appeal pending long and no negligence in applying for substitution of legal representatives—Delay in bringing on record legal representatives of deceased held should be excused 710a
 —Duty of Court—Court must administer law as it stands 183i
 —Duty of Court—Party becoming of unsound mind during pendency of suit—Court should appoint next friend to protect his interests 7b
 —Evidence—Document—Production of—Party relying should produce proper and certified copy—Sending for records from other departments or offices wholesale as evidence is no correct procedure—Court must give opposite party fullest opportunity of rebutting such fresh evidence 933b
 —Evidence—Certain question put to witness objected to by other side—Court should record such question and give its ruling whether it is allowed or disallowed—It cannot allow it subject to objection 183a

Practice

—Evidence—Trial Judge should see that scandalous matters are not introduced into record unless they are relevant for proper decision of case 183b
 —Hearing—Reader adjourning cases—Getting order signed by Judge not seised of case—Practice is wholly irregular and should be immediately stopped 1000a
 —Inconsistent pleas—Litigants cannot be permitted to take up inconsistent pleas to suit their own purpose 18b
 —Judgment—'Consigned to record room' means 'dismissed' 388a
 —Mixed question of law and fact cannot be raised in appeal for first time 192b
 —New plea—Question as to when cause of action arises is mixed question of fact and law 629a
 —New plea—Highly technical point not raised in Courts below and in grounds of appeal—High Court can disallow appellant to raise it in second appeal—But if question is of importance and one purely of law apparent on face of record High Court may allow argument on it 612c
 —Pleader telling Court that he has no instruction, tantamounts to default of appearance by party 1000b
 *—Power of Court—Person on whose behalf suit is instituted becoming of unsound mind during pendency of suit—No finding that suit was not properly instituted—O. 32, Rr. 2 and 15, Civil P. C., do not apply 7a
 —Procedure—Judge raising point against plaintiff neither pleaded nor proved—Procedure is unjustifiable 887a
 —Procedure—Court is entitled to examine and cross-examine witnesses to get at truth 887c
 —Procedure—District Bar Association's resolution declaring certain persons touts—Inquiry by District Judge—No opportunity given to persons to show cause against passing resolution—Persons held not entitled to be heard before Association under any provision of law 382e
 —Procedure—Defendant filing written statement—Witnesses summoned but not examined—Defendant taking up new plea of defence going to root of case—Plea should be allowed—High Court can interfere under S. 107, Government of India Act, when plea is not allowed—Rules of procedure ancillary to object of administering justice 141a
 —Procedure—Record of Court not of Small Causes and in headquarters—Appli-

Practice

cation for copy should be to district copy-
ing agent 123a

—Relief—Both parties overstating res-
pective claims is not sufficient to defeat
plaintiff's claim 673c

—Remand—Preliminary objections not
decided by Court remanding case—Objec-
tion can again be raised in appeal 564a

—Remand—Objection as to onus being
wrongly placed by trial Court taken in
memo of appeal but not pressed in argu-
ments—Parties having produced all evi-
dence—No remand in second appeal 469c

—Restoration of proceedings—Review—
Court cannot set aside its own judgment
on reconsideration of same materials 301b

—Revision—Appeal incompetent under
O. 47, R. 7, Civil P. C.—It may be treated
as revision 301a

—Revision — Arbitration — Award—
Binding nature of—Cases arising out of
arbitration form class by themselves—
Aggrieved party cannot have recourse to
ordinary remedies by revision or appeal
301d

*—Revision—Powers of superintendence
—High Court can interfere in judicial
matter 141b

—Second appeal—Lower Court deciding
question of title on inadmissible evidence
and other evidence—Case can be remanded
for fresh finding on other evidence or High
Court can itself arrive at finding 788b

—Second appeal—Finding of fact—Suit
for setting aside alienation by widow to
raise money for litigation—No clear find-
ing as to whether funds with widow were
insufficient to meet expenses of litigation—
Finding is not one of fact 98b

—Some defendants contesting claim—
Others confessing judgment — Plaintiff
should be given advantage of the con-
fession 971

—Transfer of suit—Transferee Court
informing pleaders of parties of new date
fixed—Pleader intimating to Court in-
ability to appear in transferee Court—
Court should inform parties as well 560

Precedents—Punjab—Courts in Punjab
should as far as possible follow case law
in Punjab when it is uniform and based on
sound legal principles 612b

—Conflicting rulings—Method of appli-
cation—Only cases which really touch
matter under consideration should be cited
301c

—Judge is bound to follow Privy Coun-
cil ruling—He cannot follow ruling of his

Precedents

own High Court in preference to Privy
Council ruling even though High Court
ruling is given subsequent to Privy Council
ruling 183c

Pre-emption—Suit for — Transfer whe-
ther sale—Person executing agreement in
favour of certain persons in consideration
of their financing and helping in carrying
on litigation in respect of certain land, to
transfer portion to them in event of being
successful — Land so transferred subse-
quently—Transaction amounts to sale and
is subject to right of pre-emption 612a

—Limitation—Suit by one pre-emptor
claiming superior right against another—
Art. 120, Lim. Act, applies 503

—Owner of agricultural estate — Con-
version of agricultural land into building
site—Owner is deprived of all privileges
which he previously enjoyed 202a

—Notification excepting land within
Municipal limits from right of pre-emption
—Notification covers land brought within
Municipal limits after notification 145

—Appeal—Land valued for jurisdiction
at less than Rs. 5,000—Decree for pre-
emption on payment of more than Rs. 5,000
—Appeal lies to District Judge and not to
High Court 133

—Cause of action — Plaintiff merely
alleging in plaint that he has right of pre-
emption without specifying grounds of his
claim—Grounds specified in replication—
Pleading taken as whole discloses cause of
action with sufficient clearness 35a

Preliminary Decree — Subsequent order
dismissing suit in default is illegal—But
such order once passed cannot be ignored
unless set aside 875a

—Order dismissing suit in default —
Order though illegal must be set aside
expressly—Order appointing Commissioner
and for final decree does not amount to
order setting aside order for dismissal in
default 875b

Prescription—Possessory title — Cutting
of grass from barren land does not amount
to exclusive user or possession 669

Principal and Agent—Act of agent rati-
fied after limitation period — Ratification
has no effect 321

—Duties and liabilities of agent —
Director of bank acting as agent—Suit
against him is governed by Art. 90, Lim.
Act 268a

Private Defence — Extent of right held
exceeded 28d

****Privy Council** — Leave to appeal — Company wound up by order of Court on petition from creditor of company — Application for leave to appeal against such order — Application not disclosing name of any respondent—Application is bad in law and should be dismissed —(Per *Full Bench; Tek Chand, J. contra*)

(FB) 322

Promissory Note — Place specified—Pro. notes in North India are generally made payable at specified place—Name of particular town is sufficient 799a

—Presentment is necessary — Plaintiff must show that by non-presentment either party does not suffer 799b

—Assignment — Pro-note can be orally transferred in Punjab 547

Provincial Insolvency Act (5 of 1920), Ss. 3 and 5 (2)—S. 3 does not exclude extraordinary civil jurisdiction of High Court 608b

—S. 3—S. 3 does not take away jurisdiction of High Court to transfer of insolvency proceeding to itself 608c

—S. 4—Gift of small portion of property effected more than two years before adjudication—Property of insolvent worth great deal more on date of gift and debts in insolvency subsequently incurred—Gift cannot be deemed to be fraudulently made 593

—Ss. 4, 68 and 75—Receiver in insolvency mortgaging to creditor, occupancy rights belonging to insolvent after his discharge — Insolvency Judge setting aside mortgage, holding that Receiver had become *functus officio* — District Judge on appeal, although holding that act of Receiver was ultra vires, setting aside order of Insolvency Judge, holding insolvent's appeal to be barred by time — Second appeal held incompetent—Application by insolvent held fell under S. 68 and as such S. 4 held inapplicable — High Court, however, held entitled to interfere in revision under S. 75—Act of receiver being ultra vires and mortgage being without sanction of Court, mortgage held liable to be set aside 502

—Ss. 5 and 9—Petition by creditor on ground that debtor has executed collusive mortgage-deed—Petition filed within three months of the date of execution of the deed — Petition returned by Court on ground of its being not accompanied with mortgage-deed — Petition re-filed within two weeks along with necessary documents as directed but dismissed as filed more than

Provincial Insolvency Act

three months from date of mortgage-deed —Order dismissing petition held to be erroneous — Practice of Courts in Punjab returning plaints and other similar documents when not accompanied by necessary papers deprecated 591

—S. 5 (2) — "Subject as aforesaid," meaning explained 608c

*—S. 9—Debt not in existence on date of alleged act of insolvency—Such creditor is not entitled to maintain petition under S. 9 800

—S. 19—Date of hearing is to be fixed after date of admission and not necessarily on same date 885b

—S. 24—Petition by person claiming to be creditor—Other creditors can contest petition on ground that petitioner is not creditor at all 499

—S. 28 (4) — Adjudication of Government servant annulled — Receiver not availing of S. 28 (4)—Creditor can proceed against salary acquired subsequent to annulment 761b

*—S. 28—Defence of want of sanction not taken in lower Court — Objection deemed to be waived and cannot be pressed later 286a

—S. 37—Annulment of adjudication — Court must pass order vesting property in some one—In absence of order property reverts to insolvent 568

—S. 42—Insolvent young man of 20 and carrying on business with father—Absolute discharge held could not be granted merely on this ground 381

—S. 42 (1) (f)—Mere speculation does not disentitle insolvent from claiming discharge 840

—S. 63—Secured creditor giving proof for whole debt and actually receiving dividend on whole debt—Creditor relinquishes his security 690

—S. 70 (as amended by Act 9 of 1926)—Enquiry under S. 69—Notice to insolvent is not necessary 871b

—S. 75—Enquiry under S. 69 of offence committed by insolvent—Order recording finding passed under S. 70 is appealable 871a

Provincial Small Cause Courts Act (9 of 1887), S. 17 — Court has discretion to allow time to deposit security by defendant—Defendant cannot postpone depositing of security indefinitely 140a

—S. 25 — Transfer by District Judge under S. 24 (4), Civil P. C., from Court invested with Small Cause Court powers

Provincial Small Cause Courts Act

but succeeded by Court not vested with Small Cause Court powers to another similar Court—Transfer does not give jurisdiction to try such case as Small Cause case—Order passed on transfer is appealable 883

—*Art. 8*—Co-sharers transferring right to recover rent—Transferee bringing suit against other co-sharer for recovery of rent realized by him—Such suit is maintainable in Small Cause Court 377

—*Art. 31*—Suit for recovery of balance of price of sale—Mere notice to go into accounts is one for accounts within *Art. 31* 557

—*Art. 35, Cl. (ii)*—Suit to recover money in respect of which offence under *S. 379, I. P. C.*, is committed—Suit is unclassified one and falls within *Art. 35, Cl. (ii)* 798

Punjab Alienation of Land Act (13 of 1900), S. 3—Gift of land to bona fide religious and charitable purposes—Bona fides should be decided by civil Court—Sanction by Deputy Commissioner is not necessary 129

—*S. 6*—Mortgages existing on property before coming into force of Act—Mortgages carrying no interest—Subsequent deed after Act to same mortgagee purports to create charge but interest payable under it—Third mortgage held to be no fresh mortgage but only additional charge on property and did not contravene provisions of Act 225

—*S. 16*—Decree—Execution—Decree nullifying Act of legislature should not be passed by Court—Land of agriculturist could not therefore be sold even in execution of mortgage decree under *S. 16* 845

—*S. 16 (2)*—'Decree' or 'order' includes 'decrees or orders' and land cannot be leased for aggregate period exceeding 20 years 545b

—*S. 21-A*—Provisions mandatory—High Court is not empowered to extend time under them 857b

Punjab Colonization of Government Lands Act (6 of 1912), S. 19—Agreement to have mutation when proprietary rights are acquired—Agreement not declaring right not previously existing—Agreement does not require registration 576a

—*S. 19*—Agreement to have mutation of proprietary rights is valid 576b

—*Ss. 19 and 21 (a)*—Widow of occupancy tenant allowed to succeed by

Punjab Colonization of Govt. Lands Act Government—Gift by her to her daughter—Sanction of Commissioner obtained—Reversioner cannot contest gift 349

Punjab Courts Act (6 of 1918), S. 41—Question of succession not decided on merits but on analogy—Certificate is not necessary 920d

—*S. 41*—Certificate can be amended where point is omitted by District Judge through oversight 687a

—*S. 41*—Question of custom not depending upon any conflicting evidence but only on interpretation of Customary law of District—Necessity of certificate under *S. 41* held doubtful (*Quaere*) 660b

—*S. 41 (3)*—Custom or usage need not be confined to agricultural custom only 649b

Punjab Land Revenue Act (17 of 1887), S. 44—Presumption applies to records of current settlement 453a

—*S. 45*—Entry in record of rights—Subsequent declaratory suit—Cause of action arises when plaintiff feels aggrieved and not from date of entry—Suit is governed by *Art. 120, Lim. Act* 37e

—*S. 45*—Entry in record of rights in favour of defendants—Any person aggrieved by it can file suit under *S. 42, Specific Relief Act* 37d

—*S. 117*—Direction to institute suit in Revenue Court—Record consigned to record room—Question of application of *S. 10* does not arise 589b

—*Ss. 158 (1) and (2)*—Sub-s. (1) is not controlled by sub-s. (2)—*S. 10* applies only if there is determination by Revenue Court to decide question of title itself, and suit is instituted in that Court 589a

Punjab Municipal Act (3 of 1911), Ss. 18, 56 (g) and 169 (g)—Powers of disposal given by these sections—Agreement restricting rights of Committee is ultra vires 296b

—*S. 49*—Suit for injunction—Notice when necessary—Suit originally framed for temporary injunction but later amended for permanent injunction is not bad for want of notice 1008

—*S. 70*—Municipality by resolution contracting to exempt certain market from tax—Conditions of *S. 70* not observed—Contract held ultra vires and could not bind Municipality 972b

—*S. 81*—Magistrate recovering money under *S. 81*—Magistrate has no authority

Punjab Municipal Act

to determine whether proper notice was given or not 144b

*—*Ss. 84 and 86*—Word "tax" in S. 84 and word "assessment" in S. 86 mean respectively tax and assessment under Act—Word "liability" in S. 86 means liability to pay particular tax imposed—Where tax and assessment are ultra vires of Act, jurisdiction of civil Court is not barred—Words taking away civil Court's jurisdiction should be plain and capable of no other interpretation 972a

—*S. 121 (5)*—License granted on express condition of licensee doing certain things—Failure to comply with these conditions is in itself a breach of license : 1011—*Ss. 172 and 232*—Municipal Committee granting by resolution sanction to build platform—Sanction acted upon and platform built—Later Deputy Commissioner under S. 232 suspending resolution, and Committee serving notice under S. 172—Notice held invalid and summary procedure unjustifiable 689

—*S. 172*—Municipality entitled to remove encroachment built without permission—No applicability of Art. 146-A, Lim. Act, to acts of removing encroachment—Aggrieved party can bring suit for damages and not for injunction 182

—*S. 193 (as amended by Act 3 of 1933)*—Undoubted right of owner of land to erect building thereon restricted by S. 193—S. 193 does not create any vested rights by granting sanction to owner to erect buildings 983a

—*S. 193-A (as amended by Act 3 of 1933)*—Plan of building sanctioned—Municipal Committee is empowered to modify such plan at any time before completion of building but not after completion : 983b

—*Ss. 195 and 3 (5) (a)*—Repairing walls of shed and putting roof thereon is not beginning, erecting or re-erecting, nor amounts to material alteration 702b

—*Ss. 195 and 225*—Jurisdiction of civil Court to give relief to persons aggrieved by order ultra vires, arbitrary, oppressive or capricious is not ousted 572

—*S. 195*—S. 195 applies to notified area of Karnal 144a

Punjab Municipal (Executive Officer) Act (1931), S. 6 (2) and (4)—Contract for putting up poster on wall affects immovable property—Poster affixed to wall is not moveable encroachment—Executive Officer cannot enter into such contract without sanction of Committee 177

Punjab Opium Smoking Act (6 of 1923), Ss. 5 and 2 (b)—Three-storeyed building—Different tenants occupying different storeys—Finding of Chandu in third storey—Presumption under S. 5 held not applicable to tenants occupying other two storeys 913

Punjab Pre-emption Act (1 of 1913), S. 3 (5)—Sale of insolvent's property by Official Assignee does not amount to act in execution of order of Court—Sale is subject to right of pre-emption 35b

—*S. 11*—Decree-holders applying for attachment of house purchased by judgment-debtors—Pre-emptor in pre-emption suit pre-empting sale of that house and depositing price of pre-emption in Court—Decree-holder held could not attach sum in custody of Court 698b

—*Ss. 15 and 16*—Law of pre-emption deals with three kinds of immovable property—Right of pre-emption differs in respect of them—It indicates that urban immovable property is placed on different basis than other two 202b

—*S. 15 (b)*—Cognates of vendor can pre-empt—Preferential pre-emptor takes away right of subsequent pre-emptors : 477

—*S. 16*—Owner of urban immovable property is not entitled to pre-empt the sale of agricultural land within limits of Multan town 202c

Punjab Redemption of Mortgages Act (2 of 1913), S. 12—Co-sharer mortgagors—Co-mortgagor redeeming property—Other co-sharer proceeding under the Act—Co-sharer held not mortgagee and he could not claim adverse possession 290a

Punjab Regulation of Accounts Act (1 of 1930)—Applicability (*Obiter*) 469b

—*S. 2 (5)*—"Creditor" admitting to have advanced several loans even before 1931 is "creditor" 469a

—*S. 3*—Costs allowed—Appeal therefrom—Court-fee is necessary 469d

Punjab Relief of Indebtedness Act (7 of 1934)—Scope—Rights already lapsed cannot be revived by subsequent enactment 842b

—*S. 6*—Provisions of Act apply only to suits pending or filed after passing of Act—Appeal is not included within scope of S. 6 678b

—*Ss. 6, 35 and 60*—Provisions of S. 6 do not apply to part 8—Property belonging to judgment-debtor attached—Judgment-debtor can before sale has taken place raise objection even in appeal that property is not liable to attachment and

Punjab Relief of Indebtedness Act

sale—Court dismissing objection and refusing to apply provisions of the Act—It fails to exercise jurisdiction vested in it by law 574

—S. 34—Scope—Applies to non-agriculturists also 843c

—S. 34—Warrant of arrest issued before commencement cannot be executed after commencement of Act 150

Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 2 (a) and 16 (2) (iii)—Udasis or Almast Dhuan are not Sikhs—Dharamsala founded by Udasi is not Sikh Gurdwara under provisions of S. 16 (2) (iii) 924

—S. 5—Tribunal must decide petitioner's right—Right of objector decided incidentally—Deciding objector's right without pronouncing upon petitioner's right is not correct 643

—Ss. 5 and 10—Petitioner not having any right, title or claim to property in dispute—List of objectors published under S. 3—Tribunal cannot examine or adjudicate on claims of objectors—Petitioners establishing lesser right than claimed—Tribunal can declare and define extent of right 623a

—S. 7—Institution commemorating memory of Guru Arjan Deo, and his miracles and used for worship predominantly by Sikhs is Sikh Gurdwara 936a

—S. 7—Dhirmalis are Sikhs 936b

—S. 7—No direct and clear proof of establishment of institution—Inferences, warranted by circumstances and also those drawn by Courts in similar circumstances in other cases should be taken into consideration 825a

—S. 7—Sikh Gurdwara—Mere fact that Granth Sahib is read in institution does not make that institution Sikh Gurdwara 825b

—Ss. 7 (1) and 16 (2) (iii)—Petition under S. 7 (1)—Mere recitation of Granth Sahib does not convert institution into Sikh Gurdwara—Institution must be proved to be established for use by Sikhs for public worship—Institution found to be merely college of Udasi fakirs—Travelers and fakirs fed at langar—Granth Sahib read—Institution not held to be Sikh Gurdwara 819

—Ss. 8 and 16 (2)—Holding Granth Sahib in reverence and reciting it do not by themselves make Udasi institution a Gurdwara 841

—S. 8—Any hereditary office-holder can present petition 675a

Punjab Sikh Gurdwaras Act

—S. 8—Hereditary office-holder—Office devolving before January 1920 according to hereditary right or by nomination—Person who becomes mahant is holder of hereditary office 675b

—Ss. 8 and 7 (1)—Person describing property as private one and not claiming to be hereditary office-holder is not entitled to file petition under S. 8 213a

—S. 10—Intention of Act was that tribunal should decide whether Gurdwara did or did not own property in petition under S. 10 939a

—S. 10—Petition under S. 10—Tribunal can also decide and declare claim on behalf of Gurdwara when it is established by evidence 939b

—Ss. 10 and 85 (2)—Tribunal declaring certain institution to be Sikh Gurdwara and certain property to be appended to it—It is not empowered to pass order as to persons by whom institution is to be managed 847

—S. 10—Petitioner putting up claim that non-applicant has no right—Non-applicant not putting any claim—Petitioner's claim based on his right of ownership—Right not established—Tribunal cannot determine non-applicant's right 645

—S. 16 (2) (iii)—Sikh Gurdwara—Burden of proof is on petitioner 822a

—S. 16 (2) (iii)—Public worship—Isolated statements in muafi inquiries indicating public worship should not be laid much stress on 822b

—S. 16 (2) (iii)—Sikh Gurdwara—Institution built by Hindu Udasi Sadh—Founder and his descendants living there with families—Kharas but no langar kept for travellers—Mere fact that Granth was kept and recited in institution held not sufficient to establish institution Sikh Gurdwara 822c

—S. 16 (2) (iii)—Dharamsala not public institution but private property of Udasi fraternity—Dharmasala rebuilt by Sikhs but continued to be managed by hereditary mahants—Merely because worship has been Sikh, subsequent to rebuilding, it does not become Sikh Gurdwara 675c

—S. 16 (2) (3)—No evidence that institution is established by Sikhs for worship—Grants containing no reference to worship—Fact that Sikhs donated to the institution is not sufficient to establish the institution as Sikh Gurdwara 216

Punjab Sikh Gurdwaras Act

—S. 25-A (as amended by S. 4 of Punjab Act 3 of 1930)—Section introduced to implement decisions reached by Tribunals—Successful party can lodge suit for possession 298a

—S. 25-A (as amended by Punjab Act 3 of 1930)—S. 25-A applies only to cases where recording of evidence before Tribunal is not complete before commencement of Act 298c

—S. 31—S. 31 is no bar to civil Court's jurisdiction—Proceedings in civil Courts should be stayed till tribunal's decision—Sub-s. (2), S. 31 should be strictly construed 443a

Punjab Tenancy Act (16 of 1887), S. 4 (1)—Land—Option given to lessee to build on land—No building constructed—Land still remains "land" under Act: 244b

—S. 4 (7)—Mukarridar—Person paying rent for land held by him is a tenant even though a Mukarridar 244a

—S. 57—Occupancy rights under S. 6 or S. 8—Usufructuary mortgage of such rights—Mortgage rights cannot be attached and sold in execution 370

—Ss. 59, 60 and 77 (3)—Sale of occupancy rights by widow to landlord—Sale is voidable at option of landlord—Suit by landlord for declaration that he is owner is cognizable by civil Court 922

—S. 59—Suit for possession of water-mill and garden by heir of last holder—Water-mill is not governed by Tenancy Act, hence heir entitled to succeed—Suit for garden is suit for land; hence heir of tenant at will is not entitled to possession 780

—S. 59—Occupancy tenant dying without male lineal descendant or widow—Collaterals claiming descent through female are not entitled to succeed, even though such female, as daughter, has been allowed to be in possession till her death 97b

—S. 59—Transfer by widow of one co-tenant to landlord himself—Death of widow—Assignee from other co-tenant cannot challenge alienation by widow 70

—S. 60—Transfer of occupancy rights without consent of landlords—Decree obtained by one landlord, setting aside transfer enures for benefit of all landlords—Waiver of decree-holder landlord to execute decree does not affect others—It enures to tenant's benefit—He can get decree only on refunding consideration received from transferee 706

Punjab Tenancy Act

—S. 77—Suit for declaration that petitioners were in possession of certain land as co-sharers in village and not as tenants—Suit is cognizable by civil Court and not barred by S. 77—Dismissal of suit in revenue Court contesting notice of ejectment does not operate as res judicata 710b

—S. 77—Land neither occupied nor let for agricultural purposes but used as site for building in village—Provisions of Punjab Tenancy Act do not apply—Civil Court has jurisdiction to try suits relating to such land 662

—S. 77—Suit for possession of occupancy land and house in abadi is cognizable by civil Court 97a

—S. 77 (h)—Suit for ejectment of occupancy tenant should be tried by revenue Court—Suit tried by civil Courts without prejudicing the parties—Decree should be registered as that of a Collector 512b

—S. 77 (3), Cl. H—Occupancy holder mortgaging tenancy with possession—Landlord claiming possession on ground that tenancy was extinguished and by dispossessing mortgagee—Suit falls under S. 77 (3), Cl. H 46a

—S. 77 (3)—Civil Court finding it necessary to decide matter coming under S. 77 (3)—Whole suit becomes triable by revenue Court 46b

—S. 100—Case triable by revenue Court heard and decided by civil Court—Proper issues and evidence recorded—Parties not prejudiced—Case should not be remanded but decree should be registered as one of revenue Court 244c

Rateable Distribution—Order allowing claim to rateable distribution not challenged by way of appeal or any other proceeding—Order is final and cannot be attacked in subsequent suit 891b

—Two persons having decrees against same man attaching same property in different Courts—Execution proceedings transferred to same Court—One can claim rateable distribution in the assets realized by other 519a

—Decree-holder purchaser—Entire decree satisfied by bid and excess paid by him in Court—Another decree-holder of same judgment-debtor applying for rateable distribution after auction but before excess deposited—Court holding him entitled to share—Order held passed under S. 73 and not under S. 47, Civil P. C., hence not appealable 181

Receiver—Appointment of—Mere apprehension that defendant would wrongfully dispose of property does not justify order without further inquiry 102b

—Appointment of—Creditor having right against specific fund or estate is entitled to appointment of receiver on ground that he has special charge on debtor's property 102c

—Appointment of—Application for appointment of receiver—Suit not so patently framed in wrong manner as to make its success so problematical as to justify refusal to appoint receiver—Court should not refuse to make appointment 102d

Record of Rights—One sided entries made by illegal procedure cannot prejudicially affect interest of others 37h

Registration—Hiba-bil-iwaz—Transfer in favour of wife in lieu of dower—Value of property transferred and not consideration of transfer determines necessity for registration 307

Registration Act (16 of 1908), Ss. 17 (1) (b), 49—Agreements entered into mutually between husband and wife—Plot of land purchased by wife for Rs. 255—Agreements providing that husband would build house on site and on consideration thereof would be entitled to live in house for his lifetime—Both husband and wife to have right of residence and on their death their daughter to inherit it—Agreements held to create contingent interest in immoveable property and held inadmissible in evidence for want of registration 1002

—S. 17 (1) (b)—Document containing agreement permitting owner of adjacent vacant site to build house thereon in any manner he cared—Registration is not necessary 905a

—S. 17 (2) (viii)—Partition—Compromise pending proceedings—Application relating terms of compromise made to Revenue Officer for giving effect to them does not require registration 708a

—S. 49—Law laid down in S. 49 is really one of procedure 5c

Release—Admissibility—Property relinquished valued at more than Rs. 100—Deed unless properly stamped and registered is inadmissible in evidence 109a

Religious Endowment—Temple—Private or public—Building containing picture of some god and light eternally burning before it—This fact, by itself, will not be sufficient to convert building into public temple 744

Rent—Suit for, cannot be changed subsequently for use and occupation 26b

Res judicata—Execution—Constructive res judicata—Plaintiff applying for execution of decree as trustee on behalf of insolvent and Official Receiver—Decision that he has no *locus standi*—He is precluded subsequently from applying for execution 942

—Objections to award—Objections decided in arbitration proceedings—No separate suit lies to set aside award 865b

—Constructive res judicata—Principles apply to execution proceedings 696b

—Application for personal decree under O. 34, R. 6, Civil P. C., is substantive application—Personal decree not granted—It should be taken to have been refused—Fresh application is barred by S. 11, Expl. 5 388b

—Previous suit in representative character and conducted without any negligence—Suit disposed of under O. 17, R. 3, Civil P. C.—Decision operates as res judicata 385

*—Restitution—Principle of res judicata is not applicable to application for restitution or application for execution of portion of decree 246

—Constructive—Party admitting certain facts in previous case—Line of attack contrary to previous admission is not permissible 167b

—Obiter dicta are not res judicata 18c

—Representative suit—Public or private right claimed in common with others—Person may litigate bona fide and bind by S. 11, Civil P. C., others interested, by findings, though others not named—Under O. 1, R. 8 with Court's leave person may sue or be sued for others interested—But formalities provided must be observed—Failure binds none but himself 13a

*—Suit for ejectment by lambardar proprietor for himself and others interested—Suit dismissed on merits—Other proprietors suing for same relief under O. 1, R. 8—Plea of res judicata—Test—Previous suit bona fide and no injury caused to plaintiffs in next suit by omission to comply with O. 1, R. 8—Next suit held barred 13b

Restitution—Right of auction-purchaser—Right arises both under S. 144, Civil P. C., and under principles of justice and equity—Case not coming under S. 144, Civil P. C.—Relief can be granted under equity 497a

Restitution

—Right to claim refund recognized against decree-holder—Sale whether set aside under S. 47 or O. 21, R. 92, Civil P. C., makes no difference 497b

Review—Judgment to be reviewed based on misapprehension of nature of attachment—Judgment can be reviewed 486c

—Erroneous admission of fact by counsel is not sufficient ground 48a

Revision — Competency — Suit by rate-payer against Municipal Committee for injunction restraining defendant from paying salary of officer of committee on ground of his appointment being ultra vires, by reason of his term of office having been illegally extended by Ministry for Local Self-Government—Secretary of State for India applying to be impleaded as party—Application rejected by trial Court—Order held to be improper and open to revision — Secretary of State held to be proper party being directly affected by result of suit: 619

—Refusal to stay proceedings under S. 10, Civil P. C.—No revision lies 569

—High Court reluctant to interfere with discretion of lower Courts 140b

—Error of law—No revision lies 100b

—Competency — Mortgagee becoming insolvent during pendency of suit — Unauthorized person applying to bring himself on record as assignee of Official Receiver, who did not choose to take steps to that extent — Application dismissed under O. 22, R. 8, Civil P. C.—Appeal allowed—Appeal held incompetent under S. 104, Civil P. C. read with O. 43 — Arming unauthorized person with authority to harass another amounted to miscarriage of justice—Revision held competent 83

—Application for attachment before judgment granted without issue of notice under O. 38, R. 5 (1), Civil P. C.—Order appealed from — Court may treat it as application for revision if no appeal lay: 33d

Riwaj-i-am — Entry in, favouring adoption—Onus of proving adoption invalid is on person challenging it 261c

—Evidentiary value—Onus lies on person claiming that it is wrong 151d

—Statement unsupported by instances—Riwaj-i-am is not bad— Value of entry in Riwaj-i-am 130b

—Evidentiary value of — Entry as to special custom—Admissibility of—Onus of rebuttal 88b

Riwaj-i-am

—Evidentiary value of — Settlement Officer's opinion is entitled to consideration 88a

Second Appeal—Question of fact— Finding should be based on legal evidence 1005b

—Finding of fact—Finding based on inadmissible evidence is not maintainable— Question of admissibility not raised in lower Courts can be raised in second appeal 1005c

—Findings of fact not based upon evidence are not binding in second appeal 978c

—Finding of fact— Lower Court failing to take into consideration effect of certain mutation proceedings—Evidence not sufficient to rebut presumption arising from mutation proceedings — Finding can be challenged in second appeal 864

—Matter within discretion of lower appellate Court not to be raised in second appeal 708b

—Question of fact—Suit against Insurance Company by heirs of assured committing suicide, for amount due under policy — Circumstances in which suicide was committed, whether assured was of sound mind, whether act was deliberate and intentional, are questions of fact 685b

—Finding of fact on evidence cannot be disturbed 678a

—Absence of jurisdiction — Absence of jurisdiction to hear appeal is good ground for second appeal — District Judge entertaining appeal which under notification issued under S. 39 (3), Punjab Courts Act, lies to senior Sub-Judge—He acts without jurisdiction 575

—Pure question of law requiring no evidence can be raised in second appeal 448a

Sikh Gurdwara — Bunga Sohlanwala — Situation on outskirts of Golden Temple— Institution called as Bunga insignificant— Bunga Sohlanwala partly religious and charitable institution—Inalienable— Shri Har Mandir Sahib has no right of control over this Bunga 641

—Bangee is sort of hostel for pilgrims — Without formal declaration it can remain inalienable 623b

Sind Sagar Doab Colonization Act (1 of 1902) — Reclamation of land during continuance of Act — There could be no acquisition of "Adna Malkiyat" rights 958

Sind Sagar Doab Colonization Act

—S. 5—Agreements under — Surrender of rights not taking place according to proviso in agreements — Merely by this, agreements held did not become inoperative 962b

Specific Relief Act (1 of 1877), S. 41—

Defendant not in possession of property— Suit for mere declaration that plaintiff is owner of property is maintainable 929a

—S. 42—Plaintiff claiming for declaration of right in suit property— Defendant denying title of plaintiff— Property being trust plaintiff cannot ask for possession — Suit is maintainable under S. 42 283b

Stamp Act (2 of 1899), S. 2, Cl. 12 —

Signature alone does not complete execution of document— But Cl. 12, S. 2 makes all documents chargeable as soon as they are signed by executant (SB) 449a

—Ss. 2 (12), 40 (1) (b) — Proprietor of firm executing deed selling certain property to creditor firms in part payment of debt and promising to pay balance later—Deed also signed by creditor firms, described as vendees therein — They cannot be said to have drawn, made or executed any bond to pay balance within meaning of Cl. 12 (SB) 449b

—S. 33—Mere filing of document without attempt to tender it in evidence or prove it does not attract provisions of S. 33 985

—S. 62 — Signing improperly stamped instrument as witness is not criminal — Witness to document does not execute it (SB) 449c

***Stamp Duty**—Security bond— Insolvent asked to execute security bond — Art. 57, Stamp Act, applies to such bonds and not Art. 15, Sch. 1 (SB) 45

Subrogation—In the Punjab right can be conferred on lender even by oral agreement 390c

Succession Act (39 of 1925), S. 255 — Probate Court is only concerned with due execution of will — S. 255 does not empower Court to question validity of will with reference to Hindu law 378b

—S. 299—Assignment of bond — Order is not purely of formal or interlocutory nature—Such order is appealable 684

—S. 299 — Letters of administration— Subordinate Judge having powers of District Judge—Order by such Judge covered by S. 299, Succession Act 378a

Surety—Liability of— Alteration in judgment-debtor's position by act of third

Surety

party — Security remains enforceable — Bond given to secure balance left after sale of D's property — And D's interest in property reduced — Surety not absolved 470

***Tort** — Death of tort-feasor — Right to prosecute action survives — Onus lies on person to prove exception to above rule 271b

—Nuisance—Abatement — Branches of tree overhanging can be cut off 134

—Defamation—Allegory may be libel— Definite imputation upon definite person must be proved — Article published in newspaper painting Sub-Inspector in Criminal Investigation Department in very dark colours — Cursory reading of article sufficient to connect it with person actually serving in Criminal Investigation Department—Identity held to be sufficiently established and proprietor of paper held liable to pay damages 23a

—Defamation — Libel appearing in newspaper—Mere fact that proprietor has no knowledge of it does not absolve him 23b

—Defamation— Words on face of them amounting to libel — Plaintiff can claim general damages without proof of actual pecuniary loss 23c

—Defamation— Assessment of damages —One feature to be considered is method of publication — Publication in print is more serious 23d

Transfer of Property Act (4 of 1882) —

Applicability to the Punjab — Though principles are applicable, rules of procedure do not apply 390b

—S. 1 — General principles of Act are only applicable to Punjab 944b

—S. 41—Words "with consent" explained 816b

—S. 41 — Father transferring minor son's property — Transferee cannot claim benefit of S. 41 161b

—Ss. 51; 63; 108—Rule of law that whatever is affixed to land becomes part of it does not apply in India — Two brothers owning land in equal shares—One of them building house and planting garden over portion entirely at his own expense —Other brother cannot claim it 511

***—S. 53**—Intention of parties to defeat creditors of donor— Gift is voidable at instance of creditor of donor — Transferee from donee must suffer unless protected by S. 53 286b

Transfer of Property Act

—S. 53-A— S. 53-A is intended to have retrospective effect (*Obiter*) 5b

—S. 54—Vendee already in possession
—Formal delivery of possession is sufficient 756

—S. 55 — Covenant guaranteeing non-existence of encumbrances necessarily implies condition of indemnity in case of its breach 746a

—S. 67-A — S. 67-A not applicable to mortgage executed before 1st April 1930 1020b

—S. 74— Provisions are not exhaustive 390a

Trust — Person for whose benefit trust is created is interested in its maintenance — Such person can sue for declaration that property is wakf without sanction under S. 92, Civil P. C. 283a

*—Creation of — Trusts in favour of some creditors only—Notice of trust given by debtor to other creditors as well—They can also claim to be beneficiaries 10

Wajib-ul-arz—New one— Old one ceases to be operative 962a

—Bhakar Tahsil, Mianwali District — Agreement by village proprietor to abstain from claiming proprietor's right in land broken up during time agreement is in force —Agreement held to be not conditional upon actual surrender of shamliat to Government 779

Will — Construction of — Trustworthy and effective evidence to be given to prove legality of will— Best evidence procurable

Will

should be tendered to prove signature of testator 443b

—Attestation—Witnesses consenting to disposition by will can become attesting witnesses 367

—Construction — Trust created by will
—Direction that succession to trusteeship should pass to descendants of trustee — Succession cannot pass to collaterals — Relatives not having powers to interfere with bequest — Line of trustee coming to an end—Trust reverts to original founder 300

—Revocation — Property dedicated to wakf by will— Subsequent gift of his property by testator— Wakf property not included in gift — Gift cancels only part of will dealing with non-wakf property—Untouched part comes in operation on testator's death — Hence will could not be left out of consideration 81c

Words and Phrases—"Jama" means only deposit 587b

—"Punjab Customary Law", meaning of —There is no such thing as Punjab Customary law in same sense that there is Hindu or Mahomedan law — It describes certain customs which govern agricultural and village communities in Punjab 151c

—"Suit"—No definition of "suit" in any Act—Suit begins with plaint—Application under Sch. 2, Para. 20, Civil P. C. is not a suit 136b

—"Usage and law" are interchangeable expressions 649a

COMPARATIVE TABLES

A. I. R. 1936 Lahore = Other Journals.

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
1	16	Lah	901	55	163	I C	103	138	160	I C	855	205	161	I C	647
	37	P L R	878		38	P L R	707	139	163	I C	480		17	Lah	477
	160	I C	206		17	Lah	378		38	P L R	763		38	P L R	966
5	157	I C	839	59	163	I C	108	140	161	I C	518	206	38	P L R	120
	37	P L R	658		38	P L R	743	141	161	I C	645		161	I C	725
6	161	I C	347	60	162	I C	406		38	P L R	438	207	159	I C	766
	38	P L R	727	63	...			142	162	I C	716		38	P L R	742
7	161	I C	646	64	...			143	162	I C	704	208	162	I C	380
8	16	Lah	454	65	162	I C	523		17	Lah	470		17	Lah	449
	37	P L R	745	67	...				38	P L R	960		38	P L R	988
	1936	Cr C	1	68	17	Lah	101	144	1936	Cr C	160	209	37	P L R	779
	160	I C	111		161	I C	692		162	I C	201		161	I C	218
	37	Cr L J	231		38	P L R	502		38	P L R	4	210	163	I C	118
10	161	I C	502	70	155	I C	836		37	Cr L J	556		38	P L R	731
	38	P L R	776		37	P L R	403	145	161	I C	660	212	163	I C	121
13	158	I C	540	71	37	P L R	759		17	Lah	426		38	P L R	717
	38	P L R	785		160	I C	800		38	P L R	876	213	162	I C	847
15	1936	Cr C	2	72	162	I C	495	146	161	I C	669	215	161	I C	713
	161	I C	313		38	P L R	263	147	162	I C	280	216	162	I C	858
	38	P L R	323	76	...			149	...			218	161	I C	480
	37	Cr L J	430	78	157	I C	1113	150	160	I C	804	220	38	P L R	201
16	161	I C	294		37	P L R	663	151	161	I C	844		161	I C	861
	38	P L R	788	80	17	Lah	129	152	161	I C	662	222	162	I C	922
17	157	I C	955		161	I C	634	153	...			225	163	I C	89
18	38	P L R	780		38	P L R	571	156	161	I C	510		38	P L R	739
21	17	Lah	133	81	162	I C	404	157	162	I C	382	226	163	I C	126
	38	P L R	472	83	157	I C	900	159	162	I C	673		38	P L R	693
	162	I C	374	85	161	I C	499	161	37	P L R	112	228	38	P L R	29
23	157	I C	854	87	161	I C	650		161	I C	390		162	I C	27
	37	P L R	670	88	162	I C	934	164	161	I C	703	233	1936	Cr C	199
	17	Lah	332	92	161	I C	365	166	...				163	I C	143
26	161	I C	918	97	...			167	...				38	P L R	695
	38	P L R	770	98	161	I C	922	168	161	I C	251		37	Cr L J	751
28	1936	Cr C	11	100	162	I C	692	176	37	P L R	776	234	38	P L R	632
	161	I C	344	102	...				161	I C	151		162	I C	913
	37	Cr L J	428	104	163	I C	81	177	159	I C	775	235	38	P L R	629
30	37	P L R	629	108	161	I C	490		38	P L R	741		162	I C	921
	158	I C	842		17	Lah	387	178	161	I C	768	236	165	I C	802
31	38	P L R	767		38	P L R	849	179	38	P L R	12	237	166	I C	237
33	38	P L R	772	109	162	I C	733		162	I C	729	238	37	P L R	738
35	158	I C	658	112	...			181	162	I C	309		161	I C	288
	38	P L R	755	114	...			182	159	I C	689		1936	Cr C	209
37	38	P L R	748	116	158	I C	521		38	P L R	744		37	Cr L J	426
	165	I C	626		37	P L R	699	183	161	I C	300	239	162	I C	861
42	37	P L R	567	120	37	P L R	510		38	P L R	337	241	...		
	161	I C	984		158	I C	736	191	161	I C	752	242	161	I C	631
45	160	I C	276	123	37	P L R	792	192	163	I C	85		38	P L R	375
SB	17	Lah	74		161	I C	243		38	P L R	705	243	155	I C	837
	38	P L R	469	124	162	I C	718	193	163	I C	95	244	97	P L R	735
46	16	Lah	695		17	Lah	356		38	P L R	712		161	I C	349
	37	P L R	842		38	P L R	673	195	...				163	I C	97
	160	I C	281	129	161	I C	672	196	162	I C	698	246	38	P L R	723
47	1936	Cr C	63	130	...			199	161	I C	764		16	Lah	912
	161	I C	308	132	161	I C	457		17	Lah	456	247	37	P L R	869
	37	Cr L J	427	133	...				38	P L R	961		161	I C	339
	38	P L R	746	134	161	I C	705	200	159	I C	178		1936	Cr C	205
48	161	I C	444	135	161	I C	837		37	P L R	784		37	Cr L J	432
49	161	I C	592		38	P L R	455	202	17	Lah	322		158	I C	562
	38	P L R	376	136	162	I C	670		38	P L R	664	251	161	I C	591
51	162	I C	882	138	37	P L R	563		166	I C	408	256			

54 A. I. R. 1936 Lahore = Other Journals — (contd.)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
256	1936 Cr C 205	336	161 I C 978	378	163 I C 656	463	38 P L R 623
	37 Cr L J 474	337	16 Lah 651		38 P L R 803		164 I C 281
	38 P L R 437		37 P L R 806	379	157 I C 643	465	17 Lah 96
257	163 I C 339		1936 Cr C 258		38 P L R 1095		38 P L R 477
258	...		161 I C 898	380	1936 Cr C 327		162 I C 854
261	16 Lah 1007		37 Cr L J 508		163 I C 80	466	163 I C 380
	38 P L R 26	339	16 Lah 985		38 P L R 682		38 P L R 725
	161 I C 916		161 I C 24		37 Cr L J 740	468	38 P L R 848
263	163 I C 369		38 P L R 509	381	157 I C 935		163 I C 857
264	1936 Cr C 250	341	16 Lah 345		38 P L R 1164	469	38 P L R 164
	164 I C 891		37 P L R 605	382	1936 Cr C 377		160 I C 883
	37 Cr L J 1026		1936 Cr C 264		165 I C 963	470	166 I C 111
267	165 I C 823		161 I C 900		38 Cr L J 19	471	1936 Cr C 506
268	162 I C 204		37 Cr L J 504		39 P L R 62		163 I C 145
	17 Lah 262	345	37 P L R 491	385	38 P L R 809		38 P L R 689
	38 P L R 526		161 I C 956		165 I C 808		37 Cr L J 811
271	...	346	37 P L R 282	387	38 P L R 74	473	1936 Cr C 508
273	...		162 I C 42		163 I C 100		38 P L R 680
276	162 I C 306	348	37 P L R 45	388	163 I C 119		163 I C 135
278	161 I C 793		1936 Cr C 268		38 P L R 700		37 Cr L J 748
	1936 Cr C 248		161 I C 886	390	163 I C 114	474	164 I C 288
	37 Cr L J 493		37 Cr L J 503		38 P L R 733	476	38 P L R 155
	38 P L R 1	349	16 Lah 252	394	17 Lah 403		163 I C 123
	17 Lah 460		37 P L R 797		38 P L R 887	477	163 I C 513
280	38 P L R 88		161 I C 974		166 I C 157		38 P L R 774
	161 I C 790	350	16 Lah 479	400	1936 Cr C 355	478	163 I C 698
282	158 I C 996		37 P L R 749		162 I C 511	479	...
	37 P L R 780		161 I C 965		37 Cr L J 597	480	163 I C 670
283	160 I C 289	351	37 P L R 309		17 Lah 518		38 P L R 816
286	37 P L R 787		162 I C 88		38 P L R 949		17 Lah 576
	162 I C 39	353	16 Lah 594	401	164 I C 136	482	38 P L R 8
290	37 P L R 103		37 P L R 715		38 P L R 1104		163 I C 69
	159 I C 633		1936 Cr C 294	403	38 P L R 807	485	163 I C 734
291	...		162 I C 180		164 I C 796		38 P L R 827
293	165 I C 137		37 Cr L J 515		38 P L R 807	486	163 I C 374
294	1936 Cr C 244	356	37 P L R 80	404	163 I C 701	489	163 I C 658
	164 I C 809		1936 Cr C 297		38 P L R 1093		38 P L R 812
	37 Cr L J 1033		161 I C 921	405	38 P L R 1097	492	164 I C 296
296	163 I C 372		37 Cr L J 510		166 I C 147	493	160 I C 584
298	165 I C 846	357	1936 Cr C 298	406	163 I C 366	495	163 I C 274
300	160 I C 283		162 I C 379		38 P L R 1119		38 P L R 697
301	37 P L R 887		37 Cr L J 567	407	164 I C 846		164 I C 260
	161 I C 765		17 Lah 419		38 P L R 1099	496	166 I C 381
304	156 I C 58		38 P L R 820	408	163 I C 378	497	163 I C 383
	16 Lah 982	359	1936 Cr C 300		38 P L R 1103	499	38 P L R 729
	38 P L R 50		17 Lah 472	409	1936 Cr C 389		38 P L R 258
305	37 P L R 43		38 P L R 1040		162 I C 969	500	163 I C 141
	157 I C 124		166 I C 501		37 Cr L J 732		17 Lah 610
	16 Lah 583	361	37 P L R 85		38 P L R 1128		163 I C 751
307	16 Lah 177		162 I C 89	418	17 Lah 232	501	38 P L R 828
	156 I C 70	362	162 I C 936		38 P L R 592		160 I C 921
	37 P L R 424	365	38 P L R 284	429	1936 Cr C 464	502	38 P L R 238
316	16 Lah 244		163 I C 963		162 I C 624		164 I C 366
	156 I C 132	366	162 I C 314		38 P L R 638	503	...
	37 P L R 456	367	162 I C 333		37 Cr L J 661	504	1936 Cr C 512
319	37 P L R 105	368	38 P L R 108	441	163 I C 629	507	38 P L R 628
	156 I C 158		162 I C 299		38 P L R 1096		162 I C 926
321	37 P L R 446	369	162 I C 489	442	163 I C 278		37 Cr L J 722
	161 I C 957		38 P L R 1101		38 P L R 698		164 I C 463
322	165 I C 568	370	162 I C 526	443	38 P L R 1139	508	163 I C 860
328	162 I C 302		38 P L R 625	448	38 P L R 608	510	164 I C 262
330	1936 Cr C 260	371	162 I C 501		164 I C 30	511	165 I C 833
	162 I C 342		38 P L R 1073	449	17 Lah 223	512	...
	37 Cr L J 562	373	162 I C 339	SB	162 I C 774	514	38 P L R 281
334	162 I C 803		38 P L R 1077		38 P L R 558	519	163 I C 59
335	16 Lah 995	374	160 I C 287	452	38 P L R 1085		163 I C 584
	1936 Cr C 257		38 P L R 102		165 I C 671	521	38 P L R 800
	161 I C 884	376	162 I C 481	453	38 P L R 1086		163 I C 350
	38 P L R 15		38 P L R 1082	458	160 I C 642	523	17 Lah 668
	37 Cr L J 508	377	162 I C 389	461	163 I C 592	524	39 P L R 68
336	37 P L R 297		38 P L R 1084		38 P L R 804		

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
524	166	IC	521	608	160	IC	972	692	38	PL R	917	737	38	PL R	333
530	166	IC	684		38	PL R	235		165	IC	739		164	IC	690
532	161	IC	16		17	Lah	582	693	38	PL R	903	739	166	IC	745
533	17	Lah	176		38	PL R	1013		165	IC	516	741	166	IC	607
FB	38	PL R	421	610	164	IC	940	694	165	IC	767	742	166	IC	698
	1936	Cr C	563	611	38	PL R	68		38	PL R	1155	744	38	PL R	289
	162	IC	976		163	IC	953	695	38	PL R	900		164	IC	313
	37	Cr L J	742	612	165	IC	66		165	IC	664	746	166	IC	302
538	38	PL R	121	617	160	IC	1075		17	Lah	768	747	...		
	160	IC	1052	618	161	IC	212	696	38	PL R	936	749	166	IC	377
540	...			619	164	IC	882		166	IC	391	750	...		
543	164	IC	252	621	164	IC	1018	693	38	PL R	906	752	165	IC	961
545	160	IC	947	623	165	IC	283		165	IC	658	753	...		
	17	Lah	531	627	...			700	38	PL R	931	756	166	IC	751
	38	PL R	957	629	165	IC	723		17	Lah	793	758	1936	Cr C	763
546	164	IC	316		17	Lah	737		166	IC	406		37	Cr L J	939
547	164	IC	271	641	166	IC	693	702	1936	Cr C	719		38	PL R	1059
548	166	IC	150	643	38	PL R	865		164	IC	368		164	IC	435
550	38	PL R	220		165	IC	667		37	Cr L J	935	759	166	IC	102
	163	IC	223	645	38	PL R	861		38	PL R	886	760	162	IC	618
551	166	IC	719		166	IC	63	703	38	PL R	923		38	PL R	627
555	166	IC	603	648	38	PL R	857		165	IC	670	761	166	IC	214
557	160	IC	1038		164	IC	832	704	17	Lah	187	762	17	Lah	494
558	17	Lah	588	649	38	PL R	859		38	PL R	430	FB	164	IC	598
	38	PL R	1029		166	IC	438		164	IC	378		38	PL R	1031
	166	IC	421	650	166	IC	716	705	38	PL R	896	765	38	PL R	505
560	164	IC	142	652	166	IC	753	706	38	PL R	922		164	IC	693
561	...			657	38	PL R	465		165	IC	640	766	166	IC	149
562	38	PL R	259		166	IC	492	707	164	IC	373	767	17	Lah	90
	164	IC	53	659	38	PL R	855		1936	Cr C	736		162	IC	131
564	166	IC	575		165	IC	74		37	Cr L J	940		38	PL R	480
567	164	IC	16	660	38	PL R	851		38	PL R	881	769	165	IC	23
568	38	PL R	273		165	IC	78	708	161	IC	3	771	38	PL R	493
	163	IC	1007	661	160	IC	1042		38	PL R	567	FB	17	Lah	429
569	165	IC	131		38	PL R	296	710	38	PL R	915		166	IC	467
570	38	PL R	357	662	38	PL R	854		165	IC	521	778	38	PL R	274
	164	IC	59		164	IC	749	712	38	PL R	263		1936	Cr C	769
571	164	IC	235	663	38	PL R	1058		164	IC	334		164	IC	1056
572	38	PL R	83		165	IC	353	713	38	PL R	911		37	Cr L J	1029
	160	IC	942	665	38	PL R	162		165	IC	643	779	162	IC	506
573	164	IC	140		163	IC	963	716	161	IC	701	780	161	IC	975
574	164	IC	225	666	165	IC	383		38	PL R	400	781	1936	Cr C	793
575	164	IC	440	668	38	PL R	276	717	1936	Cr C	735		165	IC	61
	38	PL R	990		163	IC	928		165	IC	601		37	Cr L J	1056
576	165	IC	166	669	165	IC	191		38	Cr L J	54		38	PL R	1061
577	164	IC	836	670	161	IC	215	718	17	Lah	481	783	38	PL R	315
578	164	IC	971		38	PL R	852		38	PL R	1025		165	IC	278
580	1936	Cr C	651	672	38	PL R	868		165	IC	699	784	165	IC	48
581	165	IC	210		165	IC	661	721	164	IC	393	785	38	PL R	611
582	164	IC	1046	673	160	IC	1033	FB	17	Lah	722		17	Lah	606
583	165	IC	274	675	38	PL R	870		39	PL R	35		166	IC	292
584	165	IC	166		17	Lah	785	725	161	IC	21	786	165	IC	511
585	...				166	IC	397	727	17	Lah	270	788	166	IC	647
587	38	PL R	506	678	38	PL R	885		38	PL R	574	790	161	IC	952
	164	IC	50		165	IC	657		164	IC	582	792	17	Lah	599
589	160	IC	953	679	166	IC	748	729	38	PL R	247		38	PL R	1003
591	166	IC	553	681	38	PL R	219		1936	Cr C	764		165	IC	291
593	38	PL R	67		164	IC	689		164	IC	462	798	165	IC	154
	163	IC	956	682	38	PL R	86		37	Cr L J	950	794	...		
594	165	IC	553		164	IC	543	730	164	IC	376	796	38	PL R	240
595	161	IC	681	683	38	PL R	278		1936	Cr C	765		165	IC	768
	38	PL R	402		164	IC	713		37	Cr L J	937	797	38	PL R	500
597	165	IC	367	684	166	IC	115		17	Lah	779		165	IC	329
598	38	PL R	69	685	38	PL R	405		39	PL R	56	798	165	IC	267
	164	IC	751		162	IC	150	731	38	PL R	226	799	38	PL R	498
599	166	IC	912	687	38	PL R	901		1936	Cr C	766		164	IC	1033
602	165	IC	141		166	IC	386		164	IC	700	800	38	PL R	285
605	165	IC	199	689	38	PL R	897		37	Cr L J	978		17	Lah	580
607	17	Lah	520		165	IC	856	732	164	IC	384		165	IC	151
	164	IC	841	690	38	PL R	414		1936	Cr C	767	801	38	PL R	848
	38	PL R	1024		164	IC	540	733	...				164	IC	888

56 A. I. R. 1936 Lahore = Other Journals — (concl'd.)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
802	...	855	165 I C	880	911 38 P L R 1150	963	...
804	38 P L R 300	856	38 Cr L J 27	913	38 Cr L J 30	965	163 I C 817
	17 Lah 296	857	...		1936 Cr C 1008	969	163 I C 765
809	...	858	...	914	39 P L R 58		38 P L R 839
815	165 I C 56	859	1936 Cr C 877		17 Lah 284	971	38 P L R 578
816	166 I C 723		17 Lah 771		38 P L R 630		166 I C 70
819	...		166 I C 46		1936 Cr C 1023	972	...
822	...		39 P L R 105		165 I C 909	976	...
825	917	38 Cr L J 24	978	38 P L R 416
827	1936 Cr C 795	861	...		1936 Cr C 1005		165 I C 997
	166 I C 373	863	38 P L R 973		165 I C 813	982	...
828	38 P L R 16	864	38 P L R 225		38 P L R 1166	983	163 I C 958
	1936 Cr C 796	865	...		38 Cr L J 73		38 P L R 878
	164 I C 1057	871	38 P L R 1160	919	1936 Cr C 1007	985	163 I C 560
	37 Cr L J 1043	872	...		38 P L R 1165	986	38 P L R 984
830	165 I C 519	873	...		166 I C 128	990	...
831	...	875	162 I C 412	920	163 I C 695	991	...
833	38 P L R 203	876	39 P L R 50		38 P L R 838	994	...
	1936 Cr C 833	877	...	921	38 P L R 1169	996	...
	165 I C 146	878	...	922	38 P L R 564	998	...
	37 Cr L J 1079	879	...		163 I C 838	1000	...
835	38 P L R 537	883	...	923	...	1001	...
	165 I C 149	885	38 P L R 1148	924	163 I C 727	1002	...
836	...	887	39 P L R 52		38 P L R 831	1005	...
838	165 I C 82	890	...	929	163 I C 924	1007	...
	38 P L R 1016	891	...	930	38 P L R 691	1008	164 I C 425
839	165 I C 280	894	163 I C 524	931	163 I C 879		38 P L R 1069
	38 P L R 1067		38 P L R 760		38 P L R 874	1010	38 P L R 1071
840	38 P L R 218	895	...	933	38 P L R 511		164 I C 408
	164 I C 1087	897	38 P L R 1107		162 I C 152	1011	1936 Cr C 1119
841	165 I C 507	901	38 P L R 1113	935	...		166 I C 80
842	165 I C 358	904	163 I C 854	936	...	1012	1936 Cr C 1115
	39 P L R 6		38 P L R 846	939	...		166 I C 580
843	161 I C 960	905	38 P L R 1146	942	...	1013	163 I C 975
	39 P L R 8	907	37 Cr L J 581	943	39 P L R 76		1936 Cr C 1116
845	165 I C 243		162 I C 391	944	38 P L R 702	1015	38 P L R 332
	38 P L R 1065		1936 Cr C 992	946	17 Lah 686		1936 Cr C 1118
847	...		38 P L R 1157		39 P L R 83	1016	166 I C 71
850	1936 Cr C 873	909	38 P L R 374		17 Lah 502	1019	164 I C 420
851	38 P L R 298		166 I C 83	958	38 P L R 1036	1020	...
	1936 Cr C 874	910	161 I C 511		166 I C 118	1021	...
	166 I C 190		38 P L R 1162		164 I C 57	1022	164 I C 605
853	...	911	1936 Cr C 1009	961	161 I C 942		38 P L R 946
855	1936 Cr C 879		165 I C 874	962			

Other Journals = All India Reporter

I. L. R. 17 Lahore = All India Reporter

ILR	AIR	ILR	AIR	ILR	AIR	ILR	AIR	ILR	AIR
1	1935 L 567	107	1935 L 599	275	1935 L 893	395	1937 L 247	518	1936 L 400
10	" " 93	115	" " 484	280	" " 641	403	1936 " 394	520	" " 607
13	" " 508	122	" " 448	284	1936 " 914	419	" " 357	523	1937 " 133
20	" " 391	129	1936 " 80	291	1935 " 916	426	" " 145	531	1936 " 545
32	" " 439	133	" " 21	296	1936 " 804	429	" " 771	547	1937 " 127
35	" " 345	139	1935 " 855	311	1935 " 735	449	" " 208	557	1936 PC 171
38	" " 739	146	1936 PC 93	316	" " 687	456	" " 199	576	" L 480
48	" " 622	176	" L 533	322	1936 " 202	460	" " 278	580	" " 800
53	" " 482	187	" " 704	332	" " 23	470	" " 143	582	" " 603
61	" " 518	190	1935 " 765	341	1935 " 975	472	" " 359	588	" " 558
67	" " 850	201	" " 834	346	" " 830	477	" " 205	593	1937 " 160
74	1936 " 45	213	" " 790	356	1936 " 124	481	" " 718	599	1936 " 792
78	1935 " 437	218	" " 648	369	1935 " 875		" " 199	604	1937 " 132
84	" " 590	223	1936 " 449	373	1937 " 237	488	" PC 199	606	1936 " 785
90	1936 " 767	232	" " 418	378	1936 " 55	494	" L 762	610	" " 500
96	" " 465	262	" " 268	387	" " 108	502	" " 958	612	1935 " 967
101	" " 68	270	" " 727	391	1935 " 982	515	1937 " 80		

ILR		AIR		ILR		AIR		ILR		AIR		ILR		AIR		ILR		AIR	
621	1935 L	682	668	1936 L	524	768	1936 L	695	785	1936 L	675	809	1937 L		223				
629	1936 PC	253	686	" "	946	771	" "	859	787	1937 "	19	817	" "		164				
644	" "	277	722	" "	721	779	" "	730	793	1936 "	700	831	" "		151				
659	1937 L	35	737	" "	629	783	1937 "	33	799	1937 "	157	843	" "		155				

38 Punjab Law Reporter = All India Reporter

PLR	AIR	PLR	AIR	PLR	AIR	PLR	AIR	PLR	AIR	PLR	AIR	PLR	AIR	PLR	AIR
1	1936 L	278	229	1937 L	131	449	1937 L	115	682	1936 L	380	846	1936 L	904	
4	" "	144	233	1936 "	502	450	1935 "	790	684	" PC	176	848	" "	468	
8	" "	482	235	" "	608	455	1936 "	135	689	" L	471	849	" "	108	
12	" "	179	238	1935 "	622	456	1935 "	834	691	" "	930	851	" "	660	
15	" "	335	240	1936 "	796	462	" "	508	693	" "	226	852	" "	670	
16	" "	828	242	" PC	51	465	1936 "	657	695	" "	233	854	" "	662	
19	" PC	15	247	" L	729	467	1937 "	91	697	" "	495	855	" "	659	
24	1935 L	368	248	1937 "	49	469	1936 "	45	698	" "	442	857	" "	648	
26	1936 "	261	252	1935 "	391	472	" "	21	700	" "	388	859	" "	649	
29	" "	228	258	1936 "	500	474	1935 "	484	702	" "	944	861	" "	645	
35	1935 "	416	259	" "	562	477	1936 "	465	705	" "	192	865	" "	643	
44	" "	279	263	" "	712	480a	1937 "	71	707	" "	55	868	" "	672	
48	" "	302	269	1937 "	220	480b	1936 "	767	712	" "	193	870	" "	675	
50	1936 "	304	273	1936 "	568	484	1937 "	118	717	" "	212	874	" "	931	
52	1935 "	742	274	" "	778	486	1936 PC	139	723	" "	246	876	" "	145	
67	1936 "	593	276	" "	668	493	" L	771	725	" "	466	878	" "	983	
68	" "	611	278	" "	683	498	" "	799	727	" "	6	881	" "	707	
69a	" "	598	281	" "	519	500	" "	797	729	" "	499	883	1935 "	982	
69b	" PC	60	284	" "	365	502	" "	68	731	" "	210	885	1936 "	678	
74	" L	387	285	" "	800	505	" "	765	733	" "	390	886	" "	702	
80	1937 "	11	289	" "	744	506	" "	587	739	" "	225	887	" "	394	
83	1936 "	572	292	1935 "	739	509	" "	389	741	" "	177	896	" "	705	
86	" "	682	296	1936 "	661	511	" "	933	742	" "	207	897	" "	689	
88	" "	280	298	" "	851	517	1935 "	949	743	" "	59	900	" "	695	
92	1935 "	846	300	" "	804	521	" "	855	744	" "	182	901	" "	687	
102	1936 "	374	308	" PC	91	526	1936 "	268	746	" "	47	903	" "	693	
105	1937 "	248	315	" L	783	531	1937 "	178	748	" "	37	906	" "	698	
108	1936 "	368	322	1937 "	17	537	1936 "	835	755	" "	35	911	" "	713	
109	1936 "	337	323	1936 "	15	541	" PC	141	757	1937 "	4	915	" "	710	
109	1935 "	337	325	" PC	46	552	1935 L	599	760	1936 "	894	917	" "	692	
113	" "	389	329	1935 L	934	558	1936 "	449	761	1937 "	7	918	" Pesh	181	
115	" "	602	332	1936 "	1015	564	" "	922	763	1936 "	189	922	" L	706	
118	" "	686	333	" "	737	567	" "	708	764	1937 "	76	923	" "	703	
120	1936 "	206	337	" "	183	571	" "	80	767	1936 "	31	925	1937 "	56	
121	" "	538	348	" "	801	574	" "	727	770	" "	26	926	" "	194	
123	1935 "	894	349	1935 "	698	578	" "	971	772	" "	33	928	" "	57	
124	" "	291	354	" "	957	580	1937 "	18	774	" "	477	930	" "	69	
126	" "	974	355	" "	631	582	1935 "	448	776	" "	10	931	1936 "	700	
127	" "	523	357	1936 "	570	587	" "	335	780	" "	18	934	1937 "	162	
136	" "	922	359	" PC	325	592	1936 "	418	785	" "	13	936	1936 "	696	
138	" "	805	367	1935 L	927	608	" "	448	788	" "	16	939	1937 "	79	
141	" "	534	374	1936 "	909	610	1935 "	641	789	" PC	169	941	" "	62	
143	" "	761	375	" "	242	611	1936 "	785	791	1937 L	98	944	" "	16	
145	" "	721	376	" "	49	613	1937 "	157	793	1936 PC	188	946	1936 "	1022	
155	1936 "	476	378	" PC	93	621	" "	145	800	" L	521	949	" "	400	
156	" PC	70	390	1935 L	567	623	1936 "	463	802	" PC	253	951	1937 "	133	
162	" L	665	394	" "	345	625	" "	370	803	" L	378	957	1936 "	545	
164	" "	469	395	" "	518	627	" "	760	804	" "	461	960	" "	143	
166	1935 "	779	400	1936 "	716	628	" "	507	807	" "	403	961	" "	199	
177	" PC	199	402	" "	595	629	" "	235	809	" "	385	964	1937 "	80	
182	1936 "	83	405	" "	685	630	" "	914	812b	" "	489	966	1936 "	205	
191	1935 L	565	414	" PC	126	632	" "	234	816	" "	480	969	1937 "	120	
194	" "	712	416	" L	690	633	1935 "	393	818	1935 "	875	970	1937 "	102	
198	" "	93	421	" "	978	636	" "	916	820	1936 "	357	973	" "	863	
201	1936 "	220	430	" "	533	638	1936 "	429	824	" PC	199	975	1936 "	246	
203	" "	833	433	" "	704	654	1935 "	735	827	" L	485	976	1936 PC	277	
218	" "	840	437	1937 "	141	657	" "	830	828	" "	501	984	" L	936	
219	" "	681	438	1936 "	256	662	" "	975	829	" PC	198	988	" "	203	
220	" "	550	440	" "	141	664	1936 "	202	831	" L	924	990	" "	575	
225	" "	864	445	1935 "	765	670	1935 "	687	838	" "	920	992	1937 "	41	
226	" "	731	447	1937 "	111	673	1936 "	124	839	" "	969				
				1935 "	648	680	" "	473	842	1937 "	247				

PLR	AIR	PLR	AIR	PLR	AIR	PLR	AIR	PLR	AIR
1003	1936 L 792	1036	1936 L 958	1069	1936 L 1003	1097	1936 L 405	1146	1936 L 905
1006	" PC 171	1040	" " 359	1071	" " 1010	1099	" " 407	1148	" " 885
1013	" L 608	1042	1937 " 160	1073	" " 371	1101	" " 369	1150	" " 911
1015	1937 " 132	1045	1935 " 967	1077	" " 373	1103	" " 408	1155	" " 694
1016	1936 " 838	1051	1937 " 195	1078	1937 " 35	1104	" " 401	1157	" " 907
1018	1937 " 127	1052	" " 14	1082	1936 " 376	1107	" " 897	1160	" " 871
1022	" " 130	1054	1935 " 682	1084	" " 377	1113	" " 901	1162	" " 910
1024	1936 " 607	1058	1936 " 663	1085	" " 452	1117	1937 " 236	1164	" " 381
1025	" " 718	1059	" " 758	1086	" " 453	1119	1936 " 406	1165	" " 919
1029	" " 558	1061	" " 781	1093	" " 404	1121	1935 " 482	1166	" " 917
1031	" " 762	1065	" " 845	1095	" " 379	1128	1936 " 409	1169	" " 921
1035	1937 " 196	1067	" " 839	1096	" " 441	1139	" " 443		

37 Criminal Law Journal = All India Reporter

CrLJ	AIR	CrLJ	AIR	CrLJ	AIR	CrLJ	AIR	CrLJ	AIR
1	1935 C 675	103	1935 C 176	220	1935 R 446	331	1936 R 15	438	1936 C 65
2	1936 M 219	104a	" M 301	221	" P 506	333	" B 35	445	" " 101
3	1935 R 357	104b	1936 P 74	223	1936 M 163	335	" A 83	449	" R 28
4	" M 350	106	1935 S 203	225	1935Pesh 165	337	" " 134	451	" A 192
6	" R 359	107	" P 451	227	" P 474	342	" Pesh 16	452	" P 152
9a	" A 294	108	" S 216	230a	" L 769	343	" A 356	453	" A 148
9b	" R 97	110	" A 986	230b	1936 P 1	344	" Pesh 19	454	1937 O 157
12	1936 O 44	113	1936 " 212	231	" L 8	345	" " 32	455	1936 S 40
15	1935 M1044	115	1935 C 741	233	1935 " 922	346	" A 141	457	" " 29
20	" S 7	117	" A 1023	234a	1936 P 109	347a	" Pesh 32	460	" " 23
23	" B 393	131	" " 968	234b	1935 R 506	347b	1935 A 926	462	" R 119
25	" Pesh 74	133	" C 736	235	1936 P 11	348	1936 " 56	463	" " 71
26	" B 165	135	" A 970	240	" " 20	354	" " 109	467	" " 115
28	" C 677	139a	" C 731	243	1935 R 485	357	" M 160	468a	" " 120
29	" A 925	139b	" A 1037	244	1936 A 146	358	" A 88	468b	" P 170
30	" C 687	142	1935 M 1	246	1935 R 512	359	" C 18	469	" " 172
32	" A 362	146	1935 R 464	247	" A 935	360	" A 86	470	" Pesh 81
35	" " 916	148	" S 245	250	" L 805	362	" O 219	471	" M 426
39	" " 931	150a	" M 258	252	1936 B 5	365	" A 142	473	" R 112
43	" B 399	152	" S 223	256	1935 R 484	366	" B 52	474a	" L 256
44	" A 981	153	" C 742	258	1936 A 143	372	" A 129	474b	" N 55
45	1936 M 82	154	" M 319	261	1935 R 487	374	" P 101	483	" S 31
46	1935 A 940	155	1936 A 107	263	1936 A 165	377	" C 16	485	" " 20
49	" " 989	157	" " 105	267	1935 R 504	378	" P 59	490	1937 O 77
55	" P 436	159	" M 89	269	1936 A 156	379	" C 33	492	1936 R 174
56	" A 938	161	" N 13	278	1935 R 494	380	" M 65	493	" L 278
58	" P 426	163	" O 156	279	1936 M 48	382	" A 74	495	" C 124
62	" A 977	173	1935 A 928	280	" R 491	385	" " 140	496	" A 253
63	1936 P 36	175	" S 228	283	1935Pesh 189	388	" " 439	501	" M 341
64	1935 M 793	179	" R 426	284	1936 A 193	390	" O 238	502	" P 175
65	" C 684	180	" N 241	289	" P 145	394	" C 73	503a	" L 348
68	" L 24	181	" R 427	290	" R 46	408	1937 O 130	503b	" " 335
69	" C 681	182	1936 O 164	293	" " 1	410	1936 R 40	504	" " 341
70	" L 28	186	" R 391	295	" " 11	411	" " 49	508	" " 337
72	" " 445	187	1935 C 182	297	" " 38	413	" P 122	510a	" " 356
73	" C 345	189	" R 433	298	1935Pesh 178	414	" R 75	510b	" R 158
75	" L 35	190	" " 453	299	1936 R 42	416	" " 70	513	" P 249
77	" O 246	193	1936 P 162	303	1935 L 945	417	" A 147	514	1935 B 409
79	" L 799	195	1935 M 326	305	" A 614	418	" R 60	515	1936 L 353
80	" S 221	196	" R 406	308	" " 922	420	" A 164	521	" C 147
81	" L 92	197	" Pesh 174	309a	1936 P 38	421	" M 280	522	" A 269
82	" S 222	199	" R 471	309b	" B 15	422	" A 150	524a	" O 157
83	" L 130	200	" " 458	312	1935 S 244	424a	" M 204	524b	" " 149
85	" A 930	201	" Pesh 170	313	1936 C 21	424b	" A 363	527	" R 116
87	" Pesh 155	205	" R 418	314	" S 3	426a	" L 238	528	" " 96
91a	" P 472	207	" L 758	318	" P 249	426b	" A 149	530a	" " 94
91b	" R 407	209	1936 A 853	319	" " 37	427	" L 47	531	" O 184
92	" " 447	211	1935 B 437	320	" " 46	428	" " 28	534	" R 131
93	" P 460	212	1936 A 171	322	" O 329	430	" " 15	538	" C 158
94	" R 393	214	1935 R 408	324	" P 56	432	" " 247	541	" " 224
98	" P 455	215	1936 A 177	325	" O 231	435	" R 113		" B 151
99	" M 325	217	1935 R 456	327	" P 44	436	" " 114		" C 185
100	" P 465	219	1936 P 108	328	1935 R 509				

CrLJ	AIR	CrLJ	AIR	CrLJ	AIR	CrLJ	AIR	CrLJ	AIR
543	1936 P 245	673	1936 C 186	814	1936 B 221	935b	1936 L 702	1050	1936 R 421
545	" S 42	675	" A 364	818	" C 292	937	" " 730	1054	" N 233
546	" " 44	676	" C 227	821	" N 88	939	" " 758	1056	" L 781
548	" A 306	679	" PC 160	827	" A 360	940	" " 707	1058	" O 188
551	" " 650	688	" B 154	828	" C 324	941	" O 376	1059	" R 380
552	" C 237	694	" A 322	829	" R 232	943	" A 561	1061	" P 486
553	" B 172	696	" C 259	831	" C 294	948	" S 91	1065	" O 413
556	" L 144	697	" A 357	832	" R 247	950	" L 729	1068	" S 153
557	" M 350	698	1935 C 304	833	" PC 199	951	" O 401	1073	" A 675
559	" P 425	700	1936 A 361	836	" M 560	953	" M 824	1074	" M 629
560	" " 418	701	" C 796	838	" P 382	954	" O 375	1075	" A 691
562a	" A 313	705	" A 320	846a	" " 360	955	" " 405	1077	" C 524
562b	" L 330	710	" " 319	848	" " 274	963	" PC 289	1079	" L 833
566	" A 318	713	" " 354	849	" Pesh 141	975	" O 400	1082	" S 156
567	" L 357	715a	1935 S 144	850	" P 321	977	" N 156	1086	" " 146
569	" R 216	715b	1936 N 87	851	" C 355	978	" L 731	1090	" N 234
571	" M 318	716	" S 47	852a	" Pesh 139	979	" N 152	1092	" C 529
573	" B 171	719	" A 372	852b	" A 470	981	" Pesh 166	1100	" A 695
574	" O 326	721	" R 177	855	" S 78	983	" N 153	1104	" " 747
577	" B 167	722	" L 507	857	" A 469	988	" Pesh 169	1107	" M 628
581	" L 907	723	" R 242	862	" P 358	990	" R 324	1108	" A 707
586	" N 138	727	" A 392	864	" A 437	992	" " 373	1109	1937 O 72
587	" " 86	730	" " 373	866	" " 534	1003	" S 125	1112	1936 R 453
588	" " 78	732	" L 409	869	" R 297	1005	" " 126	1114	" A 693
590	" C 205	740	" " 380	870	" S 94	1006	" N 181	1115	" R 446
595	" A 311	741	" Pesh 113	875	" P 413	1007	" S 123	1118	" " 382
597a	" L 400	742	" L 533	876	" S 90	1008	" R 369	1119	" " 442
597b	1937 A 190	747	" C 261	877	" P 350	1012	" N 150	1121	" A 689
599	1936 " 314	748	" L 473	883	" B 256	1013	" R 425	1123	" P 534
603	" Pesh 72	749	" O 268	885	" O 373	1017	" A 656	1124	" B 327
604	" " 66	751	" L 283	886	" A 531	1019	" " 651	1126	" P 537
607	" N 103	753	" B 193	886	" O 383	1022b	" R 444	1128	1937 O 81
616	" O 311	758	" C 356	888	" Pesh 152	1024	" L 264	1129	1936 M 793
617	" R 189	773	" R 230	889	" O 379	1026	" A 658	1134	1937 M 8
618	" Pesh 101	775	" C 316	892	" P 346	1028	" L 778	1137	1936 R 455
619	" " 106	782	" A 370	893	" PC 253	1029	" S 143	1140	" B 372
621	" R 187	783	" S 49	897	" R 325	1030	" L 294	1144	1937 O 163
623	" " 175	785	" P 503	902	" " 368	1033	" N 119	1146	1936 N 146
625	" P 423	787	" O 294	905	" P 438	1035	" S 147	1147	" A 743
627	" M 471	790	" R 227	906	" O 380	1036	" O 195	1149	" C 407
628	" PC 169	791	" " 234	907a	" " 372	1037	" S 145	1150	1937 M 231
629	" M 316	792	" S 51	907b	" M 516	1038a	" N 79	1151	1936 O 418
630	" P 481	793	" R 229	909	" PC 242	1038b	1937 Pesh 172	1153	" M 788
634a	" M 317	793	" A 337	914	" R 350	1043	" L 828	1154	" P 533
634b	" P 282	794	" L 471	920	" " 299	1045	" S 140	1156a	" " 536
637	" M 353	811	" A 386	927	1937 O 54	1047	" N 200	1156b	" C 403
661	" L 429	813						1159	" P 577

159 Indian Cases = All India Reporter

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
1	1935 M 839	40b	1935 A 156	90	1935 B 393	151	1935 A 542	180	1935 O 684
4	" P 396	41	" B 167	93	" M 875	153	" S 205	183	" A 916
8	" C 752	44	" A 123	95	" R 97	154	" A 925	186	" R 364
12	" P 436	45	" R 118	97	" Pesh 158	155a	" M 913	188	" S 212
13	1936 M 42	48	" A 263	98	" C 368	155b	" A 362	190	1936 A 218
19	" A 215	49	" M 350	117	1936 O 52	158	" M 1047	191	" M 278
20	1935 O 541	51	" A 379	121	" " 56	159	" O 666	193	1935 A 117
22	" A 981	54	1936 O 47	125	1935 S 200	163	" P 422	196	" R 349
23	" M 888	57	1935 R 357	126	1936 O 74	165	1936 M 86	198	" A 926
26	" A 931	59	1936 O 79	127	1935 M 1003	167b	1935 R 397	199	" B 417
30	1936 M 82	61	1935 L 599	129	" " 737	169	" P 118	202	1936 A 217
31	1935 O 681	64	" A 147	131	" S 201	170	" B 416	203	1935 L 437
33	" S 206	65	" R 126	133	" C 671	171	" P 126	205	" " 440
35	" A 372	66	" A 299	138	" R 240	172	" M 884	207	" B 324
36	" O 675	70a	" R 181	140	" O 677	173	1936 P 198	209	" " 321
37	" A 278	70b	" A 148	142	" R 367	176	1935 B 399	212	" L 439
38	" M 922	72	" L 492	144	" B 396	177	" P 125	213	" B 326
39	" A 293	81	" R 359	147	" A 381	178	1936 L 200	217	" R 343
40a	1936 M 219	88	" M 1058	149	" O 687	179	" P 33		

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
224	1935 M 1050	378	1935 B 382	529	1935 Pesh 168	711	1935 P 470	866	1935 L 708
226	" L 656	381	" L 35	531	" A 968	713	" PC 212	867	" M 1072
227	" " 661	383	" C 357	532	" M 913	716	" P 476	868	" N 249
228	" M 893	385a	" L 279	533	" B 385	717	1936 " 75	870	" L 802
230	" L 651	385b	" C 246	541	" M 300	718	" M 101	872	1936 M 25
232	" " 733	387	" A 946	542	" C 726	720	1935 R 365	873	1935 " 721
233	" " 650	405	" L 184	544	1936 M 118	722	" P 481	875	1936 O 156
235	" C 638	409	" A 930	545	" PC 5	723	" A 1011	886	1935 C 809
237	" L 657	410	" L 189	549	" " 9	725	" P 488	888	" M 870
240	" M 793	411	" A 976	555	" " 1	727	1936 A 216	890	" Pesh 165
241	" P 426	412	" L 799	559	" " 24	728	1935 P 459	893	" C 805
244	" M 907	413	" B 423	561	1935 A 1028	729	1936 M 88	897	1936 A 117
246	1936 P 36	418	" L 180	575	" C 738	730	1936 A 220	899	1935 M 353
247	1935 S 222	419	" L 686	577a	" M 342	732	" L 865	900	" A 928
248	1936 P 93	420	" C 728	577b	" P 451	734	1935 A 1047	902	" R 427
250	1935 L 626	421	" " 176	578	1936 M 81	735	" L 687	903	1936 A 124
253	" P 450	422	" M 301	580	" P 70	737	" M 768	907	1935 C 811
254	" Pesh 163	423	" C 688	584	1935 N 212	739	" N 250	909	1936 O 94
256	" P 458	424a	" M 279	586	" P 456	745	" S 53	911	1935 B 287
257	" L 653	424b	" B 412	587	" S 216	749	" R 340	919	1936 O 164
260	1936 P 128	427	" S 73	589	" M 383	750	" M 354	923	1935 B 437
261	" O 115	432	" M 325	591	" S 213	752	" C 760	925	" R 391
263	1935 M 863	433	" A 1008	594	1936 M 10	755	" R 229	927	" L 850
264	1936 O 106	437	" C 716	596	" O 32	756	" C 711	929	" M 1056
266	1935 M 890	441	" A 1014	608	1935 L 642	758	" N 226	932	" N 241
269	1936 O 81	443	" C 707	609	1936 O 100	762	1936 M 99	933	" S 225
271	1935 S 221	446	" A 945	611	1935 C 706	763	1935 L 26	936	" R 415
272	" B 420	447a	" " 984	613	" " 783	765	" S 111	939	" L 758
273	" Pesh 160	447	" N 221	616	" A 982	766	1936 L 207	943	" M 1066
274	" L 448	449	" P 453	618	" C 721	767	1935 C 625	945	" R 466
279	" M 803	450	" R 393	621	" A 970	772	1936 O 97	950	" N 244
284	" Pesh 155	451	" P 455	625	" M 50	775	" L 177	952	" R 458
287	" A 940	452	" M 219	630	" A 965	776	" O 75	954	" N 235
289	" R 407	453	1936 P 68	632	1936 M 18	778	" " 147	957	" C 800
290	" A 989	454	1935 M 318	633	" L 290	780	" " 87	958	" M 919
296	" S 210	458	" " 312	634	" M 132	787	" M 282	960	1936 P 268
298	" A 966	460	1936 P 57	637	1935 C 664	788	1935 A 1041	962	1935 L 804
299	" C 356	462	1935 C 725	639	1936 L 182	789	" R 426	963	" P 501
300	" B 403	463	" Pesh 161	641	1935 " 844	790	1936 A 112	964	" C 182
306	" A 938	465	" R 399	642	" A 974	794	1935 PC 208	966	" P 503
308a	" R 447	466	" S 203	644a	" L 811	797	1936 A 127	967	" R 436
308b	" A 977	468	" R 336	644b	" A 979	798	1936 R 355	968	" L 795
310	" L 24	472	" " 464	646	" L 858	801	1935 " 341	972	" S 232
311	1936 O 121	474	" L 867	647	" A 943	802	" A 221	975	" L 801
314	1935 C 345	478	" M 360	650	" B 267	804b	1936 " 107	977	" A 995
316	1936 O 102	480	" L 593	653	" A 1037	807	" " 26	983	" L 958
319	1935 M 244	483	1936 O 110	656	1936 M 1	808	1935 S 105	984	" A 1004
320	1936 O 105	486	1935 M 287	660	1935 C 731	810	1936 A 105	988	" L 972
325	1935 PC 199	487	" P 465	661	" M 795	812	1935 R 211	989	" A 1042
329	" " 203	490a	" M 298	662	" C 769	816	1936 A 131	993	" M 340
334	" P 460	490b	1936 P 52	663	" M 258	817	1935 R 898	996	" R 413
339	" " 417	492	1935 B 225	664	" C 742	819	1936 P 162	998	" N 245
340	" L 605	494	1936 P 62	665	" S 245	821	1935 Pesh 174	999	" L 853
342	1936 P 41	495	1935 R 389	667a	" L 606	824	1936 P 167	1001	" C 659
345	" M 135	497	" N 195	667b	1936 PC 34	828	1935 S 228	1005	1936 M 5
346	1935 P 472	500	1936 P 65	677	1935 L 877	830	1936 P 123	1008	1935 C 792
347	" L 288	501	" M 40	678	" C 739	834	1935 Pesh 170	1014	" L 875
350	1936 P 39	503	" P 74	680	" A 1040	835	1936 M 267	1016	" C 813
352	1935 A 975	505	1935 B 176	681	" C 729	837	" " 849	1019	" L 863
353	" L 92	507	" M 347	683	" A 1002	840	1935 " 67	1021	" M 1059
354	1936 M 58	509	" B 421	685	" C 771	843	1936 M 67	1024	" L 855
356	" O 60	511	" C 658	687	" S 223	845	1935 " 342	1026	" R 471
358	1935 B 331	512	" M 297	689	" M 602	853a	1936 " 740	1027	1936 M 100
363	" " 333	513	" A 986	691	" L 692	853b	" L 974	1028	" " 49
366	" L 446	515	" C 607	692	" M 319	855	1936 M 89	1029	" " 24
367	" M 262	517	" A 942	693	" L 489	857	1935 M 390	1030	1935 L 662
369	" L 445	518	" B 265	694	" M 1040	861	" N 13	1031	1936 M 47
370	" C 713	521	" A 964	696	" C 751	862a	1935 L 857	1032	1935 R 418
372	" M 298	523	" C 741	697	" B 427	862b	" M 261	1034	" M 1045
374	" L 28	524	1936 A 212	702	" L 644	862b	1936 N 18	1036	" R 453
376	" C 723	527	1935 C 736	704	1936 PC 27			1037	" L 926

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
1038 1935	R 420	1052 1936	O 180	1068 1935	S 214	1079 1936	PC 18	1092 1936	M 126
1044a "	L 645	1053 1935	L 641	1070 "	C 732	1080 "	" 20	1095 1935	R 428
1044b 1936	O 128	1055 "	R 352	1071 "	M 1069	1085 1935	L 10	1100 "	L 612
1046 1935	R 394	1058 "	" 408	1073 1936	P 110	1087 "	" 640	1101 "	C 702
1047 1937	O 80	1059 "	L 970	1074 1935	C 743	1088 "	" 791	1104 "	L 648
1048 1935	M 326	1060 "	R 460	1075 1936	P 182	1089 "	O 786	1107 1937	" 226
1049 1936	O 169	1064 "	L 636	1077 1935	R 895	1091 "	L 714	1116 1935	C 733
1050 1935	R 406	1065 "	R 456	1078 "	C 746			1119 "	P 478

160 Indian Cases = All India Reporter

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
1 1936	PC 55	124 1935	C 788	236 1935	N 258	379 1936	A 1	522 1936	Pesh 5
6 1935	S 38	128 "	N 257	242 1936	B 10	381 1935	M 783	524 1935	L 980
12 1936	P 108	129 "	L 840	245 1935	R 401	382 "	A 922	525 "	A 614
13 "	A 853	130 "	R 409	250 "	C 779	383 1936	S 2	527 1936	B 17
14 1935	P 490	133 "	L 843	254 "	M 378	384 "	PC 70	529 1935	L 919
17 1936	A 171	134 "	Pesh 179	264 1936	A 165	388 1935	C 817	530 1936	M 116
18 1935	P 506	137 1936	M 171	268 1935	M 1041	394 1936	A 21	531 1935	L 646
20 1936	A 177	143 1935	L 807	269 1936	A 156	407 "	C 12	533 "	" 813
21 1935	L 638	144 "	" 841	270 "	M 34	410 "	M 311	534 1936	M 152
23 1936	P 1	145 "	" 809	275 "	A 63	414 1935	L 696	536 1935	L 623
24 1935	L 792	146 1936	P 112	276 "	L 45	416 1936	M 103	538 "	" 663
27a 1936	P 125	148 1935	L 895	277 "	A 3	417 1935	" 880	540 "	" 901
27b "	O 174	149 1936	P 107	281 "	L 46	420b 1936	" 167	541 1936	A 33
29 "	PC 15	150a "	" 106	282 1935	R 494	423 "	" 57	557 1935	L 924
33 "	O 177	150b 1935	R 485	283 1936	L 300	425a 1935	R 501	559 1936	M 123
35 "	N 17	152a 1936	P 109	285 "	PC 63	425b "	M 1009	563 "	" 102
36 "	O 132	152b 1935	L 923	287 "	L 374	427 1936	Pesh 10	564 1935	L 931
38a "	" 180	153 1936	P 18	289 "	" 283	428 "	M 8	567 1936	O 329
38 1935	B 433	155 1935	L 896	292 1935	R 491	430 1935	" 996	569 "	Pesh 11
42 1936	O 167	156 1936	P 15	295 "	Pesh 185	437 1936	P 29	570 1935	L 918
43 1935	C 763	158 1935	L 922	297 "	L 846	441 "	Pesh 7	571 1936	Pesh 14
44 1937	O 115	160 "	N 239	301 "	N 242	443 "	P 38	572 1935	L 630
45 1936	PC 60	161 1936	P 103	302 1936	A 13	444 "	Pesh 15	573 1936	M 136
48 "	A 202	162 1935	A 935	303 "	M 21	445 "	P 34	574 1935	L 685
61 1935	L 920	165 1936	O 183	306 1935	N 237	447 "	" 45	576a "	" 635
62 1936	B 3	167 "	A 146	309 "	" 230	448 "	Pesh 9	576b "	R 482
64 "	A 172	169 "	O 234	314 "	R 473	450a "	P 37	577 1936	C 30
68 "	PC 46	170 1935	A 153	321 "	A 924	450b 1935	L 838	579 "	PC 83
70 "	A 151	171 1937	O 132	323 1936	O 179	452 1936	Pesh 12	584 "	L 493
71 "	C 15	173 1935	L 810	324 1935	L 637	454 "	O 141	586 "	C 28
73 "	A 169	174 1936	O 173	325 "	R 448	457 1935	Pesh 186	588 1935	R 514
75 1935	Pesh 191	175a 1935	Pesh 192	327 "	" 449	459 1936	R 46	591 1936	C 21
76 1936	A 157	175b "	R 487	330 "	" 524	461 "	O 222	592 1935	R 496
80 "	M 55	177 1936	P 20	331 "	" 521	462 "	Pesh 1	593 "	L 990
82 1935	Pesh 182	180 1935	L 820	332 1936	C 1	463 "	R 1	594 1936	M 155
84 "	C 770	181 1936	P 11	343 "	P 145	465 "	O 248	597 "	R 42
85 "	R 446	185 1935	L 934	344 1935	R 495	466 "	R 38	602 "	M 12
86 "	C 816	186 1936	P 102	345 1936	P 150	468 "	O 172	604 "	P 249
87 "	L 973	187 1935	L 805	346 1935	L 975	469 1935	R 438	606b "	" 173
88 "	C 764	189 1936	B 5	347 1936	P 23	471 "	M 995	608 "	" 190
90 "	R 439	193 1935	Pesh 189	349 1935	L 808	477 1936	R 11	611 "	" 267
96 "	C 801	194 1936	B 13	351 1936	P 2	478 "	M 64	612 "	B 30
99 1936	B 1	196 "	N 34	352 1935	L 826	480 1935	R 433	617 "	A 50
101 "	PC 44	199 "	C 766	353 1936	P 6	482 1936	" 31	623 "	" 77
104 "	M 163	202 "	N 8	354 "	A 15	489 1937	O 130	624 1935	M 775
105a 1935	L 592	205 "	M 125	355 "	P 10	490 1935	R 525	631 1936	Pesh 16
105b 1936	PC 49	206 "	L 1	356 "	A 193	498 "	L 690	636a 1935	R 481
107 1935	L 887	209 "	M 421	361a 1935	L 894	495 1936	O 218	636b "	L 982
109 1936	R 26	210 1935	R 512	361b 1936	S 1	503 1935	L 861	638 1936	B 24
111 "	L 8	212 "	C 748	263 1935	L 945	505 1936	B 19	642 "	L 458
113 1935	R 506	215 "	R 484	364 "	Pesh 178	509 1935	L 818	645 "	M 121
114 1936	P 111	217 "	L 940	365 "	L 902	511 1936	M 14	647 1935	" 1017
115 1935	S 244	219 "	C 756	367 "	R 435	513 1935	L 893	668 1936	Pesh 19
116 "	P 474	228 "	R 174	368 1936	M 16	515 1936	B 15	672 "	" 26
118 "	L 769	226 1936	A 18	370 "	A 8	517 1935	L 681	675 "	P 46
119 1936	P 126	229 "	O 236	372 "	Pesh 4	519b "	" 921	676 1935	M 753
121 1935	C 744	230 "	A 143	373 "	A 9	520 1936	M 150	678 1936	P 26
123 1936	M 48	234 1935	R 504	375 "	S 8	521 1935	L 971		

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
680	1935 M 718	768	1935 M 769	835	1936 Pesh 41	923	1936 P 76	1013	1936 Pesh 63
681	1936 P 3	773	" L 821	837	" PC 77	925	1935 " 524	1015	1935 M 1073
684	" M 105	777	" " 702	844	" " 74	927a	1936 " 40	1025	1936 A 89
685	" P 28	779	" " 765	846	1935 B 439	927b	" A 56	1026	" " 86
686	" M 113	783	1936 PC 65	854	1936 A 356	933	" P 60	1028	" C 18
689	" B 35	788	1935 L 625	855	" L 138	935	1937 M 235	1030	" A 94
691	" C 22	789	" " 549	856	" A 134	937	1935 L 884	1033	" L 673
693	" Pesh 2	790	" Pesh 190	861	1935 R 498	939	1936 M 201	1035	" A 88
694	1935 S 235	791	" L 825	862	1936 A 83	940	1935 A 853	1036	" M 134
701	" R 502	793	" " 691	865	" " 64	942	1936 L 572	1037	" A 85
703	1936 A 69	794	" " 952	866	" " 385	943	" A 66	1038	" L 557
708	1935 L 935	795	1936 P 44	867	" C 31	945	" P 59	1039	" O 238
709	1936 A 309	796	" R 58	868	" A 740	947	" L 545	1042	" L 661
711	" PC 51	797	" P 56	870a	" " 141	948	" M 144	1044	" O 241
715	" R 17	798	1935 L 939	870b	" C 34	952	" Pesh 24	1046	" B 59
724	" " 65	799	1936 O 181	874	" A 393	953	" L 589	1049	" P 97
726	" Pesh 32	800	" L 71	876	" " 139	955	" M 142	1052	" L 538
727	1935 R 483	801	" O 224	878	" R 67	957	" R 77	1054	" P 66
728	1936 C 24	802	" Pesh 32	879	" A 90	960	" O 136	1056	" C 44
729	" M 137	803	" O 206	883	" L 469	963	1935 L 897	1060	" B 52
730	" C 17	804	" L 150	884	" A 129	967	1936 M 199	1066	" P 63
733	" M 197	805	1935 " 816	886	1935 P 483	969	" O 219	1068	1935 L 948
734	1935 L 936	807	1936 O 231	889	1936 A 142	972	" L 608	1069	" M 206
735	1936 C 29	810	1935 R 500	890	" O 202	976	" P 49	1073	1936 P 78
736	" B 43	811	1936 O 205	892	" Pesh 52	980	1935 L 830	1075	" L 617
739	1935 L 775	812	" Pesh 46	893	" O 245	984	1936 P 7	1076	" P 101
743	1936 C 16	814	" O 185	895	1935 L 955	986	" Pesh 43	1077	" R 40
744	1935 L 879	816	" R 15	897	" " 889	988	" M 160	1079	" P 96
746	" R 509	818	1935 " 517	901	1936 PC 89	989	" " 151	1080	" C 26
749	" L 942	822	" M 750	902	1935 L 899	993	" " 200	1083	" P 80
751	" " 628	824	" R 497	904	1936 C 37	994	" A 102	1086	" " 84
753	1936 M 165	826	" L 529	908	" Pesh 57	996	" M 154	1088	" A 140
755	1935 R 507	829	1936 C 33	912	" A 78	998	" A 109	1089	" " 74
757	1936 M 61	830	1935 L 881	915	" P 87	1000	1935 L 787	1091	" " 97
759	1935 L 705	833	" " 694	920	" O 168	1003	1936 M 138	1096	" P 104
763	" R 522			921a	" P 77	1005	" Pesh 20	1098	" A 119
765	" L 712			921b	" L 502	1010	" " 29	1103	" P 54

161 Indian Cases = All India Reporter

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
3	1936 L 708	63	1936 Pesh 61	171	1936 P 370	221	1935 R 423	294	1936 L 16
5	" R 49	65	1935 M 356	173	1935 L 698	224	1936 C 87	295	" S 29
7	" Pesh 37	72	" L 682	177	" M 983	230	" M 220	297	" R 28
8	" N 23	74	1936 C 73	182	1936 " 246	233	" R 109	300	" L 183
10	" B 49	87	" B 46	183	" C 64	234	" M 188	307	" A 147
14	" R 75	90	" R 70	184	" M 266	237	1935 L 964	308	" L 47
16	" L 532	91	1935 L 735	186	" " 290	238	1936 C 65	309	" A 150
17	" A 439	93	1936 M 91	187	" C 49	240	" R 114	310	" M 187
18	" P 114	96	" B 37	189	1935 M 199	242	1935 L 876	311	" A 80
20	" " 122	102	" P 406	192a	1936 Pesh 36	243	1936 " 123	313	" L 15
21	" L 725	103a	1935 A 125	192b	" M 247	244	" Pesh 80	314	" A 164
22	" P 85	103b	" M 701	194	" Pesh 53	245	1935 L 93	315	1935 L 917
24	" L 339	106	1936 Pesh 47	196	" M 280	246	" " 956	316	1936 A 149
26	" P 119	107	" A 378	197	1935 L 602	247	1936 C 100	317b	" " 160
29	" PC 91	109	1937 P 200	200	1936 Pesh 40	248	1935 L 631	320	" Pesh 81
32	" M 65	111	1936 M 128	201	1935 L 739	250	1936 R 113	322	1935 A 696
33	" PC 103	113	" R 60	204	1936 Pesh 17	251	" L 168	324	1936 S 34
38	1935 M 764	115	1935 M 988	205	1935 R 489	258	" R 12	330	" A 152
41	1936 Pesh 34	122	" L 771	207	1936 Pesh 55	260	" PC 246	331a	" M 97
45	" " 33	126	1936 B 62	209	1935 L 957	266	" O 235	331b	" P 186
46	" M 98	150	" O 176	210a	1936 B 98	267	" S 40	335	" R 110
47	" Pesh 39	151	" L 176	210b	" C 70	269	" O 170	336	" M 147
48	" C 42	152	" O 253	212	" L 618	270	" Pesh 87	339	" L 247
49	" A 363	155	" Pesh 48	214	" C 63	271	1937 O 157	342	" R 2
51	" Pesh 51	158	" O 225	215	" L 670	273	1936 M 179	344	" L 28
52	" A 366	164	1937 P 222	216	1935 " 962	285	" O 256	347	" " 6
54	" Pesh 56	166	1936 C 51	217	1936 M 204	288	" L 288	348	" M 275
55	" M 202	167	" P 115	218	" L 209	289	" C 101	349	" L 244
57	" B 88			219a	" M 190	293	1935 L 984		

IO	AIR	IC	AIR	IO	AIR	IO	AIR	IO	AIR	IC	AIR
351	1936 N 15	485	1936 M 288	647a	1936 C 124	744	1936 C 138	887	1936 R 117		
353	" A 154	487	1935 L 716	647b	" L 205	748	" M 469	888	" P C 131		
355	" Pesh 78	490	1936 " 108	649	" R 103	749a	" R 166	891	1935 M 686		
356	" A 148	491	1935 " 727	650	" L 87	749b	" C 123	898	1936 L 337		
357	" M 83	493	1936 A 179	652	" Pesh 65	751	" M 494	900	" " 341		
358	1935 A 967	499	" L 85	653	1935 M 967	752	" L 191	903	" A 239		
359	1936 M 158	501	" S 7	659	1936 R 68	753	" A 732	916	" L 261		
361	1935 L 927	502	" L 10	660	" L 145	757	1935 M 789	918	" " 26		
365	1936 " 92	505	" S 9	661	" N 120	759	1936 A 200	919	" C 68		
369	1935 " 391	507	" A 197	662	" L 152	762	" " 459	921	" L 356		
374	1936 B 94	510	" L 156	663	" M 426	763	" R 174	922	" " 98		
378	" C 57	511	" " 910	665	" R 121	764	" L 199	924	1935 M 899		
383	" R 125	512	" C 125	668	" N 25	765	" " 301	927	1936 P C 325		
384	" S 25	514	" P 133	669	" L 146	768	" " 178	932	" P 175		
385	" O 242	515	" R 112	670	" M 223	769	" B 114	933	" " 176		
387	" R 5	516	" P 140	672	" L 129	784	" N 29	934	" M 195		
389	" O 247	518a	" L 140	673	" P C 108	787	" " 37	936	" P 443		
390	" L 161	518b	" S 14	679	" M 411	790	" L 280	937	" " 428		
393a	" O 240	520	" C 114	681	" L 595	791	" R 164	939a	" S 42		
398b	" B 99	522	" M 140	682	1935 M 1062	793	" L 278	939b	" P 425		
408	" O 223	524	" S 11	687	1936 R 54	795	" R 151	941	" " 426		
409	" N 26	528	" R 27	689	" N 139	797	" M 346	942	" L 962		
411	" O 211	529	" P C 93	690	" P 339	798	" R 149	943	" P 422		
414	" S 31	538a	" O 261	691	" " 161	800	1935 M 977	945	" S 41		
416	" M 387	538b	" M 250	692	" L 68	806	1936 N 44	947	" M 414		
417	" O 264	539	" P C 114	694	" P 356	816	" A 267	950	" R 56		
418	1935 L 914	547	" S 16	695	" " 142	818	1937 O 155	952	" L 790		
421	1936 M 84	551	" N 32	698	" Pesh 86	820	1936 R 167	954	" Pesh 69		
424	1937 O 108	553	" S 20	699	" P 160	821b	" O 263	956	" L 345		
427	1936 O 97	558	" A 222	700	" " 177	823	" A 594	957	" " 321		
429	1935 L 721	574	" R 71	701	" L 716	825	" O 250	958	" R 158		
435	1936 R 98	578	" " 115	703a	" P 172	828	1937 " 77	960	" L 843		
440	" A 442	579	" P 153	703b	" L 164	830	1936 M 472	963	1935 M 961		
441	" N 28	584	" R 107	705a	" P 170	832	" O 307	965	1936 L 350		
443	" A 441	585	" P 147	705b	" L 134	833	" R 124	967	" R 147		
444	" L 48	588	" R 108	706	" P 171	834	1937 O 75	969	" M 434		
445	" A 192	590	" " 62	708	" Pesh 77	837	1936 L 135	973	" C 167		
446	" " 184	591a	" L 256	709	" P 135	840	" A 737	974a	" L 349		
447	1935 M 914	591b	" R 51	713	" L 215	843	" M 170	974b	" C 157		
450	1936 C 106	592	" L 49	714	" P 164	844	" L 151	975	" L 780		
456	" Pesh 88	593	" N 70	716	" Pesh 79	846	" M 341	976	" R 85		
457	" L 132	595	" C 116	717	" M 424	847	" " 352	978	" L 336		
459	" R 119	604	" R 120	719	" N 113	849	" B 132	979	" C 149		
461	" " 80	605	" O 270	721	" M 276	851	" A 573	981	1935 N 246		
462	1935 L 906	610	" A 205	723	" " 161	855	" P 179	984	1936 L 42		
464	1936 R 82	617	" R 7	725	" L 206	861	" L 220	986	" C 165		
465	" P 129	621	" A 186	726	" M 193	862	" P 191	989	" R 87		
468	" O 93	626	" R 47	728	" " 847	865	" A 485	992	" " 89		
472	" P 151	628	" Pesh 90	731	1935 L 842	867	" N 21	993	" " 116		
473	" M 251	629	" R 105	732	" M 809	869	" A 253	994	" C 152		
474	" P 135	631	" L 242	734	1936 C 130	874	" Pesh 74	997	" R 134		
475	" M 149	632	" R 63	735	" " 142	877	" N 1	999	" M 308		
477	" P 152	633	" Pesh 71	736	" B 130	879	" M 383	1002	" " 320		
478	" " 158	634	" L 80	738	" O 132	884	" L 335	1003	" " 408		
480	" L 218	635	" N 55	740	" B 137	885	" Pesh 72	1006	" " 463		
481	" Pesh 82	645	" L 141	741	" C 133	886	" L 348	1007	" R 96		
484	1935 L 909	646	" " 7	742	" M 492						

162 Indian Cases = All India Reporter

IO	AIR	IO	AIR	IO	AIR	IO	AIR	IO	AIR
1	1936 P C 138	25	1936 P 245	45	1936 A 621	62	1936 A 613	103	1936 A 286
6	" R 131	27	" L 228	47	" " 269	68	" M 225	115	" R 129
8	" P C 126	32	" P 225	49	" " 265	88	" L 351	117	" A 258
13	" P 418	33	" C 155	50	" M 299	89	" " 361	124	1935 L 951
15	" " 439	34	" M 264	51	" A 655	91	" O 164	125	1936 R 95
17	" P C 150	36	" O 169	53a	" " 652	92	" P C 141	127	" " 52
21	" P 243	37	" M 191	53b	" M 380	97	" M 692	129	" O 184
22	" " 248	39	" L 286	56	" A 298	100	" O 47	131	" L 767
23	" M 177	42	" " 346	59	1935 L 632	102	" " 147		

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
133	1936 B 135	298	1936 A 318	485	1936 R 189	689	1936 C 221	840	1936 M 665
135	" C 171	299	" L 368	486	" P 250	692	" L 100	841	" O 321
137	" R 94	300	" Pesh 106	489	" L 369	694a	" C 234	842	" R 204
138	" C 176	302	" L 328	490	1935 P 177	694b	" R 215	844	" O 294
140	" Pesh 66	303	" " 334	491	1936 R 187	695	" C 198	847	" L 213
143	" A 270	304	" M 293	493	1935 N 119	697	" " 195	849	" P 270
150	" L 685	306	" L 276	494	1936 M 316	698	" L 196	853	" R 201
152	" " 933	308	" N 86	495	" L 72	700	" R 206	854	" L 465
154	" C 180	309	" L 181	499	" A 311	702	" C 210	856	" M 571
156	" M 205	310	" B 167	501	" L 371	704	" L 143	858	" L 216
170	" C 158	314a	" L 366	503	" A 867	705	" O 268	861	" " 239
175	" M 420	314b	" Pesh 108	504a	" M 317	707	" C 238	863	" S 47
176	" C 224	315	" C 189	504b	1937 A 190	708	" O 267	865	" R 184
177	" P 417	319	" O 262	506	1936 L 779	709	" C 200	867	" P 303
178	" " 444	320	" C 235	507	" A 314	712	" O 306	868	" M 602
180	" L 353	323	" " 193	511	" L 400	713	" M 119	870	" P 319
183	" P 230	325	" M 262	512	" A 301	715	" O 266	871	" R 190
184	" R 160	329	1935 C 119	517	" C 205	716	" L 142	873	" M 422
188	" B 138	330	1936 L 208	522	" " 245	717	" O 297	875	" P 235
201	" L 144	332	" N 78	523	" L 65	718	" L 124	876	" M 488
202	" R 145	333	" L 367	525	" C 246	722	" M 27	879	" P 258
204	" L 268	336	" " 362	526	" L 370	729	" L 179	882a	" M 624
207	1935 B 409	338	" A 313	527	" O 298	731	" R 198	882b	" L 51
208	" L 949	339a	" L 373	534	" R 175	733	" L 109	887	" R 177
210	1936 P 226	339b	" A 306	536	" O 259	736	" A 322	894	" A 396
214	" M 336	342	" L 330	538	" R 178	738	" O 290	899	" " 372
216	" P 423	346	" A 653	539	" PC 179	743	" R 202	900	" Pesh 103
218	" " 468	348	" C 178	550	" P 282	745	" O 308	902	" A 336
221	1935 M 904	349	" A 626	553	" " 429	748	" A 357	903	" " 335
223	1936 B 162	352	" R 141	554	" N 121	750	" O 317	904	" M 552
225	1937 O 146	355	" C 231	557a	" P 437	752	" A 361	907	" A 381
227	1936 B 166	358	" R 136	557b	1937 L 146	754	" C 260	909	" " 371
229	" O 275	362	" O 280	559	1935 P 154	755	" A 354	910	1935 C 304
231	" B 151	371	" M 94	560	1936 R 212	758	" " 319	912	1936 A 392
233	1937 O 144	374	" L 21	563	" P 481	759	" M 625	913	" L 234
234	1936 C 230	376	" M 284	566	" C 186	760	" A 320	914	" A 388
235	" P 231	379	" L 357	568	" P 472	762	" C 262	917	1935 R 112
247	" R 170	382	" " 157	571	" N 65	763	" A 324	919	1936 S 49
250	" C 168	383	" R 127	576	" Pesh 113	766	" R 193	921	" L 235
251	" R 168	386	" O 326	577	" N 80	771	" M 654	922	" " 222
253	" B 164	389a	" L 377	582	1937 P 202	772	" R 191	925	" N 87
255	" C 185	389b	" O 311	592a	1936 " 266	774	" L 449	926	" L 507
257	" S 43	391	" L 907	592b	" M 353	777	" C 267	927	" C 796
258	" M 417	396	" O 334	617	" C 243	780	" B 182	934	" L 88
260	" B 160	399	" B 154	618	" L 760	787	" P 300	941	" B 197
261	" M 464	404	" L 81	619	" C 143	790	" C 256	944	" N 4
263	" S 44	406	" " 60	622	" A 359	793	" P 257	948	" A 373
265	" B 171	410	" PC 123	623	" C 197	794	" M 547	950	" B 193
266	" M 557	412	" L 875	624	" L 429	797	" P 275	954	" A 376
268	" N 138	414	" M 318	636	" C 227	797	" C 247	958	" M 477
269	" B 175	416	" Pesh 97	639	" S 26	804	" C 247	958	" A 401
270	" Pesh 101	419	" M 269	642	" A 327	805	" P 480	961	" M 342
271	" C 173	425	" " 471	650	" C 212	806	" B 189	964	" A 386
274	1935 S 142	426	" PC 154	654	" C 239	809	" P 309	976	" L 409
277	1936 R 216	430	" N 103	658	" Pesh 38	810	" C 264	981	" " 533
278	" Pesh 102	439	" PC 139	659	" B 176	811	" " 265	982	" P 265
280	" L 147	445	" " 176	660	" C 261	814	" " 263	984	1935 PC 197
281	1935 S 144	448	" O 332	661	" M 313	815	" M 465	985	1936 P 313
282	1936 C 237	450	" PC 169	664a	" C 223	817	" P 307	987	" S 51
283	" B 172	451	" O 313	664b	" R 183	820	" " 317	988	" P 305
285	" M 350	454	" PC 171	666	" C 145	822	" B 177	992	" R 242
287	" O 219	459	" O 279	668	" M 19	827	" C 259	993	" P 310
288	" M 687	461	" PC 147	670	" L 136	828	" C 259	993	" PC 198
289	" A 639	465	" " 183	671	" C 225	830	" M 500	995	" P 295
292	" M 429	470	" " 169	673	" L 159	836	" P 239	999	" " 315
295	" A 650	481	" L 376	675	" M 324	837	" O 324	1001	" R 223
296	" C 181	482	" P 253	685	" C 215	838	" S 52	1004	" P 260
							" P 287	1008	" M 283

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
1	1936 PC 201	166	1936 R 246	369	1936 L 263	584	1936 L 521	822	1936 M 525
4	" " 204	167	" C 849	372	" " 296	586	" R 249	823	" A 436
7	" " 199	169	1935 P 149	373	" S 78	590	" " 240	825	" M 666
9	" O 356	172	1936 R 226	374	" L 486	592	" L 461	828	" A 449
24	" P 508	173	" S 57	378	" " 408	594	" Pesh 149	831	" " 489
27	" Pesh 128	175a	" P 306	379	" S 84	600	" R 274	834	" M 473
29	" P 503	175b	" O 277	380	" L 466	601	" " 262	837	" " 344
30	" S 53	177	" M 334	383	" " 499	607	" M 504	838	" L 922
34	" P 496	179	" N 71	384	" M 564	609	" A 469	840a	" M 491
36	1935 M 918	186	" O 316	391	" P 404	611	" Pesh 139	841	" A 467
38	1936 P 616	190	" M 573	393	" R 253	612	" M 406	842	" R 279
41	" C 316	192	" S 63	397a	" P 256	614	" A 481	843	" A 517
49	" PC 189	194	" O 338	397b	" R 251	619	" M 675	845	" C 628
52	" Pesh 111	195	" M 256	399	" P 321	621	" Pesh 151	847	" B 266
55	" P 312	202	" O 320	402	" " 360	625	" " 150	848	" A 437
56	" C 310	203	" M 470	403	" R 271	626	" M 432	850	" R 290
59	" L 519	204	" O 337	405	" P 274	628	" PC 158	854	" L 904
60	" M 398	206	" S 65	406	" C 565	629	" L 441	855	" M 490
64	" Pesh 125	209	" M 437	408a	" P 321	630	" R 241	856	" R 296
69	" L 482	211	" R 256	408b	" R 277	632	" B 201	857	" L 468
72	" O 275	214	" Pesh 130	411	" P 398	644	" A 493	860	" " 510
74	" R 227	217	" R 284	415	" " 384	645	" R 152	861	" P 430
79	" B 199	222	" C 347	417	" PC 236	650	" A 443	863	" M 292
80	" L 380	223	" L 550	418	" " 230	656	" L 378	866	" A 534
81	" " 104	226	" A 410	425	" " 238	658	" " 489	869	" P 390
84	" C 299	228a	" " 337	430	" " 219	661	" A 470	872	" A 523
85	" L 192	228b	" C 292	434	" " 224	668	" R 235	875	" S 106
87	" M 550	231	" A 369	443	" Pesh 141	670	" L 480	877	" A 520
88	" " 556	232	" C 324	444	" R 266	671	" R 218	879	" L 931
89	" L 225	234	" A 411	448	" Pesh 148	672	" A 452	881	" PC 253
90	" M 460	235	" R 232	451	" P 382	675	" P 401	887	" S 108
95	" L 193	236	" A 403	453	" R 282	677b	" R 239	892	1937 L 169
96	" M 503	238	" O 294	455	" S 79	681	" PC 242	895	1936 P 408
97	" L 246	239	" A 722	462	" Pesh 140	685	" P 393	908	" " 420
99	" N 93	240	" S 59	463	" M 402	689	" A 460	910	" S 94
100	" L 387	242a	" A 368	467	" B 242	695	" L 920	915	" P 386
103	" " 55	242b	" R 247	471	" M 388	697	" S 85	919	" A 514
107	" M 412	244	" A 383	480a	" L 139	698	" L 478	922	" O 322
108	" L 59	246	" M 576	480b	" M 560	701	" " 404	924	" L 929
113	" " 210	250	" A 370	481	" A 495	704	" M 814	926	" A 479
114	" " 890	251	" M 486	493	" M 508	708	" R 250	928	" L 668
118	" R 284	253	" A 337	499	" R 237	711	" M 680	929	" A 438
119	" L 388	270	" C 334	501	" P 372	712	" " 440	930	1937 O 143
121	" " 212	274	" L 495	510	" S 75	724	" " 559	935	1936 " 331
122	" S 71	274	" L 495	513	" L 477	727	" L 924	937	" B 268
123	" L 476	275	" S 68	514	" P 409	732	" M 524	940	" P 323
124	" Pesh 133	278	" L 442	515	1937 L 7	734	" L 485	953	" L 611
126	" L 226	279	" B 221	516	1936 R 269	743	" M 506	956	" " 593
127	" N 117	283	" A 412	518	" P 410	751	" L 501	957	" R 295
129	" B 191	293	" B 219	518	1937 L 4	752	" M 497	958	" L 983
131	" P 322	295	" PC 193	520	1936 P 414	754	" A 475	962	" P 345
133	" " 562	300	" B 218	522	" L 894	755	" M 661	963	" L 665
135	" L 473	301	" A 360	524	" P 362	756	" A 507	965	" P 413
136	" P 511	303	" M 338	525	" B 250	762	" " 456	966	" A 512
137	" S 61	305	" B 227	532	" A 450	765	" L 969	968	" M 321
139	" P 553	319	" N 88	537	" P 411	767	" A 492	971a	" A 451
141	" L 500	324	" A 279	538	" M 583	770	" O 340	971b	" P 400
142	" P 505	339	" L 257	539	" A 466	799	" M 702	973	" R 294
143	" L 233	340	" R 208	545	" PC 212	802	" A 488	974	" A 454
144	" R 229	344	" A 404	547	" A 477	803	" M 616	975	" L 1013
145	" L 471	350	" L 523	554	" " 473	805	" P 358	977	" M 106
149	" M 689	351	" B 225	558	" L 985	803	" " 861	984a	" P 340
152	" C 355	354	" M 613	560	" A 434	809	" M 526	984b	" A 537
154	" M 379	357	" B 213	564	" S 72	811	" P 357	1003	" P 341
156	" PC 207	363	" L 365	570	" R 280	814	" M 561	1007	" L 563
161	" M 385	364	" R 260	578	" B 246	817	" L 965	1008	" R 297
163	" R 230	366	" L 406	579					

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
1	1936 P C 264	238	1936 L 474	455	1936 R 342	702	1936 A 651	891	1936 L 264
6	" " 277	239	" M 593	459	" " 367	703a	" " 656	893	" R 413
9	" B 277	243	" " 516	462	" L 729	703b	" B 301	896	1935 M 352
16	" L 567	248	" A 549	463	" " 508	712	" R 398	898	1936 " 852
17	" P C 258	252	" L 543	465	" M 635	713a	" L 683	899	" Pesh 172
18	" " 269	253	" A 561	466	1937 O 43	713b	" N 156	903	" M 878
26	" " 281	260a	" R 298	468	1936 R 308	714	1937 L 79	906	" S 165
27	" " 283	260b	" L 496	470	" O 407	716	1936 S 132	913	" A 671
30	" L 448	262	" " 511	472	" M 618	717	" M 699	914	" R 405
31	" M 541	268	" B 283	482	" O 405	718	" R 313	915	" A 657
43	" S 99	271	" L 547	494	1937 " 194	724	" " 366	917	1937 L 174
50	" L 587	272	" R 344	500	1936 C 506	725	" A 636	919	" O 69
52	" R 303	277	" P 462	513	1937 L 59	740	" N 130	927	1936 A 670
53	" L 562	281	" L 463	515	1936 A 600	743	" R 401	928	" N 119
57	" " 961	282	" P 447	522	" R 358	744	" N 153	929	" S 119
58	" S 90	286	" R 305	533	" B 257	748	" M 697	931	" N 148
59	" L 570	287	" P 465	540	" L 690	749	" L 662	934	" S 145
63	1937 " 185	290	" A 528	541	" A 619	750	" Pesh 163	939	1937 N 79
69	1936 S 87	296	" L 492	543	" L 682	751a	" L 598	940	1936 L 610
74	" P 350	298	" A 576	545	" PC 289	751b	" R 400	941	" N 221
82	" M 294	302	" O 376	556	" R 388	752	1937 L 194	942	" S 147
86	" P 346	305	" A 584	557	" N 174	753	1936 PC 312	943	" R 390
93	" " 433	313	" L 744	566	" B 272	759	" " 329	945	1937 O 87
95	" S 91	316	" " 546	568	" Pesh 164	762	" A 661	959	1936 M 660
97	" O 380	317	" A 566	570	" A 593	764	" M 682	960	" R 425
98	" P 446	321	" PC 285	571	" S 130	769	" R 369	964	" N 200
99	" O 379	325	" A 611	572	" A 607	778	1937 L 69	967	" R 444
101	" B 264	328	" B 296	576	" S 125	784	1936 A 658	969	" S 143
105	" O 383	333	" O 400	577	1937 L 57	785b	" R 389	971	" L 578
106	" R 289	334	" L 712	578	1936 Pesh 166	792	" N 168	973	" M 700
107	" O 373	335	" B 314	581	" B 313	794	" M 704	974	" R 429
118	" " 387	337	" PC 309	582	" L 727	796	" L 403	975	1937 O 152
133	" R 316	340	" " 304	583	" S 127	797	" S 123	977	1936 M 642
136	" L 401	345	" " 301	586	1937 L 62	799	" P 476	984	" R 430
139	" R 324	347	" " 318	588	1936 M 717	804	" " 474	995	" O 195
140	" L 573	350	" R 382	595	" A 624	806	" M 707	997	" M 689
141	" R 331	351	" N 150	598	" L 762	809	" L 294	1000	1937 O 29
142	" L 560	353	1935 M 404	600	" A 628	811b	" P 493	1003	" " 165
144	" O 372	358	1936 P 450	605	" L 1022	814	" Pesh 175	1006	1936 M 853
145	" Pesh 152	364	" R 329	608	" R 306	817	1937 O 20	1011	" S 138
148	" B 286	366	" L 503	610	1937 L 167	822	1936 Pesh 170	1012	" Pesh 185
149	" Pesh 157	368	" " 702	611	1936 M 856	823	" O 385	1013	" B 321
151	1937 O 54	369	" R 299	613	" A 595	825	" N 95	1015	" S 121
152	1936 B 276	373	" L 707	615	" M 449	827	" O 403	1017	" M 629
153	" Pesh 158	376	" " 730	628	" B 289	829	" Pesh 178	1018	" L 621
157	" B 274	378	" " 704	630	" Pesh 169	830	1937 O 151	1020	" S 146
159	" O 370	379	" M 634	632	" B 290	831	1936 M 662	1022	" M 776
162	" R 350	381	1937 L 35	639	" R 352	832	" L 648	1023	" R 417
170	" S 114	384	1936 " 732	642	" S 126	833	" Pesh 181	1025	1937 O 57
177	" B 287	385	" R 332	644	" B 311	836	" L 577	1029	1936 Pesh 180
178	" P 442	387	" A 568	645	" M 301	841	" " 607	1033	" L 799
180	" A 531	392	" R 336	650	1937 L 162	842	" R 399	1034	1937 O 31
181	" Pesh 155	393	" L 721	654	1936 R 319	844	" L 16	1036	1936 S 140
184a	" P 438	398	" M 531	660	" M 778	845	1937 L 16	1039	" O 410
184b	" A 532	408	" L 1010	664	1937 L 249	846	1936 M 714	1041	" R 418
189a	" B 285	410	" R 310	665	1936 A 598	848	" L 407	1044	" " 403
190	" B 280	412	" " 338	668	" M 706	851	" N 157	1046	" L 582
193	" A 557	418	" " 314	670	" " 801	853	1937 P 56	1047	" A 641
200	" " 555	420	" L 1019	674	1937 O 204	854	" M 698	1056	" L 778
202	" R 327	421	" O 371	677	1936 R 373	855	" P 490	1057	" " 828
205	" A 553	424	" " 369	684	1937 O 12	856	" M 713	1059	" A 659
206	" R 325	425	" L 1008	687	1936 N 152	857	" Pesh 176	1061	" R 393
208	" A 525	426	" O 375	689a	" L 681	860	" M 817	1064	" M 851
213	" P 434	428b	" " 401	689b	" M 824	876	" P 513	1065	" N 233
217	" M 623	431	" " 384	690	" L 737	877	" " 485	1066	" A 666
220	" P 456	432	1937 L 14	692	" N 181	882	" A 631	1069	" Pesh 179
225	" L 574	434a	1936 M 468	693	" L 765	884	" L 619	1071	" C 524
226	" C 497	435	" L 758	694	" N 112	888	" R 421	1072	" N 118
235	" L 571	440	" " 575	695	" B 310	889	" S 158	1074	" S 133
236a	" R 368	445	" R 340	697	" M 709			1078	" M 696
236b	" " 335	448	" " 354	700	" L 731				

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
1079	1936 P 486	1087	1936 L 840	1098	1936 N 128	1109	1936 M 825	1116	1937 O 67
1083	1937 L 102	1088	" R 380	1100	" R 383	1111	1937 O 15	1118	1936 R 453
1085	1936 P 491	1090	1937 L 41	1105	1937 O 184	1113	1936 S 175	1120	" O 188

165 Indian Cases = All India Reporter

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
1	1936 A 686	180	1936 M 905	319	1936 R 455	507	1936 L 841	650	1936 C 446
3	" R 219	182	" A 691	322a	1937 L 56	508	" M 522	654	" A 763
7	" A 578	184	" B 322	322b	" O 4	511	" L 786	655	" C 662
12	1937 O 52	189	" A 690	328	1936 S 137	512	" B 396	656	" M 914
15	1936 A 704	190	" C 536	329	" L 797	516	" L 693	657	" L 678
17	" C 279	191	" L 669	330	" M 788	518	" B 385	658	" " 698
19	" O 409	192	" M 628	332	" C 283	519	" L 830	659	1937 M 289
20	" A 695	193	" A 747	338	" B 344	520	" C 399	661	1936 L 672
21	" P 535	199	" L 605	347	" PC 332	521	" L 710	664a	" " 695
23	" L 769	201	" Pesh 192	350	" N 185	523	1937 O 170	664b	" M 948
25	" A 707	202	" S 150	353	" L 663	530	1936 B 389	666	" C 429
26	" P 546	205	" R 446	354	" C 295	537	1935 C 773	667	" L 643
28	1937 O 81	207	" M 915	358a	" L 842	540	1936 N 231	669	" M 841
29	1936 N 177	210a	" L 591	358b	" R 459	542	" P 577	670	" L 703
32	" P 532	210b	" A 697	363	" C 567	545	" C 392	671	" " 452
33	" O 193	213	1937 P 141	367	" L 597	550	" N 125	672	" B 363
34	" B 330	217	1936 N 186	369	" S 184	553	" L 594	681	" A 801
45	" O 209	223	" A 693	370	1937 O 19	556	" N 197	682	" C 249
48	" L 784	225	" M 848	371	1936 O 564	558	" " 273	689	" A 742
56	" " 815	227	1937 O 16	373	1937 O 169	559a	" M 483	690	" M 861
58	" B 842	230	1936 P 534	378	1936 P 563	559b	" S 200	694	" A 701
59	" M 812	231	" A 700	383	" L 666	560	" M 918	695	" PC 322
61	" L 781	232	" R 448	384	" R 412	561	" P 568	698	" A 762
63	" M 495	237	1937 O 72	385	" C 430	564	" " 531	699	" L 718
66	" L 612	240	1936 A 672	387	1937 M 231	565	" S 203	701	" A 753
70	" O 196	243a	1937 O 9	388	1936 R 396	567	" P 571	706	1937 O 145
74	" L 659	243b	1936 L 845	390	" C 353	568	" L 322	709b	1936 A 750
76	" N 207	245	" R 442	392	1937 O 116	574	" P 561	713	1937 O 141
78a	" L 660	247	1937 O 10	402	1936 A 708	575	" R 485	715	1936 C 342
78b	" S 153	251	1936 " 129	404	1937 O 149	578a	" P 416	716a	" A 761
81	" N 182	252	" Pesh 189	405	1936 M 514	578b	1937 O 65	716b	" C 525
82	" L 838	254	1937 O 62	408	" O 327	581a	1936 P 570	718	1937 O 1
83	" M 800	257	1936 R 458	412a	" N 145	581b	" B 397	720	1936 C 520
86	" B 815	258	" M 695	412b	" M 562	583	1937 O 45	721	" A 759
91	" S 169	259	" A 689	414	" N 217	585	1936 P 542	723	" L 629
94	" N 274	261	" B 327	415	" C 418	587	1937 O 150	734	" A 758
95	" Pesh 186	266	" A 706	417	" PC 259	588	1936 S 199	736	" " 800
98	1937 P 169	267	" L 798	422	" B 372	589	" P 543	737	" M 545
104	1936 O 207	268	" Pesh 191	425	" N 146	592	" M 917	739	" L 692
106	1937 N 14	269	1937 O 26	426	" C 304	593	" P 539	740	" C 420
112	1936 Pesh 184	273	1936 S 148	429	1937 L 168	596	" R 471	741	" M 842
118	1937 O 99	274	" L 583	430	1936 N 222	597	1937 O 56	742	" S 190
119	1936 S 156	276a	1937 O 2	432	" M 879	598	1936 S 201	743	" M 715
122	" N 180	276b	1936 M 668	433	" " 669	600	" P 526	745a	" S 189
124	" A 668	278	" L 783	438	" C 407	601	" L 717	745b	" P 579
129	1937 O 25	279	1937 O 3	439	" A 723	603	" P 533	747	" M 651
131	1936 L 569	280	1936 L 839	450	1937 O 138	604	" B 399	749	" P 572
132	" O 189	281	" C 444	452	1936 A 710	606b	" C 424	754	1935 L 518
137	" L 293	283	" L 623	453	" M 589	612	" P 548	756	1936 O 400
138	" O 413	287	" M 884	461	" A 702	615	" C 459	758	" R 468
141	" L 602	289	" P 537	462	" O 656	620	" M 971	760	" " 493
146	" " 833	291	" L 792	465	" A 743	623	" P 556	761	" P 581
148	" A 675	292	1937 M 8	466	" M 907	626	" L 37	762	" R 477
149	" L 835	294	1936 O 307	469	1937 O 124	631	" O 464	764	" M 653
151a	" " 800	297	" M 793	471	1936 M 600	632	" M 677	765	" " 603
151b	" N 284	298	" P 527	473	" A 717	637	" B 376	767	" L 694
154a	" L 793	301	" M 785	478	" M 595	640	" L 706	768	" " 796
156	" " 576	305a	" R 447	480	" N 203	641	" N 144	769	" A 788
158	" S 179	305b	" S 166	484	" M 626	642	" S 185	780	" M 919
162	" O 529	308	" R 419	486	1937 O 168	643	" L 718	785	1937 O 133
166	" L 584	310	1937 P 156	498	1936 A 712	645	" A 806	790	1936 A 803
167	" A 676	314	1936 M 609	503	" M 632	647	" M 964	793	1937 O 127
177	" N 214	317	" P 552	505	" C 403	649	" A 741	797	" " 107

68		165 Indian Cases = All India Reporter — (concl'd.)													
IC	A I R	IC	A I R	IC	A I R	IC	A I R	IC	A I R	IC	A I R	IC	A I R	IC	A I R
798	1937 O 158	828	1936 R 504	874	1936 L 911	924	1936 Pesh 198	951	1936 M 942						
799	" " 191	830	" N 220	877	1937 O 53	925	" P 607	952	" P 608						
802	1936 L 236	831	1937 M 27	878	1936 C 659	927	" P 591	954	" B 353						
803 ^a	" P 512	833	1936 L 512	880	" L 855	929	" " 621	957	" N 254						
803 ^b	" R 507	834	1937 O 209	882	" A 771	930	1937 N 4	959	" P 615						
804	" N 281	844	1936 P 501	891	1937 O 111	931	1936 P 626	961	" L 752						
805	" P 588	846	" L 298	892	1936 A 780	933	" S 233	962	1937 P 199						
808	" L 385	847	" C 686	900	1937 O 154	934	" N 282	963	1936 L 382						
809	" P 498	849	" N 258	901	1936 B 453	936	" P 604	966	1937 P 160						
810	" R 508	850	" P 593	904 ^a	" Pesh 196	937	" Pesh 195	968	" M 35						
812	" P 590	852	1937 O 106	904 ^b	1937 O 176	937	" N 209	970	" P 176						
813	" L 917	854	1936 P 606	905	1936 C 673	939 ^a	" M 991	972	" M 46						
815	" P 499	855	" M 664	907	" S 206	939 ^b	" P 619	977	1936 B 442						
817	" C 678	856	" L 689	908	1937 O 183	940	" " 639	986	1937 P 136						
819	" R 499	857	" P 506	909	1936 L 914	942	" N 166	987	1936 B 402						
820	" M 581	860	" M 835	911	" R 526	944	" P 627	993	" S 235						
823	" L 267	864	" " 963	913	" N 97	945	" Pesh 199	994	" B 408						
825	" N 243	865	1937 O 181	918	" Pesh 197	947	" N 123	997	" L 978						
826	" S 211	867	1936 B 379	919	1937 M 17	948	" S 243	1001	" B 412						
827	" C 674	873	1937 O 79	923	1936 S 187	950		1006	1937 M 176						

CASES OVERRULED & REVERSED

IN

A. I. R. 1936 LAHORE

Abdullah v. Emperor, (1933) 14 Lah 290 =34 Cr L J 1025=A I R 1933 Lah 716=145 I C 467 (F B)	Impliedly overruled in A I R 1936 P C 253 (2).
Bakhshan v. Emperor, (1936) 16 Lah 912 =A I R 1936 Lah 247=162 I C 804	" A I R 1936 P C 253 (2).
Chunna Mal Salig Ram v. Commr. of Income-tax, (1931) 5 I T C 316=32 P L R 517=A I R 1931 Lah 320= 131 I C 193 (F B)	Overruled in A I R 1936 Lah 762 (FB).
Feroz v. Emperor, (1918) 11 P R 1918 Cr=19 Cr L J 651=A I R 1918 Lah 92=45 I C 843	Impliedly overruled in A I R 1936 P C 253 (2).
Janki v. Sattan, (1933) 34 P L R 964= A I R 1933 Lah 777=146 I C 511	Reversed in A I R 1936 Lah 139.
Jiwan v. Punjab National Bank, (1935) A I R 1935 Lah 889=160 I C 897	Overruled in A I R 1936 Lah 771 (FB).
Khazan Chand v. Moti Singh, (1935) A I R 1935 Lah 914=161 I C 418	Reversed in A I R 1936 Lah 486.
Naul Mal v. Reru Mal, (1935) A I R 1935 Lah 625=160 I C 788	Overruled in A I R 1936 Lah 771 (FB).
Pars Ram-Brij Kishore v. Jagraon Trading Syndicate, (1936) 38 P L R 693=A I R 1936 Lah 226=163 I C 126	Reversed in A I R 1936 Lah 739.
Pir Shah v. Mamud, (1936) 38 P L R 455= A I R 1936 Lah 135=161 I C 837	" A I R 1936 Lah 858.
Ram Chand v. Wasanda Ram, (1936) 38 P L R 320=161 I C 987	" A I R 1936 Lah 861.
Sher Bhadur v. Emperor, (1934) 36 P L R 469=1934 Cr C 990=36 Cr L J 169 =15 Lah 331=A I R 1934 Lah 667 =152 I C 673	Overruled in A I R 1936 Lah 533 (FB).
Shere Singh v. Emperor, (1881) 21 P R 1881 Cr	Impliedly overruled in A I R 1936 P C 253 (2).
Umar Hayat Khan v. Md. Zaman, (1935) 37 P L R 367=A I R 1935 Lah 865 =159 I C 702	Reversed in A I R 1936 Lah 792.

THE ALL INDIA REPORTER 1936

LAHORE HIGH COURT

* A. I. R. 1936 Lahore 1

ADDISON AND DIN MOHAMMAD, JJ.

Maqbul Ahmad—Defendant—Appellant.

v.

Mt. Afzal-Ul-Nisa — Plaintiff and others—Defendants—Respondents.

First Appeal No. 433 of 1931, Decided on 3rd January 1935, from decree of Sub-Judge, 1st Class, Delhi, D/- 12th December 1930.

* (a) Partition—Court should pass decree in favour of all co-sharers whether plaintiffs or defendants—It cannot make payment of Court-fee condition precedent to passing of decree in favour of defendants.

In a partition suit, each party stands in the position of a plaintiff with reference to the others and the Court has no reason to refuse the prayer of the defendants for partition of their shares if the plaintiff's right to claim partition has been established; and it cannot make payment of Court-fee a condition precedent to passing of decree in favour of the defendants; such a decree falls within the definition of an instrument of partition within the meaning of S. 2 (15), Stamp Act and under S. 29 (g), it is the duty of the Court to decide the proportion of the stamp payable by each person who desires his share separated. Art. 45 of the Act is the article under which this stamp duty is levied. It would, of course, be impossible for any of the parties to execute the decree until the stamp duty is first levied and paid; 1926 Cal. 184; 1918 Lah. 385; and 28 P. R. 1905, *Rel on.* [P 802]

(b) Partition—Final decree in partition suit—Execution by defendant—Defendant need not pay Court-fee to have his share separately allotted to him—*Obiter*.

Obiter—There is nothing in the law which requires a defendant in a partition suit to pay Court-fees in order to have his share separately allotted to him. The decree that is finally drawn up has to be stamped as an instrument of partition under the Stamp Act and except that duty, no other duty is payable by the defendant; 1926 Pat 154; 1932 Mad 722 and 1918 Mad 448, *Not Foll.*, 1928 Bom 41 and 29 Bom. 79 *Appr.* [P 401, 2]

1936 L/1 & 2

Kishan Dayal and *S. N. Bose*—for Appellant.

Shuja-Ud-Din, *L. Saunders*, *Khurshaid Zaman* and *Mohammad Amin*—for Respondents.

Addison, J.—One Abdul Hamid died leaving nine houses and one shop in Delhi. His heirs were a son, Abdul Samad and two daughters as well as his widow, Mt. Mahmud-Ul-Nisa defendant 3. One of the daughters Mt. Afzal-Ul-Nisa, instituted this suit for partition of her 7/32 share of the property. Abdul Samad is dead and is represented by his son, Abdul Jabbar and widow, Mt. Anwar-Ul-Nisa, defendants 1 and 2. The other sister, Mt. Niab-Ul-Nisa, is also dead and is represented by her son Abdul Rashid and husband Abdul Majid, defendants 4 and 5 respectively. The other defendants are transferees of portions of the property from various members of the family. The numbers of the houses are 2698, 2699, 2700, 2796, 2797, 2798, 2800, 2801 and 2802, while the number of the shop is 2770. It was recited in the plaint that Abdul Samad, the son, had mortgaged in his lifetime his 7/16th share in four properties, namely houses Nos. 2800, 2801, 2802 and shop No. 2770 to one Lachhu Mal whose son is defendant 11. Defendant 11 obtained two decrees for the sale of this share in these four properties. These decrees were purchased by defendant 6 Maqbul Ahmed who subsequently in execution purchased Abdul Samad's 7/16th share in these four properties. It was further recited in the plaint that before this auction sale took place plaintiff and other members of the family referred the matter of the partition of the estate of Abdul Hamid to arbitration and an

award was given on 29th October 1923 according to which house No. 2800 fell to plaintiff's share. Maqbul Ahmed was taking possession of his share in this property as well as in the other three properties and plaintiff brought a suit for a declaration to restrain him on the ground that property No. 2800 had come to her share on partition. Her suit was however dismissed on the ground that the award was obtained collusively in order to defeat the claim of Maqbul Ahmed, defendant 6. Accordingly the plaintiff instituted this suit for partition of the whole property. Various defences were raised. The shares are not in dispute nor is it disputed that Maqbul Ahmed, defendant 6, is entitled to 7/16ths of the four properties mentioned. The cases of the other transferees need not be specially mentioned here. An order was recorded by the first Judge who was trying the suit as follows:

The question whether Maqbul Ahmed, defendant, should be turned out of the share of the properties purchased by him and should be awarded a share in the remaining property should be decided after the preliminary decree as it relates to the mode of partition.

At this stage it may be mentioned that the shop No. 2770 has already been partitioned between the parties and it was agreed that no further partition proceedings as regards it were necessary and that it should be excluded from this partition. It has also to be mentioned that there is a suit pending by Maqbul Ahmed for partition of his share of house No. 2802 without including his share in the other properties purchased by him. The trial Judge found that the partition effected by the award was invalid as it was collusive. The shares of the other transferees were set out and at the end of the judgment, directing a preliminary decree to be drawn up, it was said that the vendees should be allowed property alienated to them if the equities permitted this. Due regard, however, should be paid to the state of the family, its debts, nature of property, etc. It was directed that in the proceedings for drawing up the final decree regard should be had to these directions. The preliminary decree is dated 23rd July 1930, and there was no appeal against it. Thereafter a local commissioner was appointed to submit a report as to the

mode of partition. On 18th October 1930, he submitted a report setting out the values of all the ten properties. In this he valued house No. 2800 at Rs. 2,768-2-0. He valued the share of Mt. Afzal-ul-Nisa at Rs. 3,065-9-0. He suggested that plaintiff should be allowed this house No. 2800 as her share and that the defendants should pay her the deficiency of Rs. 297-7-0.

The plaintiff herself objected to this report pointing out that shop No. 2770 had been valued at Rs. 2,006-13-3 while its value was more than Rs. 4,000. She further asked that instead of house No. 2800 and a share of shop No. 2770 being given to her she might be given shop No. 2770 and house No. 2801 the value of which according to the commissioner was Rs. 2,921-6-0. Most of the defendants also filed objections as regards the under-valuation of the property and asked for a complete partition of the shares of all the heirs. Maqbul Ahmed, defendant 6, specifically mentioned that house No. 2800, awarded to the plaintiff, had been very much under-valued and he added that he was being deprived of his share in the specific numbers purchased by him at the Court auction. Mt. Afzal-ul-Nisa put in another petition admitting that shop No. 2770 had already been partitioned agreeing that this previous partition should be maintained and stating that she had no objection to Maqbul Ahmad getting his share in house No. 2800 allotted to her by the commissioner. As already stated it was agreed before us that this shop No. 2770 should be excluded from the partition as it had already been partitioned. It has also to be noted that house No. 2800 had been valued at a much higher figure in the collusive award proceedings already alluded to.

After these objections were put in the trial Court ordered on 28th October 1930 that the local commissioner should make proposals for the complete partition of the property. Accordingly he put in a report dated 17th November 1930, suggesting a partition into four shares namely those of the original heirs of Abdul Hamid, i. e., his widow, two daughters and son. No attempt was made in this report to give Maqbul Ahmad and others the shares they were entitled to. The properties were valued at the same figures as had been given in

the first report. Maqbul Ahmad, defendant 6, again objected to the commissioner's proposals and prayed that a competent commissioner might be appointed to prepare a complete scheme to settle the shares of the parties once for all. There were also objections on behalf of the other defendants. Maqbul Ahmed again pointed out that the local commissioner had awarded the same house, No. 2800, to Mt. Afzal-ul-Nisa which she obtained under the collusive award proceedings. In this second report of the commissioner the shop No. 2770 was excluded so that the value of the share of the plaintiff became Rs. 2,626-8-0, whereas the value of the house No. 2800, according to the commissioner, was Rs. 2,768-2-0. Maqbul Ahmad again asked that his 7/16th share in houses No. 2800, No. 2801 and No. 2802 should also be partitioned and awarded to him. In her application of 28th October 1930 the plaintiff Mt. Afzal-ul-Nisa had stated in para. 3 that she would be content to get a 7/16th share in property No. 2800 awarded to her and that she had no objection to the remaining portion going to Maqbul Ahmed.

Instead of framing issues on the numerous objections taken to the commissioner's report the trial Court at once proceeded to pass a final decree which is dated 12th December 1930. It was stated in this order that Maqbul Ahmed was not entitled to possession of the share he claimed in respect of the properties purchased by him until he came before the Court either as a plaintiff in respect of all these properties or paid proper court-fees in respect of them. The Judge, therefore, directed that a final decree should be drawn up allotting house No. 2800 to the plaintiff and directed her to deposit Rs. 141-10-0 for distribution among the other co-sharers. Against this decision Maqbul Ahmed, defendant 6, has preferred this appeal. From what has been said it will be clear that the trial Judge has acted very hastily in this matter. He should have framed issues, gone into the question of under-valuation and seen whether it was possible to allow Maqbul Ahmed portions of the properties or some of the properties, a share of which was purchased by him. Seeing that it is admitted that shop No. 2770 has already been partitioned these properties

are now houses Nos. 2800, 2801, 2802. There has been no proper adjudication as regards the valuation of the properties and the way they should be allotted.

Apart from that, the trial Judge has erred in holding that Maqbul Ahmed or any other of the co-sharers must either come into Court as a plaintiff or first pay proper court-fees before a partition decree could be drawn up in their favour. This has never been laid down. In 86 I C 765 (1) the Calcutta High Court said that in a partition suit each party stands in the position of a plaintiff with reference to the others and that the Court had no reason to refuse the prayer of the defendants for partition of their share if the plaintiff's right to claim partition had been established. In 22 P L R 1918 (2) it was held that every co-sharer is entitled to obtain possession of the share allotted to him under a decree for partition whether he is a plaintiff or defendant, while it was held in 23 P R 1905 (3) that as a decree for partition is a joint declaration of the rights of all the co-sharers interested in the property of which partition is sought, each co-sharer is entitled to obtain possession of the share allotted to him under the decree whether he be plaintiff or defendant. It was therefore necessary for the trial Court also to separate the shares of those defendants who desired that to be done. It may be pointed out that such a decree would fall within the definition of an instrument of partition within the meaning of S. 2 (15), Stamp Act, and that under S. 29 (g), Stamp Act, it is the duty of the Court to decide the proportion of the stamp payable by each person who desires his share separated. Art. 45 is the article under which this stamp duty is levied. It would of course be impossible for any of the parties to execute the decree until the stamp duty is first levied and paid. Whether however it is necessary for the defendants who claim execution under such a stamped decree also to pay court-fees is a more difficult matter and I am doubtful if it arises at this stage of the case.

1. Loke Nath v. Radha Gobinda, 1926 Cal 184=86 I C 765.
2. Debi Sahai v. Tara Chand, 1918 Lah 835=44 I C 185=22 P L R 1918.
3. Wasudeo v. Rupchand, (1905) 28 P R 1905=13 P L R 1905.

As however the matter has been argued, I proceed to discuss this question.

In 29 Bom 79 (4) a defendant to a partition suit applied for execution in his favour of the decree therein. The Judge ruled that he could execute the decree when he had paid court-fees on his share. The decree itself imposed no such term as to court-fees. It was held by a Division Bench of the Bombay High Court that the execution Court was not justified in requiring payment of an additional court-fee on the plaint. In this case, of course, the final decree had been passed without any stipulation as to its not being capable of execution by the defendants until the executing defendant had paid court-fees on his share. Another Division Bench of the Bombay High Court held in 1923 Bom 41 (5) that, where a complete decree had been drawn up on the award and the executing Court dismissed the application for execution on the ground that there was no decree as the necessary court-fees had not been paid, the order dismissing the application for execution was wrong and execution should have been allowed. Here again it will be seen that there was no provision in the decree to the effect that any defendant executing the decree must first pay court-fees on his share. In 42 I C 365 (6) however a Division Bench of the Madras High Court held that if a defendant under a decree or award for partition gets a share of the property allotted to him he must if he wishes to execute the decree pay his share of the court-fee payable on the entire decree. There was practically no discussion of the question by the Judges who decided the case.

The view taken by this Bench of the Madras High Court was not taken by a Division Bench of the Patna High Court in 1926 Patna 154 (7). It was there said that there was nothing in the law which requires a defendant in a partition suit to pay court-fees in order to have his share separately allotted to him. The decree that is finally drawn

up has to be stamped as an instrument of partition under the Stamp Act and except that duty, no other duty is payable by the defendant. Further, another Division Bench of the Madras High Court in 55 Mad. 975 (8) took the same view as the Patna High Court. The Judges stated that they did not agree with the decision in 42 I C 365 (6) and that they preferred the reasoning in the Patna decision. There are also some remarks by Jenkins, C. J. in 29 Bom. 79 (4) which seem to indicate that he was of the same view. He said:

Now ex concessis this court-fee is to be imposed if at all in respect of the plaint, but the plaint is not the defendant's document; so why should he pay any fee on it? We can find nothing in the Court-fees Act which imposes the burden.

This seems to show that he was of the same view as was taken by the Patna High Court and by the Madras High Court in its later decision, though it was unnecessary for him to come to this decision as in the case before him the final decree had been drawn up without any stipulation that it could not be executed until each defendant had paid his share of the court-fee. In my judgment the law is correctly laid down in 55 Mad 975 (8) and 1926 Patna 154 (7). For the reasons given, this appeal must be accepted and the final decree set aside. The case will be remanded to the trial Court to proceed with the case from the stage of the preliminary decree. A new commissioner should be appointed and he should be directed to divide the property into as many lots as the parties desire. Of course any of the parties can elect not to have their shares divided but to leave them undivided, or any group can ask for their share to be treated as joint. When the Court has ascertained this the Commissioner should be instructed after a proper valuation of the property to make proposals for the partition of the various shares desired. So far as possible the share of the appellant Maqbul Ahmed should be given out of houses Nos. 2800, 2801 and 2802. If this is not possible some reasonable arrangement should be made. This remark applies to the others as well. Shop No. 2770 should be treated as already partitioned. As regards the

4. Sadorudin v. Nuruddin, (1905) 29 Bom 79=6 Bom L R 834.

5. Wadilal Ohhaganlal v. Manek Lal Ohhaganlal, 1928 Bom 41=79 I C 489.

6. Nagabushanam v. Pitchayya, 1918 Mad 448=42 I C 865.

7. Hemchandra Mahto v. Prem Mahto, 1926 Pat 154=90 I C 789.

8. Venkata Subhamma v. Ramanadhayya, 1932 Mad 722=199 I C 457=55 Mad 975.

suit instituted by Maqbul Ahmed for partition of house No. 2802 it should be consolidated with this suit and only one partition effected. Parties will bear their own costs here. Other costs in connection with the making of the final decree will be in the discretion of the Court of first instance.

Din Mohammad, J.:—I agree.

K.S./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 5

RANGI LAL, J.

Benarsi Das and another—Plaintiffs—Appellants.

v.

Ali Muhammad and another—Defendants—Respondents.

Second Appeal No. 1708 of 1934, Decided on 28th February 1935, from decree of Addl. Dist. Judge, Amritsar, D/- 20th July 1934.

(a) **Part-performance — Applicability—Doctrine applies to lease—Previous lessee in possession of land under lease and regularly paying rent—Suit by subsequent lessee to dispossess him does not lie.**

The doctrine of part performance applies to a lease. Where a previous lessee holds possession of land under a lease and has been continuously paying the fixed rent to his landlord a suit by a subsequent lessee to dispossess him does not lie, although the previous lessee holds the land under an unregistered deed; 1928 Pat 89; 1925 Rang 118; 1926 Pat 184 and 1928 Oudh 479 Foll. [P 6 C 1]

(b) **Transfer of Property Act (1882), S. 53-A—S. 53-A is intended to have retrospective effect—Obiter.**

Obiter—According to the amended Act 20 of 1929, S. 53-A is intended to have a retrospective effect. The section merely gives statutory recognition to the equitable doctrine of part performance; Bom 881, Foll. [P 5 C 2]

(c) **Registration Act (1908), S. 49—Law laid down in S. 49 is really one of procedure**

The law laid down in S. 49 is really one of procedure and the admissibility of a document in a suit is governed by the law as it exists when the suit is brought; 1933 Lah 1038 Foll. [P 5 C 2]

Chiranjiva Lal Aggarwal for Fakir Chand—for Appellants.

Muhammad Alam—for Respondents.

Judgment.—This judgment will dispose of Civil Appeals Nos. 1708 and 1709 of 1934. They arise out of two suits by a subsequent lessee to dispossess a previous lessee who held two plots of land, under unregistered deeds and was entitled to remain in possession for an indefinite period unless he himself desired to quit on giving six months' notice.

The trial Court held in favour of the plaintiff in each case and decreed the suits. On appeal the learned Additional District Judge held that the doctrine of part-performance applied to the case and dismissed both the suits. The plaintiff has appealed in each case to this Court.

I am clearly of opinion that there is no force in the appeals. It has been clearly found by the learned Additional District Judge that the previous lessee took possession of the land in dispute in each case under his lease and has been continuously paying the fixed rent to the landlords. The learned Counsel for the appellants urged that S. 53-A of the Transfer of Property Act did not apply to leases and in any case had no retrospective effect. These contentions have no force whatever. S. 53-A lays down that notwithstanding that the transfer has not been completed according to law, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession. According to this section, the plaintiff was debarred from enforcing this claim against the defendant when he brought his suits. No question of giving retrospective effect to the section therefore, arises, though I agree with the view taken in 1933 Bom 381 (1) that according to the amended Act XX of 1929, S. 53-A was intended to have retrospective effect. That section merely gives statutory recognition to the equitable doctrine of part-performance which the Courts in India have applied in numerous cases. Along with the enactment of S. 53-A a proviso was added to S. 49 of the Registration Act. It has been held in 1933 Lah 1038 (2) that the law laid down in S. 49 is really one of procedure and the admissibility of a document in a suit is governed by the law as it exists when the suit is brought.

The learned Counsel for the appellant was unable to advance any convincing argument in support of his contention that the doctrine of part performance did not apply to a lease. There are

1. Suleman Haji Ahmad Umar v. P N Patel, 1933 Bom 881=145 I O 557=35 Bom L R 722.

2. Ganda Mal v. Uttam Chaud, 1933 Lah 1038=147 I O 673=35 P L R 167.

numerous cases in which this doctrine has been applied to leases, vide: 105 I C 172 (3); 84 I C 396 (4); 90 I C 822 (5) and 110 I C 875 (6). The decision of the lower Court was, in my opinion, correct. I dismiss both the appeals with costs.

R.M./R.K.

Appeals dismissed.

3. Damodar Prasad v. Masoodan Singh, 1928 Pat 89=105 I C 172=8 P L T 829.
4. Maung Chan E v. Ah Tit, 1925 Rang 118=84 I C 396.
5. Peari Dai v. Naimish Chandra Mitra, 1926 Pat 184=90 I C 822=5 Pat 40=7 P L T 183.
6. Raghubar Dayal v. Sheo Bakhsh Singh, 1928 Oudh 479=110 I C 875.

* A. I. R. 1936 Lahore 6

BECKETT, J.

Chuni Lal — Plaintiff — Appellant.

Maula Bakhsh — Defendant — Respondent.

Second Appeal No. 170 of 1934, Decided on 6th July 1934, from decree of Dist. Judge, Shahpur, D/- 12th October 1933.

* Contract — Consideration — Threat of bringing false suit is not good consideration for contract.

The threat of bringing a false suit is really a form of blackmail and cannot be regarded as a good consideration for a contract. [P 7 C 1]

M owed money to *S* who was on eve of insolvency. To keep this asset out of the hands of the Official Receiver, it was arranged that *M* should execute a bahi entry in which the name of the creditor was not mentioned. The insolvency took place and the bahi was made over to *R*, a relation of *S*. Some time later *R* threatened to bring a suit against *M* on the strength of the document. The matter was compromised and the terms of compromise were that, *M* should execute two bonds for certain sums in favour of *C*. *C* brought a suit against *M* on these bonds.

Held: that the suit did not lie as the contract was void for want of consideration.

[P 6 C 2, P 7 O 1]

Jagan Nath Aggarwal—for Appellant.

Ram Lal Anand — for Respondent.

Judgment. — The facts of this case, as found by the lower appellate Court, are as follows: Maula Bakhsh, the defendant-respondent, owed money to the firm Sant Singh-Sahj Singh of Gojra. Sant Singh-Sahj Singh were on the eve of insolvency. In order to keep this asset out of the hands of the official receiver, it was arranged that Maula Bakhsh should execute a bahi entry in which the name of the creditor was not mentioned. The insolvency took place,

and the bahi was made over to Ram Lal Gulati, a relation of Sant Singh-Sahj Singh. Some time later Ram Lal Gulati threatened to bring a suit against Maula Bakhsh on the strength of this document. The matter was compromised, and the terms of the compromise were that Maula Bakhsh should execute two bonds for Rs. 1500, and Rs. 22 respectively in favour of Chuni Lal, the present plaintiff.

Chuni Lal has brought the present suit on these bonds, alleging that he received the consideration in cash. The lower appellate Court has found that no cash consideration passed, the reason for the execution of the bonds being as given above. It was found that the withdrawal of the present suit by Ram Lal formed a good consideration for execution of the bonds, but it was found that the whole transaction was void as contrary to public policy and the suit was dismissed with costs. Chuni Lal has appealed.

The findings of the lower appellate Court, as to the manner in which the bonds came to be executed, are findings of fact which cannot be challenged in second appeal. The only question to be decided is whether, on the finding that the bonds were executed in the way described above, Chuni Lal's claim should still be decreed. It is argued that, when once the learned District Judge had found that there was good consideration for the bonds, this should have decided the matter and it could not be held that the final transaction was either immoral or void or opposed to public policy. There would be some force in this contention, if the decision of the District Court as to the validity of the consideration is correct. If it is correct, and there is no good consideration, the creditor's claim must clearly fail. In finding that there was good consideration for the bonds in the withdrawal of the threatened suit by Ram Lal, the learned District Judge has relied upon a well-known principle of law. This principle of law was concisely laid down in 32 Ch D 266 (1):

If an intending litigant bona fide forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mis-

1. *Miles v. New Zealand Alford Estate Co.* (1886) 32 Ch D 266=55 L J Ch 801=54 L T 582=34 W R 669.

take to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong.

It is open to question, however, whether this principle applies to the facts of the present case. As already mentioned, Maula Bakhsh did not owe any money to Ram Lal Gulati, nor had he executed any document in his favour. What had happened was that Ram Lal had come into possession of a document executed in favour of someone else in which the creditor's name was not present and was threatening to bring a suit on this document as if it was one executed in his own favour. He could not bring a suit as an assignee, for the fraud would have been apparent. In other words, he was threatening to bring an entirely false suit against Maula Bakhsh. Whatever may be said regarding the state of mind of the person who imagines that he has some right, it is entirely a different matter when a person threatens to bring an entirely false suit, the falsity of the claim being known to both parties. Such a claim must be treated as vexatious, and so falls within the exception to the rule given above. The threat of bringing a false suit is really a form of blackmail, and cannot be regarded as good consideration for the contract.

The contract in suit must thus be regarded as void for want of consideration under S. 25, Contract Act. The appeal fails and is dismissed with costs.

R.M./R.K.

Appeal dismissed.

* A. I. R. 1936 Lahore 7

BECKETT, J.

(Firm) Deokaran Das-Ram Bilas —
Plaintiff—Petitioner.

v.

Debi Sahai—Defendant—Respondent.

Civil Revn. No. 155 of 1932, Decided on 1st July 1935, from order of Sub-Judge, Second Class, Delhi, D/- 29th October 1931.

* (a) Practice—Power of Court—Person on whose behalf suit is instituted becoming of unsound mind during pendency of suit—No finding that suit was not properly instituted—O. 32, Rr. 2 and 15, Civil P. C., do not apply.

Where a suit was instituted in the name of joint family firm consisting of R and his minor son by N, holding a power of attorney on behalf

of R, and it was found during the pendency of the suit that R was of unsound mind but was not so at the time the suit was instituted:

Held: that in the absence of any finding that the suit had not been properly instituted, the Court had no power to order the plaint to be taken off the file.

Held further: that the rules relating to suits on behalf of minor could not be strictly applied under O. 32, R. 15 to the circumstances of the case and that O. 32, R. 2 did not apply as the suit was properly instituted. [P 8 C 1]

(b) Practice—Duty of Court—Party becoming of unsound mind during pendency of suit—Court should appoint next friend to protect his interests.

When a person becomes incapable of protecting his own interests by reason of unsoundness of mind, it is clearly the duty of the Court to take such steps as may be necessary to have them protected. The Court should proceed to appoint a next friend to continue the proceedings on behalf of the lunatic; and probably the best procedure would be to adjourn the proceedings to a reasonable time in order to enable a suitable next friend to come forward. [P 8 C 1]

Qabul Chand for Shamair Chand and Shamair Chand—for Petitioner.

Tek Chand for M. C. Mahajan—for Respondent.

Order.—The present suit was instituted in the name of a joint family firm consisting of Ram Gopal and his minor son. The plaint was signed and presented by Narain Singh, holding a power-of-attorney on behalf of Ram Gopal. After the institution of the suit an objection was raised that Ram Gopal was of unsound mind and unable to look after his own interests. After an inquiry, the trial Court found Ram Gopal, to be of unsound mind and directed the suit to be struck off the file. A petition for revision has been instituted by Narain Singh.

The learned Subordinate Judge appears to have been of opinion that Ram Gopal was of sound mind at the time when the power of attorney was given to Narain Singh. He has given no definite finding on the question whether Ram Gopal was insane at the time when the suit was instituted, but the presumption would be in favour of the continuance of the same state of mind. This has been confirmed by further inquiry on remand. On the other hand, it has been definitely ascertained that Ram Gopal is not of sound mind at the present moment. We must take it therefore that Ram Gopal was of sound mind

at the time the suit was instituted, but that he has since become incapable of protecting his own interests.

In the absence of any finding that the suit has not been properly instituted, it does not seem to me that the trial Court had any power to order the plaint to be taken off. O. 32, R. 15, Civil P. C., provides that the other provisions of the order shall extend to persons found to be of unsound mind so far as they are applicable, but it is obvious that the rules relating to suits on behalf of a minor cannot be strictly applied to the circumstances of the present case. A person of sound mind may become of unsound mind during the pendency of a suit; but a person who is a major at the beginning of the proceedings cannot afterwards become a minor. Moreover, the plaint could only be struck off under R. 2, which does not apply when the suit has been properly instituted. When a plaintiff becomes incapable of protecting his own interests by reason of unsoundness of mind, it is clearly the duty of the Court to take such steps as may be necessary to have them protected. The position is most nearly analogous to that which arises when a next friend dies or retires, for which provision is made in O. 32, R. 11. The Court should proceed to appoint a next friend to continue the proceedings on behalf of the lunatic; and probably the best procedure would be to adjourn the proceedings to a reasonable time in order to enable a suitable next friend to come forward, as is also done in suits in which minors are concerned.

Further complications are liable to arise in this case owing to the unusual fact that the suit has been brought on behalf of a joint Hindu family (under the local rules applicable to this Province), and the family apparently consists only of the plaintiff and his minor son. I do not think, however, that it is necessary to enter into this aspect of the case at this stage, and it will be for the trial Court to make proper provision for the protection of the interests of all concerned. For the reasons given above, I accept the petition for revision and order the proceedings to be restored to the record for further procedure on the lines suggested above. The petitioner will receive his costs in this Court from

the respondent, and other costs will be costs in the cause.

R.W./R.M.

Petition accepted.

* A. I. R. 1936 Lahore 8

YOUNG, C. J. AND SALE, J.

Karam Singh—Convict—Appellant,
v.

Emperor—Opposite Party.

Criminal Appeal No. 628 of 1934, Decided on 11th June 1934, from order of Sess. Judge, Ferozepore, D/- 8th March 1934.

(a) **Confession—Retracted — Oral confession is admissible — Weight of such confession will depend on facts of each case and corroborative evidence—Such confession has not same weight as one recorded under S. 164, Criminal P. C.**

No doubt oral confession is admissible : 1933 Lah 716, *Foll.*

Nevertheless the amount of weight to be attached to an oral confession which has been subsequently retracted must be determined by the facts of each particular case and will depend on the extent to which the oral confession is corroborated in material particulars, by independent evidence. Clearly the same weight cannot ordinarily be attached to an oral confession as to one formally recorded with all necessary precautions under S. 164, Criminal P. C. [P 9 C 2]

* (b) **Criminal P. C. (1898), S. 164—Confessions should be recorded with precaution, and as provided for by S. 164—If otherwise Court will be entitled to presume accused's denial to commit himself in writing.**

Confessions intended to be admitted in evidence against persons accused of criminal offences should ordinarily be recorded with all the precautions and in the manner prescribed by S. 164, Criminal P. C. If this salutary provision of the law is ignored in favour of an oral confession, the trial Court will be entitled to presume, unless satisfied to the contrary, that the reason for adopting the oral method is that the accused has declined to commit himself to a written confession of the nature contemplated by S. 164, Criminal P. C. [P 9 C 2]

Zahur Din Naqshbandi — for Appellant.

Edmunds—for the Crown.

Young, C. J.—Karam Singh has been convicted under S. 302, I. P. C., for the murder of his paramour Mt. Harnamo on or about 27th September 1933 and has been sentenced to death. From this conviction he appeals and the death sentence is before us for confirmation. Mt. Harnamo was the wife of Ujagar Singh (P. W. 13). In the beginning of September her husband had taken her to Tarn Taran to bathe in the Darbar Sahib tank. From there she disap-

peared; and on 13th September Ujagar Singh reported her disappearance to the Tarn Taran police. On 27th September Mr. Pratt (P. W. 2), an Assistant P. W. 1, reported to the police that a corpse was lying near the railway track between Faridkot and Kot Kapura stations. Investigation was undertaken by the police and the body was soon identified as that of Mt. Harnamo, wife of Ujagar Singh. It is not necessary to consider the evidence of identification as this has not been questioned in appeal and there can be no doubt that the corpse was that of Mt. Harnamo. It is proved by the medical evidence that death was due to shock and haemorrhage resulting from eight incised injuries inflicted mostly on the neck and face. There is no doubt therefore that the woman was murdered. The nature of these injuries is consistent with the allegation of the prosecution that they were inflicted by the kirpan (Ex. P-17). The main question for determination is whether the guilt of the appellant has been established as the perpetrator of this murder.

The first clue obtained by the police in this case was the receipt of a letter (exhibit P. K.) purporting to have come from one Hari Singh Giani intimating that Mt. Harnamo had been murdered by one Amar Singh at a spot $1\frac{1}{4}$ miles far from Faridkot railway station. This Amar Singh is P. W. 14. He was suspected because he was alleged to have illicit connexion with the deceased woman and was at first arrested by the police. He was however at a very early stage discharged and no suggestion has been made either in the cross-examination of witnesses or in argument before us that he has any connexion with the crime.

The case against the appellant depends mainly on an oral confession (subsequently retracted) said to have been made by him while in police custody on 27th October 1933 to Bhai Sri Ram Singh, Honorary Magistrate (P. W. 27). During the investigation of the case this Magistrate was, by orders of the Additional District Magistrate, associated with the investigating officer; and it is proved by the evidence of this Magistrate that the appellant pointed out various places alleged to be connected with the crime, and made admissions some of which led to the discovery of

certain facts connected with the crime. The Magistrate did not record the admissions, but made a memorandum of their substance, as orally stated by the accused. This written memorandum was used by the Magistrate to refresh his memory, as permitted by S. 159, Evidence Act, while giving evidence before the Sessions Court.

The admissibility of this confession has not been contested by counsel for the appellant. That such a confession is admissible against the accused has been decided by numerous authorities of this Court, the most important of which is the Full Bench decision 14 Lah 290 (1). In view of this authority we are bound to hold that the oral confession question is admissible. Nevertheless we are of opinion that the amount of weight to be attached to such an oral confession (which, as in this case, has been subsequently retracted) must be determined by the facts of each particular case and will depend on the extent to which the oral confession is corroborated in material particulars by independent evidence. Clearly the same weight cannot ordinarily be attached to an oral confession as to one formally recorded with all necessary precautions under S. 164, Criminal P. C., and we take this opportunity of expressing our considered view that confessions intended to be admitted in evidence against persons accused of criminal offences should ordinarily be recorded with all the precautions and in the manner prescribed by S. 164, Criminal P. C. If this salutary provision of the law is ignored in favour of an oral confession, the trial Court will be entitled to presume, unless satisfied to the contrary, that the reason for adopting the oral method is that the accused has declined to commit himself to a written confession of the nature contemplated by S. 164, Criminal P. C. The result will be that in cases in which it is sought to rely on such an oral confession which has been subsequently retracted, very little weight will be given to the oral confession, unless there is independent evidence to corroborate the confession in such a way as to establish beyond doubt that the confession is a true

1. *Abdulla v. Emperor*, 1933 Lah 716=1933 Cr C 902=145 I C 467=84 Cr L J 1025=14 Lah 290=84 P L R 612 (F B).

statement which really connects the accused with the crime. (After a discussion of the evidence, the judgment proceeded). There was no defence. The accused contented himself with a bare denial of the allegations made against him.

We agree with the learned Sessions Judge, supported by the unanimous opinion of the assessors, that the cumulative effect of this evidence establishes beyond doubt the guilt of the accused under S. 302. The capital penalty is the only appropriate sentence for this cold-blooded calculated murder. We therefore confirm the sentence of death and dismiss the appeal.

S.R. *Appeal dismissed.*

*** A. I. R. 1936 Lahore 10**

ADDISON AND DIN MOHAMMAD, JJ.

(Firm) Jawahar Singh and Sons and others—Plaintiffs—Appellants.

v.

Jamna Das Shikarpuria and others—Defendants—Respondents.

First Appeal No. 1793 of 1930, Decided on 5th November 1934, from decree of Senior Sub-Judge, Rawalpindi, D/- 8th February 1930.

*** Trusts—Creation of—Trusts in favour of some creditors only—Notice of trust given by debtor to other creditors as well—They can also claim to be beneficiaries.**

If a debtor conveys property in trust for the benefit of his creditors, who are not parties to the conveyance and to whom the fact of its execution is not communicated, the conveyance merely operates as a power to the trustees to apply the property in satisfying their claims and inasmuch as the debtor himself is in fact the only cestui que trust, it is revocable by him before the property is so applied, and cannot be enforced by the creditors. A trust in favour of creditors is not, however, revocable if the creditors are parties to assent to the conveyance or if the fact of its execution is communicated to them. [P 12 C 1]

Where therefore a trust is created in favour of some of the creditors, who sign the composition deed and if the deed is communicated to the other creditors, a notice of the trust being given by the debtor before it is executed and by the trustees after its execution to the other creditors, it will also create a trust in their favour and they would be cestui que trust under the deed: 25 Cal 642, *Acton v. Woodgate*, 39 R R 251, *Synnot v. Simpson*, 101, R R 81, *Rel on*.

[P 12 C 1, 2]

Mehr Chand Mahajan and S. N. Bali—for Appellants.

Dev Raj Sawhney and N. L. Sadana—for Respondents.

Addison, J.—Khiala Shah, the proprietor of the firm Dyala Shah-Khiala Shah, in 1923, considered that his firm was unable to meet its liabilities and invited the creditors to take charge of its assets and to liquidate its liabilities. Negotiations took place at Rawalpindi, resulting in the execution of a deed of trust dated 20th December 1923, under which the defendants, who are some of the creditors, were appointed trustees. The plaintiffs are three firms, the partners of all being the same, except that Devi Dyal is not a proprietor of the third firm. In the trust deed it is stated that the signatures of those of the firms' creditors, who had accepted the composition deed, existed on Sch. 6, while it is further stated that Khiala Shah had given in detail an account of the money due to all creditors in Sch. 4. The trustees took charge of the trust property and commenced proceedings under the deed. The plaintiffs, instead of accepting the trust in the beginning, filed an application to have Khiala Shah's firm declared insolvent. This application is dated 19th March 1924. It was dismissed on 29th August 1924. In the meantime the trustees issued a notice to all creditors to appear before them and get their accounts compared and settled. It was stated that this should be done on or before 5th February 1924 so that they might participate in the partial dividend about to be distributed. Owing to the attempt to get the firm declared insolvent the plaintiffs did not appear before the trustees but later, namely, on 28th June 1925, did apply to the trustees to send them their proportionate share of the dividends. The trustees replied on 11th July 1925 asking the plaintiffs to come and settle their accounts with them.

The plaintiffs refrained from doing so and finally instituted the present suit on 17th February 1928 against the trustees for rendition of accounts, enforcement of the trust and recovery of the amount that might be found to be due to the plaintiffs. They stated in the plaint that it was the duty of the defendants to render an account relating to the administration of the trust to the plaintiffs as they were some of the persons for whose benefit the trust was created. They claimed that the amounts due to the three firms on 2nd December 1927

were Rs. 19,641-10-9, Rs. 1,368-2-0 and Rs. 1,072-5-0; total, Rs. 22,082-1-9. They further claimed that Khiala Shah entered them in the deed of trust itself as creditors for the sums of Rs. 11,300, Rs. 1,000 and Rs. 847-4-0 respectively, and that this admission was binding upon the trustees. They also claimed to be treated in the same way as the creditors to whom payments had already been made. There was an allegation that the trustees had been negligent in their duties in certain respects.

The defendants denied the right of the plaintiffs to demand an account as they were not beneficiaries. They admitted their liability to the debtor Khiala Shah only, but stated that they were willing to schedule the debts of the plaintiffs if proved. They added that the plaintiffs had refused to do so. They denied the plaintiffs' right to be treated on an equal footing with the other creditors because of their obstinacy and because some of the dividends had already been paid. Negligence was denied.

The trial Judge held that there was only one beneficiary, Khiala Shah himself, the trust being created for his benefit only. He also held that the creditors who had signed Sch. 6 in token of their agreement, might also claim to be beneficiaries, but that it could not be argued that the plaintiffs, who had not signed, were. For these reasons the Judge held that the plaintiffs could not rely upon the admission of Khiala Shah in the trust deed and that it was their duty to prove to the satisfaction of the trustees what was due to them. This they had never done and had not even done in Court. He therefore dismissed the suit leaving the parties to bear their own costs.

The suit had been valued for the purposes of Court-fee and jurisdiction at Rs. 2,100. The plaintiffs accordingly appealed against the decree of the trial Judge to the District Judge. He found that the valuation for purposes of jurisdiction was more than Rs. 5,000 and he returned the memorandum of appeal for presentation to the proper Court.

Thereupon the plaintiffs presented the appeal to this Court and at the same time presented a petition on the revision side against the order of the District Judge returning the memorandum

of appeal. This Revision Petition No. 483 of 1930 came before a Bench of this Court on 23rd February 1932. This Bench dismissed the petition, pointing out that the plaintiffs claimed payment of a sum of Rs. 22,082 in full or pro rata on the realisations made by the trust. Further they claimed accounts; a personal decree against the trustees and the removal of the trustees. It had been disclosed and admitted before the Bench that the trust realised and paid a dividend of five annas seven pies to the creditors who had proved their claims, this being on principal alone. As the claim therefore of the plaintiffs, whether good or bad, was for at least five annas on Rs. 22,000, the jurisdictional value was over Rs. 5,000 and the appeal lay to this Court. It was added that when and if the stamp had been made good and the appeal presented, the question of limitation would be considered. Thereafter the plaintiffs paid Court-fees on Rs. 6,875 being what they stated they were entitled to on account of past dividends. It has been held by another Bench that the appeal to this Court was within time. The appeal is therefore before us to be decided on the merits only to the extent as to whether the plaintiffs are entitled to the sum of Rs. 6,875 or less on account of past dividends.

The terms of the deed have already been partly given. Certain other terms must now be set out. If any other debt to the extent of Rs. 2,000 was shown by the books to be due by Khiala Shah, the Committee were to pay the same. If however a debt of more than Rs. 2,000 was proved to be due by him, the trustees were not liable but Khiala Shah himself was responsible for payment thereof. Again, the trustees were authorised to sell his moveable and immovable property and recover the debts due to him in any manner they liked. Similarly, they were to distribute the money realised rateably amongst his creditors. The proposal of the committee, whom he consulted (to which he also agreed) was that principal amounts should be proportionately paid to the creditors without interest. But the committee was authorised to make payments to his creditors in whatever way it liked. The above is contained in paras. 4 and 5 of the deed. Two of the debts due to the

plaintiffs are specifically set forth in paras. 13 and 14 of the deed. Khiala Shah admitted that Rs. 11,300 on account of principal, without interest, was due by him to Jawahar Singh and Sons of Lahore. He added that if it was proved that he owed more than the above amount as principal to Jawahar Singh and Sons, he himself and not the committee would be responsible for payment thereof. Similarly, he admitted about Rs. 1,000 to be due to Jawahar Singh-Kartar Singh Babar of Amritsar. If the principal was proved to be more than the said amount, he himself was to be responsible for the payment of the additional amount. The third amount is in the schedule. Again, in para. 15 it was said that the debts should be proportionately paid to all his creditors alike. The law relating to these trust deeds is now well settled. In Halsbury's Laws of England, Vol. 28, para. 71, at p. 38, it is said that :

If a debtor conveys property in trust for the benefit of his creditors, who are not parties to the conveyance, and to whom the fact of its execution is not communicated, the conveyance merely operates as a power to the trustees to apply the property in satisfying their claims; and inasmuch as the debtor himself is in fact the only cestui que trust, it is revocable by him before the property is so applied, and cannot be enforced by the creditors. A trust in favour of creditors is not however revocable if the creditors are parties to or assent to the conveyance, or if the fact of its execution is communicated to them.

It follows that a trust was created in favour of the creditors who signed Sch. 6, and if the deed was communicated to the other creditors, it would also create a trust in favour of them. This seems to have been the view taken in 25 Cal 642 (1). In 39 R R 251 (2) it was held that :

If property be conveyed by a debtor in trust for the benefit of creditors, who are neither parties nor privy to the deed, the deed merely operates as a power to the trustees to apply the property in payment of debts, and such power is revocable by the debtor.

At p. 253 of the report the question was considered whether a communication by the trustees to creditors of the fact of such a trust would not defeat the power of revocation by the debtor, and it was held that it would. In 101 R R

81 (3) at p. 89, where the subject is again discussed, it was said that :

When the creditor is a party to the arrangement, the presumption then is that the deed was intended to create a trust in his favour, which he therefore is entitled to call on the trustees to execute. So even though he be not made a party, if the debtor has given him notice of the existence of the deed, and has expressly or impliedly told him that he may look to the trust property for payment of his demand, the creditor may thereby become a cestui que trust and may acquire a right as such, just as if he had been a party and had executed the deed.

Notice of the trust was given by the debtor before it was executed and by the trustees after its execution to the plaintiffs and it must be held that they are cestui que trust under the deed. It is impossible however to understand the attitude of the present plaintiffs in refusing to show their books to the trustees so that the accounts could be compared, or to prove these accounts in Court when an opportunity was offered to them to do so. In fact they filed in Court a complete copy of their accounts taken from their books but did not proceed to prove those accounts. Had they done so the case would probably have ended in their favour partially, at any rate, in the Court below and this appeal would have been unnecessary. This being the state of the law, it must be held that the appellants are beneficiaries as well as creditors under the trust deed, but not to the extent they claim in their plaint, for Khiala Shah has only admitted the principal debts to be Rs. 11,300, Rs. 1,000 and Rs. 847-4-0. It is not quite clear whether the trustees have paid dividends merely on the principal amounts admitted or whether they have also included interest. If the dividends have been paid only on the principal sums, a dividend of five annas seven pies would come to about Rs. 4,588 on Rupees 13,147-4-0. The claim of the plaintiffs-appellants is for Rs. 6,875. The learned counsel appearing for the appellants has stated before us that he does not now claim on behalf of his clients that the dividends already distributed to other creditors should be reduced or that they should be made to refund anything. He is content that his clients be allowed their pro rata share of the dividends already paid, out of the property still re-

1. William Robert Pink v. Moharaj Bahadur Singh, (1898) 25 Cal 642=2 C W N 469.

2. Acton v. Woodgate, (1833) 39 R R 251=2 Myl & K 492=3 L J (N S) Ch 83.

3. Synnot v. Simpson, (1854) 101 R R 81=5 H L C 121.

remaining to be sold or the debts still remaining to be realised. He has also agreed that before any other dividend is declared his clients will go into the accounts with the trustees. We accordingly accept this appeal to the extent of decreeing in favour of the plaintiffs the sum to which they are entitled under the trust deed as their share of the dividends already declared. This sum probably lies between Rs. 4,588 and the sum of Rs. 6,875, and it will be the duty of the trial Court in execution proceedings, if necessary, to work out the amount, which will depend upon the principle adopted by the trustees with regard to the other debts. This sum which is found due will be paid out of the assets lying with the trustees or out of the proceeds of property still to be realised and the past distribution will not be disturbed in order to pay it. It will also be added in the decree that before the plaintiffs are entitled to future dividends, they must have their accounts compared by the trustees. As the appeal has been rendered necessary by the plaintiffs' own obstinacy, parties will bear their own costs.

R.W./R.M.

*Appeal accepted.***A. I. R. 1936 Lahore 13**ADDISON, AG. C. J. AND DIN
MOHAMMAD, J.*Bishen Singh and others—Plaintiffs—*
Appellants.

v.

Bakhshish Singh and others—Defen-
dants—Respondents.

Letters Patent Appeal No. 64 of 1932, Decided on 10th June 1935, against order of Dalip Singh, J., D/- 14th October 1932.

(a) *Res judicata*—Representative suit—Public or private right claimed in common with others—Person may litigate bona fide and bind by S. 11, Civil P. C., others interested, by findings, though others not named—Under O. 1, R. 8 with Court's leave person may sue or be sued for others interested—But formalities provided must be observed—Failure binds none but himself.

A person may litigate bona fide in respect of a public or private right claiming it in common for himself and others and by virtue of S. 11, Civil P. C., bind all persons interested in such right by the findings arrived at in his suit. In such cases it may not be necessary even to name the persons expressly in the suit. Or on the other hand, under O. 1, R. 8, he may obtain the leave of the Court to sue or be sued on behalf of or for the benefit of all persons so interested. In

these circumstances he shall have to observe all the formalities laid down in the section, and if he fails to do so, persons other than himself will not be bound by any decision arrived at in the suit. [P 14 C 1, 2]

* (b) *Res judicata*—Suit for ejectment by lambardar proprietor for himself and others interested—Suit dismissed on merits—Other proprietors suing for same relief under O. 1, R. 8—Plea of *res judicata*—Test—Previous suit bona fide and no injury caused to plaintiffs in next suit by omission to comply with O. 1, R. 8—Next suit held barred.

A suit for ejectment was instituted by a proprietor of a village who was also a lambardar, on behalf of himself as well for other persons interested in the matter of the suit. The suit was dismissed on the merits. Afterwards two other proprietors of the village instituted a suit against the same defendants and for the same relief on behalf of the whole proprietary body under O. 1, R. 8, Civil P. C. It was contended that the subsequent suit was barred as *res judicata* :

Held : that the test to be applied was whether the previous litigation was bona fide and whether any injury had resulted to the plaintiffs in the subsequent suit on account of the omission to comply with the provision of O. 1, R. 8 in the former suit. The previous litigation could not be said to be not bona fide nor had any injury resulted to the present plaintiffs by omission to comply with O. 1, R. 8. Hence findings in previous suit barred the subsequent suit on ground of *res judicata* : 1920 *Mad* 568, *Rel. on.*

[P 14 C 2; P 15 C 1]

R. C. Soni—for Appellants.*Iqbal Singh and Yashpal Gandhi* for
Faqir Chand—for Respondents.

Din Mohammad, J.—This is a Letters Patent appeal from the order of Dalip Singh, J.

The facts bearing upon the point of law involved in this case may shortly be stated. The defendants-respondents built a wall on a piece of the village common land which formed part of the abadi. Thereupon one Nand Lal, who, besides being a proprietor in the village, was a lambardar as well, instituted a suit for the ejectment of the defendants and expressly alleged in the plaint that he was claiming that relief for himself and for all the other persons interested therein. The defendants resisted the suit on the ground inter alia that Nand Lal was incompetent to sue alone. The Subordinate Judge however decided this point against the defendants, but dismissed Nand Lal's suit on the merits. On appeal the case was remanded, but even the Second Subordinate Judge, to whom the case was sent, again dismissed it on the merits. The appeal against this order abated on 13th December 1927. On 21st March 1929, the suit out of

which this appeal has arisen was instituted by two other proprietors of the village on behalf of the whole proprietary body under O. 1, R. 8, Civil P. C., impleading Nand Lal as a co-defendant along with the other offending defendants. The contesting defendants contended inter alia that the suit was barred by limitation and by the rule of res judicata. Without framing any issues on the merits of the case the Subordinate Judge resolved these two pleas into issues and without definitely deciding the question of limitation came to the conclusion that the suit was barred by the rule of res judicata on the ground that the previous suit had been instituted in a representative capacity. On appeal the Senior Subordinate Judge disagreed with this conclusion and remanded the case for disposal in accordance with law. From this order the defendants took an appeal to this Court which was heard by Dalip Singh, J. He accepted the appeal, set aside the order of the Senior Subordinate Judge and dismissed the suit. It is from this order that the present appeal has been preferred. The sole question for determination in this case is whether Nand Lal's suit was a representative suit so as to bar the present suit by its findings. In order to arrive at a decision on this point it will be necessary to refer to Expl. 6 of S. 11, and O. 1, R. 8, Civil P. C., which for facility of reference are produced below:

Explanation 6, reads as follows:

Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Order 1, R. 8, says :

Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. . . .

It is contended on behalf of the appellants that these provisions of law are not independent of one another and that Expl. 6 is controlled by O. 1, R. 8. Be that as it may, as we read the above provisions we find that a man may litigate bona fide in respect of a public or private right claiming it in common for himself and others and by virtue of S. 11, Civil P. C., bind all persons interested in such right by the findings arrived at

in his suit. In such cases it may not be necessary even to name the persons expressly in the suit. Or, on the other hand, under O. 1, R. 8, he may obtain the leave of the Court to sue or be sued on behalf of or for the benefit of all persons so interested. In these circumstances he shall have to observe all the formalities laid down in the section, and if he fails to do so, persons other than himself will not be bound by any decision arrived at in that suit.

Counsel for the appellants had relied on 56 Mad 657 (1), but that judgment does not go so far as to support the appellants' contention entirely. In the first place in that case, as will appear from p. 672, of the report, no reference to representation had been made at the time of the institution of the suit and their Lordships observed that this omission could not be regarded as a mere question of form. Secondly, at p. 677 while considering 43 Mad 487 (2), their Lordships observed that :

They would not exclude the possibility of a decree being within the benefit of the explanation where the litigation having been bona fide the omission to comply with the conditions of the rule has been inadvertent, and no injury from the omission has been sustained by the plaintiff in the second suit.

The Madras judgment that was referred to by their Lordships laid down as follows :

Explanation 6, to S. 11, Civil P. C., applied not only to cases where leave of Court has been granted under O. 1, R. 8, but also to cases where some of the persons claiming a private right in common with others litigate bona fide on behalf of themselves and such others.

It is significant that this judgment was not overruled by their Lordships of the Privy Council.

In our view therefore the test that is to be applied in such cases is whether the previous litigation was bona fide and whether any injury had resulted to the plaintiffs on account of the omission to comply with the provisions of R. 8 of O. 1. This will be a question of fact depending on the circumstances of each case as it arises. Judging by this standard, we are not in a position to hold that Nand Lal's litigation was not bona fide and that injury had been sustained by the present plaintiffs on account of his

1. Kumaravelu Chettiar v. Ramaswami Aiyar, 1933 P C 183=143 I C 655=60 I A 278=56 Mad 657 (P C).

2. Gopalacharyulu v. Subbamma, 1920 Mad 568=55 I C 984=38 M L J 493=43 Mad 487.

not having applied under O. 1, R. 8, Civil P. C. As stated above, it was expressly mentioned in his plaint that the suit was being instituted for the benefit of the entire proprietary body of the village. Not only this, both Bishen Singh and Bansil, who have now started the litigation and undertaken to contest it on behalf of the entire proprietary body, themselves appeared as witnesses in the previous suit as P. W. 2 and P. W. 4, respectively, and supported the plaintiffs. It cannot reasonably be contended on their behalf therefore that they had been left in the dark as to the institution of the previous suit or as to the nature of the relief claimed by Nand Lal. Had they not been satisfied with its conduct, they would have at once taken steps in the matter and applied for being made parties to the suit. Not having done so, the only irresistible conclusion is that Nand Lal was prosecuting the previous case in a bona fide manner and was completely safeguarding the interest of the entire proprietary body. We are rather disposed to think that the present litigation has not been started in a bona fide manner and is a mere attempt to avoid the previous judgment which, as stated above, had been delivered twice against the then plaintiff Nand Lal on full consideration of the facts of the case.

In these circumstances we affirm the decision of Dalip Singh, J., and dismiss this appeal. We however make no order as to costs.

S.R.

*Appeal dismissed.***A. I. R. 1936 Lahore 15**

SKEMP, J.

Mohammad Shafi—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 273 of 1935, Decided on 20th May 1935, from order of Magistrate, First Class, Sialkot, D/- 9th February 1935.

(a) Criminal Trial—Sentence—Offences under Ss. 460 and 366 read with S. 149, I. P. C.—No harm done to girl—Girl rescued—Grievous injury to one person caused—Very heavy sentence held not proper.

The accused were found guilty of offences under Ss. 460 and 366 read with S. 149, I. P. C., and were sentenced to very long terms of imprisonment. No harm was caused to the abducted girl as she was soon rescued and the only harm

done was grievous injury caused to one of the inmates of the house wherefrom the girl was abducted during the transaction :

Held : that the case did not call for very heavy sentences and that they should be reduced

[P 16 C 2]

(b) Criminal Trial—Sentence—Lorry engaged for abducting girl—Driver ignorant of purpose—Not participating in crime in initial stages—Becoming particeps criminis afterwards—Compelled to continue by circumstances—One year's imprisonment reduced to six months.

A motor lorry was engaged for the purpose of abducting a girl. The driver of the lorry was ignorant of the criminal purpose as the lorry had been engaged through a contractor. He did not take any part in the crime in its initial stages but became particeps criminis after the girl, who was screaming, was brought to the lorry. He however continued to do his part of the work :

Held : that the driver was in a difficult position and might have felt bound to carry on because of circumstances, hence sentence should be reduced from one year's imprisonment to that of six months.

[P 16 C 2]

R. L. Anand II—for Appellant.

Nazir Hussain—for the Crown.

Judgment.—The appellants have been convicted under Ss. 460 and 366 read with S. 149, I. P. C., and sentenced to various long terms of imprisonment. They have appealed as follows : Kartar Singh and Ujagar Singh through Sardar Jowahir Singh ; Gopal through Mr. Sachdev ; Sohan Singh and Diwan Singh through Mr. J. G. Sethi ; Rahim Bakhsh through Mr. Bashir Ahmad ; Mahommad Shafi through Mr. Ram Lal Anand II ; and the other three appellants, Labh Singh, Allah Ditta and Piara Singh, through the Superintendent of Jail. The Crown has been represented by Chaudhri Nazir Hussain. The case for the prosecution is that the principal appellant Kartar Singh had made overtures for the hand of Mt. Budhan, the abducted girl, to her father Kesar Singh, lam-bardar of Badiana in the Sialkot District. These overtures were rejected although Kartar Singh and his relations including his uncle Diwan Singh pressed the suit. On the night between 19th and 20th October a party of men suddenly appeared in the house of Kesar Singh, which is on the outskirts of the village, overpowered the inmates and carried off Mt. Budhan by force from her mother's bed in which she had taken refuge. Her father Kesar Singh was knocked senseless by a blow on the head with a chavi. Other persons in the

house received minor injuries. The girl was dragged off naked and screaming to a waiting motor lorry where she was given some clothes. The lorry then drove off at considerable speed towards Kartar Singh's village Trigri in the Gujranwala District, which is about 25 miles away. But it so happened that where the road crossed the canal bridge at Daska, its way was blocked by another motor lorry. This motor lorry was conveying a party of police and notables, which had effected a raid and search for stolen property and was returning home. The abductors' lorry had to stop. The girl seeing policemen in uniform called out and the police party rescued her and captured most of the people in the lorry. According to the prosecution two or three escaped.

This is the case for the prosecution. I have not the slightest doubt that in its main outlines it is true and that all the people captured on the spot were rightly convicted. Sohan Singh and Diwan Singh were not so captured and were not mentioned in the memorandum which the Sub-Inspector in charge of the party prepared at the spot. They are named in the first information report lodged by Mt. Jassi, mother of the girl, at their local police station. Although they were well known to the inmates of the house, nothing specific is assigned to them beyond beating Kesar Singh. Sohan Singh is the brother of Kartar Singh, Diwan Singh is his uncle, and the probability is that they were implicated on a suspicion that they were privy to the plot; but that is not proof that they were actually concerned in the abduction. I accept their appeals and acquit them. On behalf of Ujagar Singh it was urged that he was a chance passenger in the lorry. He was unfortunately found in possession of an unlicensed pistol. It was also urged that Gopal was one of the bystanders and arrested under mistaken identity, and a similar allegation was made about Rahim Bakhsh. Rahim Bakhsh however belongs to Kartar Singh's village.

In my opinion, except Sohan Singh and Diwan Singh, the appellants were rightly convicted; but the sentences are much too severe. Kartar Singh is a man who might have married Mt. Budhan. Her age is given as 18, his age as 30; he is said to be unmarried and

he is a distant connexion by marriage of Kesar Singh. Mt. Budhan was asked in cross-examination whether he had not given Rs. 200 to her father for betrothal; but this was denied and there is no evidence either as to betrothal or as to the money paid. There is nothing at all to support a discreditable written statement, which Kartar Singh put in, to the effect that he was on intimate terms with the girl who had sent for him to take her away. Nevertheless, except for the grievous injury to Kesar Singh, no great harm was done and the girl was rescued. The Magistrate sentenced Kartar Singh to a total of ten years' rigorous imprisonment, those who went in the house to seven years' rigorous imprisonment and those who stayed outside to guard against surprise to three years' rigorous imprisonment. I think these sentences are too severe, and reduce them as follows: Kartar Singh, the principal appellant, to two years' rigorous imprisonment; Labh Singh, his uncle, who went inside, to eighteen months' rigorous imprisonment; the others, except Mohammad Shafi, the lorry driver, to one year's rigorous imprisonment. The case of Mohammad Shafi is different. He stayed with the lorry and took no active part in the earlier stages of the abduction. There is evidence that the lorry was hired through a contractor by Kartar Singh and that the owner of the lorry ordered Shafi to take it. It is quite probable that before the lorry started on its journey, he did not know for what purpose it was required. But when it halted at dead of night at the village, of Badiana, still more when a naked screaming girl was dragged to the lorry, he became particeps criminis. Still he was in a difficult position and may have felt bound to carry on. I reduce the sentence in his case to six months' rigorous imprisonment.

S.R.

*Sentence reduced.***A. I. R. 1936 Lahore 16**

BHIDE, J.

Radhe Sham Beopar Co. Ltd., Okara
—Appellant.

v.

Prabh Dayal-Ram Dhan — Respon-
dant.

Misc. First Appeal No. 1565 of 1933,
Decided on 27th June 1934.

Company—Liquidation proceedings — Application for shares — Allotment not made within reasonable time held to be invalid—Letter for allotment money held highly suspicious since company resolved to go into liquidation next day.

R applied for the shares on 10 August 1930; and a sum of Rs. 250 was paid along with the application. The allotment was said to have been made on 17th September 1931. A letter was also issued to R on 2nd March 1932 asking him to pay allotment money as well as the call money and the company resolved to go in liquidation on 3rd March 1932 :

Held : that R was not the purchaser of the shares of the company since shares were not allotted to them till 17th October 1931 and also because no notice of allotment was ever sent to R. Moreover the letter calling for an allotment money was highly suspicious in view of the fact that the company resolved to go into liquidation the next day : *Ramsgate Victoria Hotel Co. Ltd. v. Montefiore*, 1 Ex. 109, *Rel. on and Land Loan Mortgage Etc. Co., In re*, (1885) 54 L. J. Ch. D. 550, *Dist.* [P 17 C 2]

Anant Ram Khosla—for Appellants.

Asa Ram Aggarwal — for Respondent.

Judgment.—This is an appeal from an order of the District Judge, Montgomery, in proceedings relating to the liquidation of a company named the Radhe Sham Beopar Company Limited. The Liquidators sought to place the respondents on the list of contributories on the ground that they were purchasers of certain shares. The respondents objected stating that the shares had never been validly allotted to them. The learned District Judge has upheld this objection and from this decision the present appeal has been preferred.

The facts alleged by the Liquidators were that the respondents had applied for the shares, on 10th August 1930 and a sum of Rs. 250 had been paid along with the application. The allotment is said to have been made on 17th October 1931. On 2nd March 1932 a letter was issued to the respondents asking them to pay the allotment money as well as the call money. They at once repudiated the allotment stating that it was fraudulent and that they had received no notice about it earlier. The main point for decision was whether the shares had been allotted to the respondents according to law. The learned District Judge has held that the allotment ought to have been made within a reasonable time and as it was not admittedly made till 17th October 1931, it was invalid. In support of this decision

1936 L/3 & 4

he has relied on 1 Ex. 109 (1). The learned counsel for the appellants sought to distinguish this ruling on the ground that it applies only to a going concern and not to a company which has gone into liquidation. In support of this argument he has relied on 54 L J Ch D 550 (2). But in that case the shareholder had been communicated the allotment before the liquidation proceedings and had not repudiated it within a reasonable time. The decision in 1 Ex. 109 (1) is not based on any such distinction, as far as I can see, as the learned counsel for the appellant has sought to draw. I further note that the liquidators have produced no evidence at all to show that any notice of allotment was sent on 17th October 1931.

It was urged that the names of the share-holders appeared on the register of the company, but it is not shown when their names were brought on the register. No evidence was led by the Liquidators and the letter which was issued on 2nd March 1932 calling for an allotment money appears to be highly suspicious in view of the fact that the company resolved to go into liquidation on 3rd March 1932, i. e., the next day.

In my opinion the decision of the learned District Judge is correct and I dismiss the appeal with costs.

R.W./R.K.

Appeal dismissed.

1. *Ramsgate Victoria Hotel Co. Ltd. v. Montefiore*, (1866) 1 Ex 109=4 H & C 164=35 L J Ex 90=14 W R 335=13 L T 715.
2. *In re, Land Loan Mortgage etc. Co.*, (1895) 54 L J Ch D 550.

A. I. R. 1936 Lahore 17

COLDSTREAM AND JAI LAL, JJ.

Phuman Singh and others—Plaintiffs—Appellants.

v.

Mt. Kishno—Defendant—Respondent.

Second Appeal No. 636 of 1930, Decided on 22nd February 1935, from decree of Dist. Judge, Ludhiana, D/- 24th February 1930.

Custom (Punjab) — Widow — Forfeiture—Ludhiana Jats—No forfeiture for unchastity if husband's house is not left.

Among the Hindu Jats, to which class the Ludhiana Jats belong, mere unchastity involves no penalty of forfeiture of a widow's right to her husband's estate so long as she does not leave her husband's house : 25 P. R. 1891, *not foll.* [P 18 C 1]

Badri Das—for Appellants.

Inder Dev for *Achhru Ram*—for Respondent.

Coldstream, J.—Chanda Singh, a Khahgoora Jat of Ludhiana Tahsil, died about 1918, leaving a widow Musammat Kishno who took possession of his property, about 36 bighas of land, a house and two residential sites. On 9th November 1926, Phuman Singh and thirteen other collaterals of Chanda Singh instituted a suit for possession of Chanda Singh's land alleging that Musammat Kishno had forfeited her right by her unchastity. The trial Court decreed the suit, but on appeal the District Judge of Ludhiana, while holding it established that Musammat Kishno had been unchaste (she had given birth to an illegitimate child some months before the suit) dismissed the suit because he found it not proved that Mt. Kishno had left her husband's house. Against this decision the collaterals have appealed, the learned District Judge having granted a certificate on the question whether Mt. Kishno can be deprived of her widow's estate although she has not left her husband's house.

It is contended by Mr. Badri Das that the lower Court's decision is not justified by the evidence on the record. He relies mainly on a *riwaj-i-am* compiled in 1882 from information given by tribes of the locality to which the parties belong which declares the custom to be that an unchaste widow is deprived of her right in her deceased husband's estate and goes on to define an unchaste widow as one who is habitually unchaste and gives birth to illegitimate children. He has also referred us to the often-cited ruling, 25 P R 1891 (1) and to two judgments of Munsifs delivered in 1922 and 1895 (Suit No. 79 of 1922 and Suit No. 180 of 1895). In reply reliance is placed by the respondent's Counsel on the *riwaj-i-am* prepared at the time of the settlement of 1911. The rule there stated (in answer to Question No. 42) is that among Hindu Jats mere unchastity involves no penalty:

So long as the widow does not leave her husband's house she is safe; on leaving his house she is generally dispossessed.

This is important evidence raising a presumption against the appellants. We have been led through the evidence of *I. Sobhi v. Bhana*, (1891) 25 P R 1891,

both sides by the appellants' Counsel and I find that there is a good deal of evidence, including several judicial decisions, going to show that the custom was rightly declared in this *riwaj-i-am* and that this evidence is much more weighty than that put forward by the appellants. Seeing no sufficient reason for interfering with the decision of the Court below I would dismiss this appeal with costs.

Jai Lal, J.—I agree.

S.R.

Appeal dismissed.

A. I. R. 1936 Lahore 18

ADDISON AND SALE, JJ.

Narain Singh and *another*—Defendants—Appellants.

v.

Waryam Singh and *others*—Plaintiff and Defendants—Respondents.

Misc. Second Appeal No. 1811 of 1929, Decided on 29th June 1934, from order of Addl. Dist. Judge, Ferozepore, D/- 20th April 1929.

(a) Auction-purchaser—He is representative of judgment-debtor.

The auction-purchaser cannot be looked upon as the successor-in-interest of the decree-holder in any sense. He is the representative of the judgment debtor: 1926 Lah 184, *Foll.* [P 20 C 2]

(b) Practice—Inconsistent pleas.

Litigants cannot be permitted to take up inconsistent pleas to suit their own purpose. [P 20 C 2]

(c) *Res judicata*—Obiter dicta are not *res judicata*.

Where the opinion expressed in a case is really obiter for the purposes of that case, that opinion in that case does not operate as *res judicata*. [P 21 C 1]

Nawal Kishore—Appellants.

Faqir Chand Mital—for Respondents.

Sale, J.—This second appeal arises out of a suit for possession by redemption of 515 kanals, 9 marlas of land without payment or on payment of such amount as the Court may deem just. The area in suit was part of a plot of 4890 kanals, 8 marlas mortgaged by Ganda Singh, deceased, father of the plaintiff, to Hazari Mal, deceased, father of defendant 3, by deed dated 12th April 1882. As a result of a series of transactions in respect of this land, which will be recited in due course, the area in suit, 515 kanals, 9 marlas, came into the possession of Jaimal Singh, deceased father of defendant 1 in 1905. The defence is, briefly stated, that Jaimal Singh had

purchased this land in full proprietary rights in execution of a decree on 6th January 1905 that the plaintiff's mortgage rights in this land had by then been extinguished and that the suit for possession by redemption brought by the plaintiff is not maintainable. This plea was upheld by the learned Senior Subordinate Judge who dismissed the suit accordingly. On appeal the learned additional District Judge reversed this finding holding that the relationship of mortgagor and mortgagee in respect of the said land still subsists and that the rights and liabilities of the parties must be determined according to the terms of the mortgage deed of 1882 executed by the plaintiff's father in favour of Hazari Mal. He accordingly accepted the appeal and remanded the case under O. 41, R. 23, Civil P. C. for a fresh decision on the merits. The sole point urged in this second appeal is that Jaimal Singh, deceased father of defendant-appellant Narain Singh, had purchased the land in dispute in full proprietary right at a Court auction sale in 1905 and that the redemption suit by the plaintiff is not, therefore maintainable.

It must be mentioned here that in 1918 the present plaintiff, who is the posthumous son of Ganda Singh, the mortgagor of 1882, sued for possession of a total area of 972 kanals, 16 marlas, which included the land now in suit and secured a decree from the then Senior Subordinate Judge. On appeal the District Judge confirmed the Senior Subordinate Judge's decree in respect of an area of 457 kanals, 7 marlas, but so far as the area of 515 kanals, 9 marlas now in suit was concerned, he accepted the appeal, on a technical ground to which reference will be made in due course. The plaintiff did not sue for possession by redemption on payment of the mortgage charges, but for possession by avoidance of the mortgage on the strength of a decree obtained by his elder brother Asa Singh on 11th August 1900 as representing the reversioners of the original mortgagor Ganda Singh (since deceased), to the effect that this mortgage did not affect their reversionary rights. The District Judge decided to leave the question as to the plaintiff's title to the 515 kanals, 9 marlas, which he held had not been established in that suit, undecided for determination in a regular suit for re-

demption "if the plaintiff is competent to sue for redemption." The decision of the District Judge was confirmed in second appeal to this Court by a Division Bench on 26th April 1928 (Civil Appeal No. 2155 of 1924). The litigation that has given rise to this appeal is a consequence of the decision in the previous case to leave undecided the question whether the plaintiff was competent to sue for redemption of the particular area now in suit.

It is now necessary to recite the material circumstances leading up to the transaction by which Jaimal Singh, father of defendant 3, obtained possession of the land in suit on 6th January 1905. It has already been stated that Ganda Singh, father of the plaintiff, mortgaged an area including the land in suit to Hazari Mal, predecessor-in-interest of one of the defendants-appellants by deed dated 12th April 1882. In 1885 Nihal Singh, predecessor-in-interest of one of the defendants-appellants in execution of a decree, attached the mortgagee rights of Hazari Mal embodied in the mortgage deed of 1882, and later himself purchased these mortgagee rights over a total area of 1076 kanals, 19 marlas (including the area now in suit). Thus Nihal Singh became the mortgagee of this land under the mortgage of 1882. On 20th April 1889 Nihal Singh obtained a decree on this mortgage. The land was sold in execution; and was purchased (after Nihal Singh's death) by his sons Ishar Singh and Mangal Singh. On 20th October 1897 Ishar Singh and Mangal Singh duly obtained possession of the mortgaged area of 1076 kanals, 19 marlas, including the land now in suit. On 28th March 1894, the mortgagee rights of the deceased Nihal Singh under the mortgage of 1882, together with his rights under the decree of 1889, were mortgaged to Kishore Chand and Kanshi Ram Khatris. On 13th March 1897 Kishore Chand and Kanshi Ram sued Nihal Singh's sons Ishar Singh and Mangal Singh for recovery of their money secured by this mortgage and obtained a decree on 13th July 1897 with an order that the money should be realized by sale of the property mortgaged. The land in question was sold by the Court in execution of this decree and on 21st November 1904 Jaimal Singh, father of one of the defen-

dants-appellants, purchased the area now in suit, (515 kanals 9 marlas) at this auction sale.

It is conceded in appeal that the lower appellate Court was right in holding that what Jaimal Singh acquired at this auction was the right, title and interest in the property held by the judgment-debtors, Ishar Singh and Mangal Singh, sons of Nihal Singh. The case for the defendants-appellants is that Nihal Singh had become a full owner of the land in suit and that accordingly the right, title and interest, which Jaimal Singh had purchased at the auction sale on 6th January 1905, was the full proprietary rights in the land and not merely the mortgagee rights. It is necessary at this stage to mention that on 7th May 1898 Asa Singh, son of Ganda Singh, the original mortgagor, (and elder brother of the present plaintiff Waryam Singh) sued for a declaration that the mortgage of 1882 and the decree obtained by Nihal Singh in 1885 should not affect his reversionary rights. He obtained an ex parte decree on 11th August 1900, a decree which still subsists. In 1903 Asa Singh died and in 1916 Ganda Singh died, his successor-in-interest being his posthumous son, Waryam Singh, the present plaintiff. In the previous suit brought by Waryam Singh, to which reference has already been made, it was decided, (and the decision was affirmed in appeal by a Division Bench of this Court), (i) that the decree, which was obtained by Asa Singh on 11th August 1900, enured for the benefit of the present plaintiff Waryam Singh and (2) that this decree was binding on the alienees. The only reason why Waryam Singh had failed in the previous suit to obtain possession of the 515 kanals, 9 marlas of land covered by the present litigation was the technical one that Kanshi Ram and Kishore Chand, the mortgagees of the area in 1894, had not been impleaded in Asa Singh's declaratory suit of 1898 and that the declaratory decree was not therefore binding on Kanshi Ram and Kishore Chand and their successors-in-interest. Jaimal Singh, as the auction-purchaser of this land, was held in that suit to be the successor-in-interest of the decree-holders Kanshi Ram and Kishore Chand. In regard to this decision the lower appellate Court has observed that

the auction-purchaser cannot be looked upon as the successor-in-interest of the decree-holder in any sense.

As held in 6 Lah 544 (1), the auction-purchasers of property attached in execution of a decree, are the representatives of the judgment-debtor. In the present case it has, in fact, been pleaded that Jaimal Singh as the auction-purchaser is the representative-in-interest not of Kishore Chand and Kanshi Ram but of Nihal Singh. But this plea, as pointed out by the lower appellate Court, is inconsistent with the position taken by the defendants in the previous case, where it was pleaded that the defendants were the successors-in-interest of Kanshi Ram and Kishore Chand and that because Kanshi Ram and Kishore Chand had not been made parties to the declaratory suit by Asa Singh, they were entitled to repudiate, as not binding on them, the declaratory decree, impugning the mortgage made in their favour in March 1894. Litigants cannot be permitted to take up inconsistent pleas in this way to suit their own purpose. In the previous case the defendants defeated Waryam Singh's suit in respect of 515 kanals, 9 marlas by claiming to be representatives-in-interest of Kanshi Ram and Kishore Chand. Waryam Singh has sued again in respect of this same area, and defendant cannot now be heard to claim succession to Nihal Singh and his sons against whom Kanshi Ram and Kishan Chand secured a mortgage decree. In any case Kanshi Ram and Kishore Chand had obtained a mere mortgage decree against Nihal Singh's sons; and it was in execution of this mortgage decree that Jaimal Singh purchased an interest in the land in 1905. Although, therefore, there may have been no privity of contract between Waryam Singh and Jaimal Singh, we hold that Jaimal Singh purchased the land in suit subject to Waryam Singh's equity of redemption which still subsisted and we find therefore that Waryam Singh is entitled to redeem the land.

In the previous case brought by Waryam Singh the District Judge expressed the view, in a judgment which still stands, that the plaintiff Waryam Singh could be granted possession of the land now in suit by redemption of the

1. Ishar Das v. Parma Nand, 1926 Lah 194=93
I O 30=6 Lah 544.

mortgage subsisting on it. It has been urged before us in appeal that this decision operates as *res judicata*; it could not be, since the opinion was really obiter for the purposes of that case. But we have, for reasons already stated, independently come to a decision uniform with the decision reached in the previous litigation. We confirm the decision of the lower appellate Court and dismiss the appeal with costs. The cross-objections were not argued and are dismissed with costs.

R.W./R.M.

Appeal dismissed.

A. I. R. 1936 Lahore 21

ADDISON, AG. C. J. AND DIN
MOHAMMAD, J.

Narain Singh and others—Decree-holder—Appellants.

v.

Malik Ahmad Yar Khan—Judgment-Debtor—Respondent.

Misc. Appeal No. 24 of 1935, Decided on 3rd April 1935, from decision of Senior Sub-J., Shahpur, D/- 7th November 1934.

(a) Custom (Punjab)—Applicability—Decision on custom is not final—It is only relevant instance under S. 13, Evidence Act.

A decision on custom is not a final decision. It only becomes a relevant instance under S. 13, Evidence Act, that such a right has been asserted and recognized. It is always necessary to assert and prove what the custom is. [P 22 C 1]

(b) Custom (Punjab)—Alienation—Ancestral land—Tiwanas of Punjab—Unrestricted right of alienation doubtful—*Quaere*.

Quaere—It is doubtful whether a custom giving right to alienate ancestral land exists among the Tiwanas of the Punjab. [P 22 C 1]

(c) Custom (Punjab)—Reversioner—Rights—His right is deferred and is vested interest.

The right of the reversionary heir under custom is a right in property, the enjoyment of which is deferred and it is a vested interest though only in the sense that the person in whom it inheres has a present fixed right to its future enjoyment. [P 22 C 1]

(d) Custom (Punjab)—Succession—Tiwanas—Widow—Widows do not take absolute interest.

Amongst Tiwanas, who do not follow Mahomedan law but custom, widows only succeed for their lives and other females take under special conditions. They do not take an absolute interest but they defer the enjoyment of the estate by a reversioner. [P 22 C 1]

(e) Custom (Punjab)—Reversioner—Rights of—Reversioner inherits from common ancestor.

Everywhere under custom there is a right of

alienation to a greater or smaller extent but the agnatic theory is the basis and foundation of all custom and the reversioner, whether son or not, is always looked upon as inheriting to the common ancestor and not from the last owner.

[P 22 C 1]

(f) Custom (Punjab)—Ancestral property—Ancestral property sought to be attached—Litigant can prove that holder is legal representative.

It is open to a creditor to plead a custom that the person in possession of ancestral property, which it is sought to attach is the legal representative of the deceased debtor and that the property is deemed to be the property of the said debtor and the successor of the debtor inherits the property from the debtor and is his legal representative: 1919 Lah 145, *Rel. on.* [P 22 C 1, 2]

(g) Custom (Punjab)—Succession—Ancestral property—Reversioner—Reversioner does not succeed as legal representative.

The idea of a reversioner succeeding to ancestral property as the legal representative of a deceased person, is ordinarily foreign to the foundation on which custom in the Punjab rests; he succeeds by virtue of his connexion through the common ancestor. [P 22 C 2]

(h) Custom (Punjab)—Ancestral land—Reversioner or major son not liable for debt of last holder—Ancestral land cannot be attached or sold to meet debts.

The reversioner or a major son, who is in possession of the ancestral land, is not liable to pay the debts of the last holder out of the ancestral land which came to him through the common ancestor and such land cannot be attached or sold in their hands to meet those debts: 4 P R 1913 and 1919 Lah 145, *Rel. on.* [P 22 C 2, P 23 C 1]

R. C. Soni for Achhru Ram and Achhru Ram—for Appellants.

Ghulam Mohy-ud-Din and Niaz Ali—for Respondent.

Addison, Ag. C. J.—Jaimal Singh obtained a money decree against K. B. Muzaffar Khan. Both the decree-holder and judgment-debtor are dead. The legal representatives of the decree-holder took out execution against the son of K. B. Muzaffar Khan, namely Malik Ahmad Yar Khan, and attached a certain area of ancestral land. It was objected by Malik Ahmad Yar Khan that this ancestral property could not be attached in view of the Full Bench decisions in 4 P R 1913 (1) and 17 P R 1919 (2). His objection has succeeded and the land has been released from attachment. Against this decision the representatives of the decree-holder have appealed. It is admitted that the judgment-debtor and his family are Tiwanas who are gov-

1. Jagdip Singh v. Narayan Singh, (1913) 4 P R 1913=15 I C 866 (F B).

2. Mikor v. Ohhajju Ram, 1919 Lah 145=49 I C 281=17 P R 1919 (F B).

erned by custom. Only in one respect it is contended that the custom which governs them is at variance with the custom of the majority of tribes in the Punjab. This exception is said to be as regards their right to alienate land without restriction. This contention is based on a decision of this Court reported as 78 I C 451 (3). A decision on custom however is not a final decision. It only becomes a relevant instance under S. 13, Evidence Act, that such a right has been asserted and recognised. It is always necessary to assert and prove what the custom is, and there is not sufficient evidence on the present record to establish the unrestricted right of Tiwanas to alienate their ancestral land. It is doubtful, therefore, whether it can be said that such a custom does exist.

Assuming however that it does, it does not seem to me that this necessarily takes the case outside the principle laid down in the two Full Bench judgments referred to. The right of the reversionary heir under custom is a right in property the enjoyment of which is deferred and it is vested in interest though only in the sense that the person in whom it inheres has a present fixed right to its future enjoyment. A reversioner does not inherit from the last owner but from the common ancestor from whom his interest is derived. Amongst Tiwanas, who do not follow Mahomedan law but custom, widows only succeed for their lives and other females take under special conditions. They do not take an absolute interest but they defer the enjoyment of the estate by a reversioner. Everywhere under custom there is a right of alienation; in some cases that right is greater than in others but the agnatic theory is the basis and foundation of all custom and the reversioner, whether he is a son or not, is always looked upon as inheriting through the common ancestor and not from the last owner. As it was expressed in 17 P R 1919 (2), it is open to a litigant to plead a custom that the person in possession of ancestral property, which it is sought to attach, is the legal representative of the deceased debtor and that the property is deemed to be the property of the said debtor, i. e. that the successor of the debtor inherits

the property from the debtor and is the legal representative as the term is usually understood. The idea of a reversioner succeeding to ancestral property as the legal representative of a deceased person is ordinarily foreign to the foundation on which all custom in the Punjab rests: he succeeds by virtue of his connection through the common ancestor. It is further contended however, that the son in this case might be looked upon as the legal representative of his father by reason of the answer given to Question 10 in S. 4, General Code of Tribal Custom in the Shahpur District compiled in 1896. In my judgment this is not so. This section deals merely with the relationship between guardians and wards and the powers under custom of the de facto guardian. The question is as follows:

Is a minor whose father is dead, and who has inherited the father's estate, liable for his father's debts? If such debts are not payable till the minor comes of age, can the property inherited be alienated in the interval?

The Answer is as follows:

All tribes except Khokhars: A minor who has inherited his father's estate is liable for his father's debts. Previous to his coming of age the guardian may arrange for their payment.

The reply of Khokhars was the same, except that it was added that the guardian cannot sell the minor's land to pay the father's debts. It seems to me that what this answer means is that the guardian of a minor can, just as the minor can when he attains majority pay his father's debts and sell the ancestral land which came to him through his father in order to do so. It does not mean that he succeeds his father as his legal representative. Although for the most part in the Punjab ancestral land is not liable under custom for the debts of the last-holder, it is frequently the case that these debts are met by the sons selling such land though they cannot be compelled to do so. The answer to the question means that the guardian has the same power in this respect as the son has when he attains majority. It seems to me that it is impossible to carry the answer in question further than I have done. Nowhere is it said that a reversioner or even a major son is liable to pay the debts of the last-holder out of the ancestral land which came to him through the common ancestor and that

such land can be attached and sold in their hands to meet those debts. Surely a distant reversioner and major son ought to be liable if a minor son is. In the present case, the son is a major; this shows in a convincing way that the reply relied upon is merely a reply stating the power of the guardians and not showing that ancestral land is liable to attachment and sale to pay the debts of the last-holder thereof.

I am clear that it has not been established that the son succeeded as the legal representative of his father and I hold that the ancestral land is therefore not liable to be attached in execution of a decree against the father. I would therefore dismiss this appeal with costs.

Din Mohammad, J.—I agree.

R.W./R.M. *Appeal dismissed.*

A. I. R. 1936 Lahore 23

ADDISON, AG. C. J. AND DIN
MOHAMMAD, J.

Munshi Ram—Plaintiff—Appellant.
v.

Mela Ram Wafa and another—Defendants—Respondents.

First Appeal No. 1516 of 1933, Decided on 17th June 1935, from decree of Sub-Judge, First Class, Lahore, D/- 16th June 1933.

(a) **Tort—Defamation—Allegory may be libel—Definite imputation upon definite person must be proved—Article published in newspaper painting Sub-Inspector in Criminal Investigation Department in very dark colours—Cursory reading of article sufficient to connect it with person actually serving in Criminal Investigation Department—Identity held to be sufficiently established and proprietor of paper held liable to pay damages.**

Even an allegory may be a libel, but in such cases there must be a definite imputation upon a definite person and that person must be the plaintiff. A narrative apparently fictitious may in fact be a libel upon a living person. If a writer intends to portray a real person under an imaginary name and chooses for that purposes what he supposes to be a fictitious name, he will nevertheless be liable if he happens to choose the name of a real person though he had no intention whatever of doing so. If the defendant's words have in fact injured the plaintiff's reputation it is no defence to an action that the defendant intended to refer to some one else. The plaintiff in such case of libel can aver extraneous facts to show that he was the person expressly referred to. It is not legally essential that the plaintiff should produce any persons who are said to have made enquiries from him after the publication of the article nor is it necessary that all the world should understand the libel. It is

sufficient if those who know the plaintiff can make out that he is the person meant. Even want of malice and deliberateness will not be enough to protect the defendant. A man may be liable although he had not a particle of malice against the person defamed [P 25 C 1, 2]

Where a narrative in story form published in a newspaper painted one M, a Sub-Inspector in the Criminal Investigation Department, posted at L, in most abominable terms openly accusing him of crime, immorality vice and dishonourable conduct in the discharge of his official functions, and even a cursory reading of the story would have at once led any ordinary reasonable reader to connect it with M, a Sub-Inspector posted at L, who was officially concerned in the investigation of conspiracy cases and belonged to the Criminal Investigation Department :

Held: (1) that the identity was fully established and it was futile to argue that the writer did not intend to defame the real M, and that he had used the name at random as a mere representative of the class which was dealt with in the article; [P 25 C 1]

(2) that it was amply proved that it was M who was defamed and injured in his office and as no justification was pleaded he was entitled to general damages. [P 26 C 1]

(b) **Tort—Defamation—Libel appearing in newspaper—Mere fact that proprietor has no knowledge of it does not absolve him.**

The mere fact that the proprietor of a paper had no knowledge of the publication of libel in his paper cannot absolve him from being held liable. [P 26 C 1]

(c) **Tort—Defamation—Words on face of them amounting to libel—Plaintiff can claim general damages without proof of actual pecuniary loss.**

When on the face of it the words used by the defendant clearly must have injured the plaintiff's reputation, they are said to be actionable per se and the plaintiffs may recover a verdict for substantial amount without giving any evidence of actual pecuniary loss. General damages differ in this respect from special damages. [P 26 C 1]

(d) **Tort—Defamation—Assessment of damages—One feature to be considered is method of publication—Publication in print is more serious.**

One feature of a libel that must be considered in the assessment of damages is the method of its publication. Where it has been printed in a newspaper it may fall into any hands. Moreover a printed matter is generally of a most permanent character and people are disposed to believe what they generally see in print. Where therefore a libel is published in a newspaper the person defamed is entitled to substantial damages. [P 26 C 2]

Ram Lal (Dewan), Govt. Advocate and Assadullah Khan—for Appellant.

V. N. Sethi and Puran Chand Mehta—for Respondents.

Judgment.—The suit out of which this appeal has arisen was instituted by

Pandit Munshi Ram, an officiating Inspector in the Criminal Investigation Department, Punjab, at Lahore. It was brought against Pandit Mela Ram Wafa, proprietor of an Urdu newspaper of the name of "Vir Bharat" published at Lahore, and Asa Ram, its editor, printer and publisher, who was then undergoing imprisonment for sedition in the Campbellpur jail. It was to recover Rs. 5,100 from the defendants on account of damages for their publishing a defamatory article in a special Swarajya issue of the said paper, dated 19th May 1931. The suit was resisted on various grounds. It was contended inter alia that the plaintiff had no cause of action as the article, being a mere fictitious narrative, did not refer to him at all, that the circulation of the paper was ordinary and that, at any rate, the proprietor was not liable at all as he had taken no part either in the writing of the offending article or its publication. Only three issues were framed in the case, the first two referring to the identity of the plaintiff and the third to the quantum of damages. The Subordinate Judge came to the conclusion that the article in question did not relate to the plaintiff and consequently there was no reflection on his character or conduct. He further remarked that even if the plaintiff had succeeded in proving that the story related to him, he would have been entitled to a normal sum of Rs. 5 only by way of damages, as he had suffered no injury at all. At the same time while dismissing the plaintiff's suit, he did not award any costs to the defendants against him, as, to quote his own words, "the libel is of the most heinous character, and that it contains imputations of the worst sort and lowest character." From this decision, an appeal has been preferred to this Court.

The learned Government Advocate, who has appeared on behalf of the appellant, has strenuously contended that the findings of the Subordinate Judge on all the issues in the case are perverse, that there was ample evidence on the record to connect the plaintiff with Munshi Ram, Sub-Inspector, of the story, that the imputations were of the worst possible character, that they exposed the plaintiff to contempt, hatred and obloquy and that the plaintiff was consequently entitled to substantial damages and costs. Counsel for the res-

pondents has reiterated the same grounds before us as were urged in the trial Court and has laid great stress on the fact that the story being a mere fiction was not aimed at any particular individual, and that accordingly no damages could be allowed against the respondents. The crucial point therefore in the case is whether it has been established by the plaintiff that the libel was aimed at him and that he could be easily recognized in the story by those who knew him.

It may be necessary here to produce the salient features of the narrative complained of. In the headlines of this narrative, which are in bolder print than the rest of the story, attention is drawn to a wicked Sub-Inspector killing an innocent person, to the method employed in the investigation of revolutionary crime, to a member of the secret police force turning approver, to the protection of a woman's honour presumably against the wickedness of the Sub-Inspector referred to therein, and to the interesting nature and eye-opening effect of the story. Then follows the story itself narrating how a young student accompanied by a young sister, of the names of Ram Nath and Bimla, respectively, arrived at the Lahore Railway Station, how they were inveigled by a C. I. D. man in disguise, how they were further entrapped into a Dharm-sala at Ram Gali, how a loaded pistol was smuggled under the pillow of Ram Nath and how Ram Nath was arrested in pathetic circumstances by one Munshi Ram, Sub-Inspector, who thundered in rage and arrested Ram Nath for the illicit possession of arms. After the departure of Ram Nath, the narrative brings the "evil natured Munshi Ram" in Bimla's room bent upon violating her chastity at any cost; the girl addresses him as father; but in spite of that, the lascivious Sub-Inspector first communicating his infernal desire in veiled language, afterwards bursts out openly and says "I want you". Bimla's abuses attract two cyclists to the scene of occurrence, one of whom is shot dead by the Sub-Inspector in the scuffle that ensues and the other is arrested on suspicion. In the meantime Bimla escapes. An interviewer later visits Ram Nath and informs him that he has been a victim of deception and that some man of the

Criminal Investigation Department has fabricated this false case against him in conspiracy with his officers. It may be remarked here that in ordinary parlance the members of the Criminal Investigation Department are known as *khufia* police (secret police force). Even an allegory, as stated by Odgers on Libel and Slander at p. 21, may be a libel, but in such cases there must be a definite imputation upon a definite person; and that person must be the plaintiff. We have therefore to determine whether certainty as to the person defamed has been established before us. Even a cursory perusal of the story, as summarised above, will at once lead any ordinary reasonable reader to connect it with one Munshi Ram, Sub-Inspector of Police, who is officially concerned in the investigation of conspiracy cases and belongs to the Criminal Investigation Department, and when it is once proved that there is a real person of that name posted at Lahore and entrusted with similar work, the identity is fully established. In these circumstances, it is futile to argue that the writer did not intend to defame the real Munshi Ram and that he had used this name at random as a mere representative of the class which was dealt with in the article in question. The law on the subject is quite clear.

In the publication of matter which would be libellous if applying to an actual person, the responsibility is as follows: in the first place, there is responsibility for the words used being taken to signify that which readers would reasonably understand by them: In the second place, there is responsibility also for the names used being taken to signify those whom the readers would reasonably understand by those names; and in the third place, the same principle is applicable to persons unnamed but sufficiently indicated by designation or description. (per Lord Shaw at p. 128 of Odgers).

Again,

Libel is a tortious act. What does the tort consist in? It consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. . . . His intention in both respects equally is inferred from what he did. His remedy is to abstain from defamatory words (per Lord Loreburn, L. C., at p. 128 of Odgers).

A narrative apparently fictitious may be in fact a libel upon living persons. If a writer intends to portray a real person

under an imaginary name and chooses for that purpose what he supposes to be a fictitious name, he will nevertheless be liable if he happens to choose the name of a real person, though he had no intention whatever of doing so. If the defendant's words have in fact injured the plaintiff's reputation, it is no defence to an action that the defendant intended them to refer to some one else (Odgers, p. 128). There is unimpeachable evidence on the record to show that the plaintiff at the time of the publication of the article was the only person connected with the Criminal Investigation Department, Lahore, bearing the name of Munshi Ram, that his substantive post was that of a Sub-Inspector, that he was generally entrusted with the investigation of revolutionary crime, that he had actually been concerned in an investigation of the case of two revolutionaries that occurred in the Ram Galli Dharamsala two years before and that the defendant Mela Ram Wafa was suspected by the Criminal Investigation Department of the Police to be in sympathy with the revolutionaries. The plaintiff in such cases of libel can aver extraneous facts to show that he was the person expressly referred to and all the circumstances mentioned above clearly indicate that it was he and none else who was made the target of the defendants' attack. The hit was so direct that there could be no mistake. The name which the plaintiff bears, the office which he holds, the department to which he belongs, and the work he generally does, were all expressed in such unmistakable terms as not to leave any doubt in the mind of any casual reader who was even slightly acquainted with the plaintiff that he was the person named. The law goes so far as to say:

Whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted; the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated (per Lord Campbell, O. J., at p. 126, Odgers).

It has further been urged on behalf of the respondents that the plaintiff has not been able to produce any persons who are said to have made inquiries from him after the publication of this article, but this is not legally essential. Nor is it necessary that all the world should

understand the libel. It is sufficient if those who know the plaintiff can make out that he is the person meant.

Even want of deliberateness and malice will not be enough to protect the defendants. As stated by Odgers, at pp. 4 and 5:

The intention or motive with which the words were employed is, as a rule, immaterial. If the defendant has in fact injured the plaintiff's reputation, he is liable, although he did not intend so to do, and had no such purpose in his mind when he wrote or spoke the words. Every man must be presumed to know and to intend the natural and ordinary consequences of his acts: The words are actionable, if false and defamatory, although published accidentally or inadvertently.

A man may be liable, although he had not a particle of malice against the person defamed. It has further been urged that the proprietor had no knowledge of the publication and was therefore free from blame. This again is an erroneous proposition of law to advance. In a case quoted by Odgers at p. 6, the proprietor of the "Times" retired to live in the country, leaving the entire management of the paper to his son, with whom he never interfered yet he was held criminally liable for a libel which appeared in the paper in his absence and without his knowledge. We have no hesitation in finding therefore that it has been amply proved that it was the plaintiff who was defamed and injured in his office and as no justification has been pleaded, he is entitled to general damages. This takes us to the question of the amount of damages, which would meet the ends of justice in this case. The Subordinate Judge has, as stated above, proposed a nominal sum of Rs. 5 in case the plaintiff's identity was established, on the ground that "the plaintiff has not suffered in any way in his pay or promotion and he has been getting regular increments." This again is based on a misconception of law. When on the face of them, the words used by the defendants clearly must have injured the plaintiff's reputation, they are said to be actionable per se, and the plaintiff may recover a verdict for a substantial amount without giving any evidence of actual pecuniary loss (Odgers at page 304). General damages differ in this respect from special damages. In the case before us, neither has it been pleaded that the accusation, if it referred to the plaintiff, was true, nor is it

denied that the words do amount to defamation of the worst possible type. The plaintiff has been painted in the most abominable terms and has been openly accused of crime, immorality, vice, and dishonourable conduct in the discharge of his official functions. In these circumstances, he will be clearly entitled to general damages for which no proof of pecuniary loss will be legally necessary.

Another feature of the libel in suit that must be considered in the assessment of damages is the method of its publication. It has been printed in a newspaper. It may fall into any hands. Moreover, printed matter is generally of a permanent character and people are disposed to believe implicitly what they see in print. Taking all these circumstances into consideration, it is our considered opinion, that the plaintiff is entitled to substantial damages. We accordingly accept the appeal, set aside the decree of the Court below and grant the plaintiff a decree for Rs. 2,250 with proportionate costs both in the Court below and before us.

R.M.

Appeal allowed

A. I. R. 1936 Lahore 26

BECKETT, J.

Amir Chand—Defendant—Appellant.

v.

Secy. of State—Plaintiff and others—
Defendants—Respondents.

Misc. Second Appeal No. 1299 of 1934, Decided on 17th July 1935, from order of Addl. Dist. Judge, Shahpur, D/- 28th May 1934.

(a) **Lease — Construction—Lease for use and occupation of buildings—Lease is of immoveable property falling under S. 17 (1), Registration Act—Such leases are not exempt under S. 90 (1) (d).**

Each case must be adjudged on its merits.

[P 27 C 2]

Where the wording of the leases so clearly and definitely refers to the use and occupation of each of the buildings, they must be taken as leases of immoveable property falling under S. 17 (1) (d), but not exempt under S. 90 (1) (d) as grants or assignments of an interest in land: 1914 All 120, *Appr.*; 1923 Oudh 114; 1927 Pat 319 and 1920 Mad 413, *Disting.* [P 27 C 2]

(b) **Rent—Suit for, cannot be changed subsequently for use and occupation.**

The nature of suits for rent should not be changed as one for use and occupation when no alternative claim was made in the beginning: 27 Cal 239, *Foll.* [P 28 C 1]

Bhagwan Das Mehra—for Appellant.
Ram Lal—for Respondents.

Judgment.—The Secretary of State for India in Council sues on documents whereby the defendants in these two connected appeals were granted the right to occupy and use certain water-mills under the management of the Irrigation Department in the Sargodha District. The defendants occupied the mills, but vacated them before the period of their lease was over. The suits are for arrears of rent and damages for the breach of the contract. The plea of the defendants is, that the documents required registration as leases of immovable property under S. 17 (1) (d), Registration Act, and cannot be admitted in evidence. On behalf of the Secretary of State, it was at first contended that the contracts did not amount to leases; but this contention has now been withdrawn, and the only question is whether the instruments are protected by S. 90 (1) (d) of the Act. This section exempts from registration sanads, inam title deeds and other documents purporting to be or to evidence grants or assignments by Government of land or of any interest in land. The trial Court held that the documents on which the present suits are based were not exempt from registration and dismissed the suits on this preliminary issue. The lower appellate Court held that the documents were exempt and remanded the suits for decision on the merits. The defendants have appealed.

In holding that Government leases of land are exempt from registration the learned Additional Judge has followed the decisions in 43 Mad 65 (1) and 6 Pat 446 (2). The same view was taken in 9 O L J 629 (3). A different view had previously been taken in 36 All 176 (4); but this decision is fully discussed in the later decisions, from which I see no reason to disagree. If S. 90 (1) (d) is read in its plain meaning, Government leases of land are exempt

from registration. There is however a further difficulty in the present case. S. 17 (1) (d), which makes registration of leases compulsory, refers to immovable property, while S. 90 (1) (d), which grants exemption, refers only to land; and it has been argued before me that Government leases of buildings, as such do not fall within the scope of the exemption. Immoveable property is defined in S. 2 (6) of the Act as including both land and buildings. Land is not defined anywhere in the Act, but it would appear to be distinguishable both from buildings and immovable property, since it is certainly used as distinguishable from buildings in S. 2 (6) and the expression "immovable property" is not repeated in S. 90 (1) (d). Immoveable property has been defined in the General Clauses Act 1897 as including both land and things attached to the earth; but here again there is no separate definition of land. The general practice in India has been, when land is to be used in an extended sense, as in the Acts relating to the collection of revenue, to give any special extended sense as a definition in the Act itself.

In the absence of any such special definition in the Registration Act, I am of opinion that land cannot be taken as including buildings, so that the present leases would not apparently be covered by S. 90 (1) (d). The learned Government Advocate has argued that a lease of a building necessarily includes a lease of the land thereunder. I quite see that difficulties might arise in applying the wording of the Act to a lease of immovable property consisting of a building with a large estate attached; but each case must be adjudged on its merits. In the present instance the wording of the leases so clearly and definitely refers to the use and occupation of each of the buildings, that I consider that they must be taken as leases of immovable property falling under S. 17 (1) (d), Registration Act, but not exempt under S. 90 (1) (d) as grants or assignments of an interest in land. It follows that they were properly rejected by the trial Court as inadmissible in evidence for want of registration and that the plaintiff's suits for rent and damages for breach of the contract must fail.

It has finally been suggested that the suits should now be treated as ones for

1. *Kallingal Moosa Kutti v. Secy. of State*, 1920 Mad 413=53 I C 845=43 Mad 65=37 M L J 882.
2. *Secy. of State v. Nistarini Annie Mitter*, 1927 Pat 819=104 I O 209=6 Pat 446.
3. *Ragho Pershad v. Secy. of State*, 1928 Oudh 114=74 I O 869=9 O L J 629=27 O C 64.
4. *Munshi Lal v. Gopi Ballabh*, 1914 All 120=22 I O 938=36 All 17=126 A L J 219.

use and occupation and remanded for trial as cases of this nature. For the reasons given in 27 Cal 239 (5) I do not think that the nature of the suits can be changed at this stage.

For the reasons given, I accept the appeal and dismiss the suits, but leave the parties to bear their own costs throughout.

R.W./V.V.

Appeal accepted.

5. Rachbea Singh v. Upendra Chandra Singh, (1900) 27 Cal 239.

* A. I. R. 1936 Lahore 28

SKEMP, J.

Hasham and others—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 347 of 1935, Decided on 31st May 1935, from order of First Class Magistrate, Ferozepore, D/- 7th March 1935.

(a) Criminal Trial—Duty of prosecution—It must make out its own case—Gaps cannot be filled by statement of accused.

The prosecution must make out its own case and gaps cannot be filled up by any statement made by the accused in his examination under S. 342, Criminal P. C. : 1916 *Mad* 407 ; 27 *Mad* 238 and 1923 *Lah* 225, *Hel on.* ; 1925 *Lah* 432, *Ref.* [P 29 C 1]

*** (b) Criminal Trial—Voluntary written statements by accused can be used to fill up gaps in prosecution.**

Statements made by accused in reply to questions required to be put under S. 342, Criminal P. C., cannot be used as gaps to fill up defects in prosecution. But voluntary written statement by accused can be so used. [P 29 C 1, 2]

(c) Criminal Trial—Duty of prosecution—Deceased receiving fatal injuries while stealing—Assault by three persons armed with lathis—Grievous hurt.

In accordance with the principles of English and Anglo-Indian procedure, it is for the prosecution to prove its case. The prosecution, without any statement made by the accused, proved that the deceased received his fatal injury while stealing carrots and that the injury was inflicted by one of the accused. If the deceased had received only one blow in a fight at the hands of one of his assailants and it was not known whose hands inflicted the blow, each of the assailants would be presumed to have had the intention of causing grievous hurt : 29 *All* 282 and 1914 *Lah* 305, *Foll.*

[P 29 C 2]

(d) Private Defence—Extent of right.

Held : that in striking a fatal blow on the

head of the deceased, accused exceeded that right. [P 30 C 1]

Barkat Ali—for Appellants.

Mohammad Amin Khan for Govt. Advocate—for the Crown.

Judgment.—Hasham and Ismail have been convicted under S. 304, Part. 2, I. P. C., and sentenced each to five years' rigorous imprisonment. They have appealed through Mr. Barkat Ali and Mr. Abdul Karim represented the Crown. The case was started on a first information report made at Ferozepore City Thana at 4 a. m. on 22nd January 1935 by Mohammed Din, son of Bhana Arain. He stated that Mohammad Din, son of Nur Mohammad Arain, deceased, together with Umer Din and Abdul Aziz, sister's sons of the reporter, were watching their wheat field as it had been previously damaged by mares belonging to Abdul Ghani, *sufedposh*. About midnight the reporter was awakened by his nephews who said that mares were doing damage ; the deceased tried to catch them, when Ismail and Hasham appellants, together with two others named Mohammad Sharif and Ilam Din, attacked him with dangs. Abdul Ghani said "Finish him" and took him to his house. The reporter was afraid to go to the house of his enemy Abdul Ghani and had been to the police station to find out if Mohammad Din had been brought there ; but about 3 a. m. the accused had thrown down Mohammad Din who was a relation of the reporter near his house. Ali Mohammad had come and told him that Mohammad Din was lying unconscious outside the house of Nihal Arain and the reporter had brought him in an unconscious state to the police station on a charpoy. He was taken on to the hospital and died without recovering consciousness at 5-30 the same morning. (After discussing evidence, the judgment proceeded) The learned counsel for the Crown drew my attention to a written statement filed by Hasham's pleader on his behalf on 5th March 1935. In that statement he said :

On the day of occurrence Ismail, Mohammad Shariff and I were on thikri pehra duty. Ismail and I were ahead of Mohammad Sharif. When we got close to the railway line, we heard a sound. On going near we found that two men were committing theft in a carrot field. Getting close to them, we accosted them whereupon they

set on us with dangs. A dang blow fell on me; but as I had a dohar of khaddar on I was not hurt. I used my dang to ward off dang blows. One of the thieves was hit with my dang. As soon as he received the blow, he grappled with us, while the other thief took to his heels. In the meantime Mohammad Sharif, who was coming behind, turned up. Seeing him the injured man disengaged himself and ran away. It being dark we did not pursue him.

Counsel for the Crown argued that Hasham had admitted striking the deceased and that the onus of bringing the case within the exception of self-defence lay on him, as to which there was no evidence. Counsel for the appellants urged that the statement was inadmissible in evidence and cited 4 Lah 55 (1) and 6 Lah 183 (2). The latter ruling is hardly relevant. According to 4 Lah 55 (1) at p. 57, the prosecution must make out its own case and gaps cannot be filled up by any statement made by the accused in his examination under S. 342, Criminal P. C. It cites 27 Mad 238 (3) to the same effect and 39 Mad 770 (4) to the effect that where no evidence has been given implicating the accused, the Magistrate has no right under the statute to put questions to the accused or to invite him to make a statement. All these rulings refer to the answers given by the accused to questions put to him by the Court in accordance with S. 342, Criminal P. C. In the present case, the accused was duly questioned in accordance with S. 342; and Hasham, Ismail and Mohammad Sharif when asked:

Did you along with other accused go to the carrot field of Ibrahim and strike Mohammad Din on his head with a dang?

each replied: "I shall put in my written statement." This was on 9th February and these three accused were charged on the same day. None of the accused except Hasham put in a written statement, and he put in two. The first, lodged on his behalf on 27th February, is a mere blank denial; the other quoted above was lodged on 5th March. It must be regarded as placed on record in accordance with S. 256 (2), Criminal P. C., which runs: "If the accused puts

in any written statement, the Magistrate shall file it with the record." I have been unable to find any authority dealing with a written statement lodged by the accused or his pleader and I am not sure that the same principle should apply to such a statement as to questions put to the accused by the Magistrate in accordance with the statute. The statement such as we are considering is lodged by the accused of his own accord; the questions under the statute are compulsory. The appellants' counsel urged that in accordance with the principles of English and Anglo-Indian procedure, it is for the prosecution to prove its case. In the present case the prosecution has, without any statement made by the accused, proved that the deceased received his fatal injury while stealing carrots and that the injury was inflicted by one of the appellants, or by Mohammad Sharif. If the deceased has received only one blow in a fight at the hands of one of his assailants and it is not known whose hands inflicted the blow, each of the assailants is presumed to have had the intention of causing grievous hurt: 29 All 282 (5) and 37 P R 1914 Cr (6). Thus without considering the written statement of Hasham there would be evidence on which to convict Hasham and Ismail under S. 325, I. P. C.

In these circumstances, I think it is proper to take into consideration the statement of Hasham. The next question is whether it is true. I would have had no hesitation in holding it to be true, if Hasham had made a statement orally when examined by the Magistrate or even if he had lodged a written statement at once. This however is a second written statement, at variance with the first, but it fits in so closely with what is established by the prosecution that I am inclined to regard it as true. Relying on that statement then Ismail is entitled to an acquittal. Hasham alone struck the fatal blow in a fight which he says the thieves began and which was certainly entered into with thieves in defence of private property. I would therefore acquit

1. *Devi Dial v. Emperor*, 1923 Lah 225=73 I C 805=24 Or L J 698=4 Lah 55.
2. *Bahawala v. Emperor*, 1925 Lah 482=88 I C 854=6 Lah 183=26 Or L J 1238.
3. *Mohideen v. Emperor*, (1904) 27 Mad 238.
4. *In re Abibulla Rowthan*, 1916 Mad 407=80 I C 447=89 Mad 770=16 Or L J 628.

5. *Emperor v. Bhola*, (1907) 29 All 282=4 A L J 207=5 Or L J 180=1907 A W N 51.
6. *Pal Singh v. Ganda Singh*, 1914 Lah 305=22 I C 319=87 P R 1914 Cr.

Ismail and convict Hasham under S. 304, I. P. C. The next question is that of sentence. The Magistrate said :

The action and (of ?) Hasham and Ismail is not covered by the right of private defence of property. The accused knew the culprits very well. They could move the authorities for the paltry theft of carrots. It has not been proved by any evidence whatsoever that the accused apprehended that death or grievous hurt would be the consequence if such right of private defence would not be exercised.

This is altogether too severe a view. The Magistrate made no allowance for the feelings of simple rustics protecting property. Under S. 105, I. P. C., the right of private defence of property against theft continues till the offender has effected his retreat with the property. Even assuming, as is proper, that Mohammad Din was struck while running away, the fact that carrots were found along his tracks proves that he had not effected his retreat with the property and Hasham was therefore acting in the right of private defence of property. Of course in striking a fatal blow on the head he exceeded that right, but in the circumstances I am of opinion that a sentence of six months' rigorous imprisonment is sufficient and I reduce the sentence accordingly. I have referred to two rulings 29 P R 1902 Cr (7) and 1 Cr L J 285 (8), which deal with somewhat similar cases. In 29 P R 1902 Cr (7) a Division Bench of the Chief Court found that the appellant was watching his field (some of the grain of which had on previous occasions been stolen), that he saw Hukman cutting corn in it, that he gave chase, that Hukman ran his head against a tree and fell, that the appellant hit him recklessly, with a stick while on the ground, on the head and fractured his skull in two places, causing death. The Bench reduced the sentence under S. 304, Part I, to one year's rigorous imprisonment.

In 1 Cr L J 285 (8) the accused armed with swords, pursued thieves at night who were taking cotton pods from their fields, and, in a scuffle killed one who was unarmed and caused grievous hurt to another armed with an iron bound stick. The thieves might have been in possession of a few handfuls of cotton.

The accused were found guilty under S. 304, I. P. C., and the members of the Court held that a sentence of nine months' rigorous imprisonment was sufficient. The President was of opinion that a severer sentence would be more appropriate but accepted the opinion of the members. This was a case from an Indian State and illustrates the ideas of indigenous India towards thieves caught red-handed, which are similar to those of primitive Rome where thieves caught in the act could be killed.

R.W./V.V.

Sentence reduced.

A. I. R. 1936 Lahore 30

BECKETT, J.

L. Narinjan Das—Decree-holder and Plaintiff—Appellant.

v.

Fazal Hassan—Judgment-debtor and Defendant—Respondent.

Misc. Second Appeal No. 487 of 1935
Decided on 26th June 1935, against order of Dist. Judge, Campbellpore, D/- 14th February 1935.

Execution — Executing Court must proceed at decree-holder's instance till decree satisfied—Full satisfaction should not be refused in absence of statutory bar—Land not saleable — But executing Court empowered to lease same—Judgment-debtor cannot claim exemption of sufficient area for maintenance.

Ordinarily, the executing Court must proceed at the instance of the decree-holder until the decree is fully satisfied ; and it is only when a statutory bar exists, that execution to the full extent can be refused. There is no statutory provision that a judgment-debtor (holding land not liable to sale is entitled to have a sufficient area for his maintenance exempted from the farm or lease which an executing Court is empowered to arrange. The instructions to Collectors contained in the Standing Order 61, para. 16, issued by the Financial Commissioner of the Punjab refer only to those cases in which the Collector has decided to intervene under S. 72, Civil P. C. [P 81 C 1, 2]

Qabul Chand—for Appellant.

Allah Din Malik—for Respondent.

Judgment.—The decree-holder holds a decree against the judgment-debtor for a sum which now amounts to Rupees 792-5-0 including costs. He applied for execution of this amount by attachment of the judgment-debtor's land. This land is exempt from sale in execution under the provision of the Punjab Alienation of Land Act. The Court accordingly consulted the Collector as to

7. *Bag v. Emperor*, (1902) 29 P R 1902 Cr=2 P L R 1903-

8. *Emperor v. Koli Mera Bhaga*, (1904) 1 Cr L J 285.

the best means of satisfying the decree. The Collector suggested a farm of half the land belonging to the judgment-debtor for a sum of Rs. 510. This sum would not have been sufficient to satisfy the full amount of the decree, but the Collector was of opinion that the remainder of the land should be left for the maintenance of the judgment-debtor and his family. On receiving this report the Court decided not to follow the Collector's advice, but to lease out the whole of the judgment-debtor's land for a period of fourteen years, which would be sufficient to satisfy the full amount of the decree. One of the reasons which influenced the executing Court in arriving at this decision was that the judgment-debtor had already disposed of part of his immovable property by way of gift in favour of his son.

The judgment-debtor then appealed to the District Court claiming that the advice of the Collector should have been followed. The District Judge held that the previous conduct of the judgment-debtor should not have influenced the decision of the Executing Court and that there were no sufficient reasons for refusing to follow the advice given by the Collector. No notice was taken of the fact that the farm suggested by the Collector would not suffice to pay off the full amount of the decree and the executing Court was directed to proceed with the proposed farm of only half of the judgment-debtor's land. The decree-holder has come up in second appeal against this order.

Ordinarily, the executing Court must proceed at the instance of the decree-holder until the decree is fully satisfied; and it is only when a statutory bar exists that execution to the full extent can be refused. There does not appear to be any statutory provision that a judgment-debtor holding land not liable to sale is entitled to have a sufficient area for his maintenance exempted from the farm or lease which an executing Court is empowered to arrange. The only authority which has been put forward in support of this suggestion is a standing order of the Financial Commissioner which contains certain instructions to Collectors (Standing Order No. 61, para. 16). One of these instructions is to the effect that a Collector, who decides to intervene under S. 72, Civil P. O., should

arrange to leave sufficient land for the support of the judgment-debtor and his family. The effect of this standing order has been fully discussed by the executing Court, and I agree with the learned Subordinate Judge that it is difficult to see how the power of an executing Court can be affected thereby. In any case, the instructions refer only to those cases in which the Collector decides to intervene under S. 72, and this is not one of those cases. In the present instance the Court was entitled to reject the advice of the Collector, and it had sufficient reason for doing so when the course suggested by the Collector would result only in the partial satisfaction of the decree. For these reasons I consider that the learned District Judge acted erroneously in setting aside the arrangement made by the executing Court and in ordering it to follow the advice given by the Collector. I accept the appeal, and return the proceedings for the arrangement ordered by the Executing Court to be carried into effect. The decree-holder will receive his costs in this Court.

S.R.

Appeal allowed.

A. I. R. 1936 Lahore 31

ADDISON, AG. C. J. AND DIN
MOHAMMAD, J.*Bal Raj and others—Plaintiffs—Petitioners.*

v.

Mt. Mahanto—Defendant—Respondent.

Civil Misc. Petn. No. 321 of 1935, Decided on 9th July 1935, for leave to appeal to His Majesty in Privy Council, from order of Addison and Din Mohammad, JJ., D/- 14th January 1935.

(a) Civil P. C., (1908), S. 110—Suit property worth less than Rs. 10,000—Decree for mesne profits of suit property obtained in separate suit—Decretal amount sought to be added to increase value in appeal—Amount held could not be so added not being within Cl. (2), S. 110.

The subject-matter of a suit in the Court of the first instance was less than Rs. 10,000. In order to make up the prescribed valuation for appeal to the King in Council, it was sought to add the amount of the decree for mesne profits of the property, which decree was obtained in a separate suit.

Held: that the decretal amount could not be added so as to increase the value of the appeal to the Privy Council as it did not fall within Cl. 2, S. 110; 1916 *Mad* 985 and 1930 *P C* 44, *Rel on* [P 32 O 2]

(b) Civil P. C., (1908), S. 110—Words, 'amount or value of the subject-matter of the suit in the Court of the first instance' mean amount or value at institution and not at time of decree.

The words 'the amount or value of the subject-matter of the suit in the Court of the first instance' mean the amount or value at the institution of the suit, and not at the date of the decree in the Court of first instance, which meaning is not affected by the alternative condition which follows in the section: 1930 P C 44 Foll. [P 32 C 2]

(c) Civil P. C., (1908), S. 110—Claims indirectly connected with subject-matter of main suit—Adding claims to make up prescribed valuation—Indirect relation must not be too remote—Phrase 'directly or indirectly' refers to existing suits—Indirect relation must be decided from actual circumstances—Possible further suits may be considered if *res judicata* affects them.

If, in order to make up the prescribed limit of valuation for leave to appeal to the Privy Council various claims indirectly connected with the subject-matter of the main suit are sought to be added, the indirect relation must not be too remote. The phrase 'directly or indirectly' in S. 110 refers to suits in existence and cannot be stretched to cover suits not yet brought. The indirect relation must be decided with reference to actual circumstances at the time and not to circumstances which are remote. On the other hand the possibility of future suits may be taken into consideration if such suits will be affected by the doctrine of *res judicata*: 35 All 445; 1925 P C 159; 1932 Mad 125 and 1922 P C 257, Discussed and Foll. [P 33 C 1, 2]

J. N. Aggarwal—for Petitioners.

Mehr Chand Mahajan—for Respondent.

Addison, Ag. C. J.—This is an application for leave to appeal to His Majesty-in-Council. The principal plaintiff is Bal Raj, son of Mohan Lal and grandson of Ganga Ram. Mt. Mahanto, defendant 1, is the daughter of Muni Lal, who was the son of Ganga Ram. The plaintiff sued Mt. Mahanto for possession of a house and shop in Amritsar city on the ground that when Muni Lal was separated from his father Ganga Ram in 1909, Muni Lal then admitted by the deed of release, dated 13th August 1909, that he had only a life interest in the property given to him by his father at the time of his separation. It was further contended that Ganga Ram bequeathed the suit property upon the death of Muni Lal to Bal Raj who was, therefore, entitled to it as against Mt. Mahanto. The suit was valued at Rs. 5,250 for purposes of jurisdiction and of Court-fee and this may be taken to be the correct valuation. The trial Court decreed the claim for possession

but on appeal we dismissed the suit with costs throughout.

It was held by this Court that the property was meant to go to Muni Lal and to his heirs, of whom the daughter in the absence of sons was one; in other words, that there was an heritable estate given in the property to Muni Lal at the time of his separation from his father. It was further held that, though it was stated in the so-called deed of release, that he had no power to alienate the property, that restriction was invalid and ineffective. In the petition for leave to appeal to His Majesty-in-Council it is admitted that the value of the suit and of the appeal is only Rs. 5,250. It is claimed, however, that in a separate suit a decree has been given for Rs. 871 for mesne profits and it is desired to add this amount to the valuation for the purpose of valuing the appeal to the Privy Council. It is further claimed that one half of an area of 467 kanals, 13½ marlas is affected by our decision. This land is in possession of the plaintiff and no suit may ever be brought by Mt. Mahanto as regards this area. It is contended, however, that the value of this land should be added as, if a suit is brought, the decision must follow what has been found by us in this suit as the matter will be *res judicata*. As regards the claim to include the sum of Rs. 871 decreed as mesne profits in a separate suit, we hold that that cannot be added so as to increase the value of the appeal to the Privy Council. This does not fall within Cl. 2, S. 110, Civil P. C., which runs:

Or the decree or final order must involve, directly or indirectly some claim or question to or respecting property of like amount or value.

This follows from a decision of the Madras High Court, 39 Mad 843 (1) and the decision of their Lordships of the Privy Council, 57 I A 56 (2). The latter decision is also an authority for the proposition that the words 'the amount or value of the subject-matter of the suit in the Court of the first instance' mean the amount or value at the institution of the suit, and not at the date of the decree in the Court of first instance, which meaning is not affected by the alternative condition which follows in the section. The question, however, re-

1. Subramania Aiyar v. Sellammal, 1916 Mad 935=31 I C 296=30 M L J 317=39 Mad 848.
2. Mangamma v. Mahalakshamma, 1930 P C 44=121 I C 513=57 I A 56=53 Mad 167 (F B).

mains whether the value of the half share in 467 kanals 13½ marlas should be added as falling within the alternative Cl. 2, S. 110 already quoted. In 35 All 445 (3) it was held that, where the value of the subject-matter of the suit in the Court of the first instance was over Rs. 10,000, but the value of the subject-matter in dispute on appeal to His Majesty in Council was less than Rs. 10,000, and, where on the other hand the proposed appeal to His Majesty in Council necessarily involved a decision as to the validity of an award which dealt with property of far greater value and which had been declared by the High Court to be invalid, the provisions of S. 110, Civil P. C., applied and a certificate should be granted. It was added that it was not necessary that at the time of presenting an application for leave to appeal there should be pending in a Court a dispute respecting other property of the value of Rs. 10,000. On the other hand in 52 Cal 650 (4) it was held that for the alternative clause to apply the final order or decree must involve, directly or indirectly, some claim or question to or respecting property of like amount or value but that the connection must not be too remote. In 61 M L J 692 (5) it was held that the mere possibility of similar litigation in the Presidency would not entitle the petitioner to add to the value in one case the value of other cases as being 'indirectly involved,' unless the other litigation would be affected by the doctrine of res judicata. The remarks of their Lordships of the Privy Council at p. 481 of 45 Mad 475 (6) are worthy of consideration in this respect:

The proceedings may, in many cases, such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value, and its determination may govern the rights and liabilities of a value beyond the limit.

In such cases it was said that the Courts with propriety may make the

3. Sri Krishna Lal v. Kashmiro, (1913) 35 All 445=21 I C 617.
4. Udoychand Pannalal v. Guzdar & Co., 1925 P O 159=88 I C 445=52 I A 207=52 Cal 650 (P C).
5. Vasi Reddi v. Secy. of State, 1932 Mad 125=136 I C 449=55 Mad 106=61 M L J 692.
6. Radhakrishna Ayyar v. Sundaraswamiar, 1922 P O 257=74 I C 584=49 I A 211=45 Mad 475 (P C).

1936 L/5 & 6

necessary certificate: see also 1929 Mad 780 (7). From what has been said it follows that the indirect relation must not be too remote and there is authority to the effect that the phrase "directly or indirectly" refers to suits in existence and cannot be stretched to cover suits not yet brought. The indirect relation must be decided with reference to actual circumstances at the time and not to circumstances which are remote. On the other hand the possibility of future suits may be taken into consideration if such suits will be affected by the doctrine of res judicata. Such being the state of the authorities, we are of opinion that the case must be remitted to the Court of the Subordinate Judge, First Class, Amritsar, to hold an enquiry and report as to the value of the land held by the plaintiff, which may be affected by the decision in the present suit on the principle of res judicata, namely, one half of 467 kanals 13½ marlas. It will depend upon this valuation as to whether the decree or final order involves, directly or indirectly, some question to or respecting property of the value of Rs. 10,000. Return should be submitted by 16th October 1935 and any objections thereto put in within fifteen days.

S.R.

Order accordingly.

7. Secy. of State v. Sannidhiraju Subbarayudu, 1929 Mad 780=57 M L J 471.

A. I. R. 1936 Lahore 33

AGHA HAIDAR, J.

Messrs. Madan Theatres Ltd—Defendant—Appellant.

v.

Hari Das—Plaintiff—Respondent.

Misc. First Appeal No. 564 of 1934, Decided on 22nd June 1934, from order of 1st Class, sub-J., Lahore, D/- 5th February 1934.

(a) Attachment—Application for attachment before judgment—Court should be fully satisfied on proper affidavit or other materials before it takes any action.

The provisions of O. 38, Rr. 5 and 6, are very drastic as the plaintiff can secure a very great advantage over his opponent in the earlier stages of the litigation long before the merits of the controversy are tried out. The Court should therefore be fully satisfied on a proper affidavit or other materials before it can take any action under O. 38, Rr. 5 and 6. It should not paralyse the defendant against whom the suit is brought by lightly making an order of attachment before judgment. Where the affidavit filed by the ap-

plicant is wholly inadequate and is not in law an affidavit at all, the Court should not take action under O. 38, Rr. 5 and 6: 1928 *Lah* 376, and 1922 *Bom* 276, *Foll.* [P 34 C 2 P 35 C 1]

(b) Attachment—Application for attachment before judgment—Issue of notice under O. 38, R. 5 (1) is absolutely necessary—Court must strictly carry out stringent procedure laid down in O. 38, R. 5.

Issue of notice to defendant under O. 38, R. 5 (1) is absolutely necessary before an order under O. 38, R. 5 (3), is passed. Where no notice is issued no foundation is laid for an action under O. 38, R. 5 (3). Before passing the order of attachment before judgment, the Court must faithfully and strictly carry out the stringent procedure as laid down in O. 38, R. 5 and no short cuts are permissible. [P 35 C 1]

(c) Attachment—Order granting application for attachment before judgment without notice to defendant under O. 38, R. 5 (1) is appealable.

An order granting an application for attachment before judgment without issuing notice to defendant under O. 38, R. 5 (1) can be deemed to have been one under O. 38, R. 6 and is therefore appealable under O. 43, R. 1 (q): 1928 *Lah* 445 and 1914 *All* 511, *Foll.* [P 35 C 1, 2]

(d) Revision—Application for attachment before judgment granted without issue of notice under O. 38, R. 5 (1)—Order appealed from—Court may treat it as application for revision if no appeal lay.

When the lower Court grants an application for attachment before judgment, without issuing notice to the defendant under O. 38, R. 5 (1) and there is an appeal against the order, the Court may treat it as an application for revision and can interfere on the ground that the order of the Court below is unjust and fair and passed in defiance of the legal procedure prescribed by the Code, if the order is not appealable. [P 35 C 2]

*Dev Raj Sawhney and Kishori Lal—*for Appellant.

*Badri Das and Kirpa Ram Bajaj—*for Respondent.

Judgment.—This appeal arises out of an application made under O. 38, R. 5, Civil P. C. The plaintiff, Hari Das Kapur, brought a suit on 3rd February 1934, against Messrs. Madan Theatres Ltd., 5 Dharamtalla Street, Calcutta, for recovery of a sum of Rs. 6,500. Along with the petition of plaint the plaintiff also filed an application for the attachment before judgment of the furniture locked in the Elphinstone, the Excelsior and the Majestic Theatres and also for an order restraining the Lahore Electric Supply Co. from paying the sum of Rs. 610 deposited with them on account of security, and further that the defendant be called upon to furnish security as required by law. This application was accompanied by a so-called affidavit.

On 5th February 1934 the Subordinate Judge, First Class Lahore, made the following order:

Lala Kirpa Ram Bajaj, Advocate for plaintiff, is present. An affidavit is attached. A warrant for attachment before judgment be issued under O. 38, R. 5 (3), Civil P. C., as prayed. Process fee to be deposited within two days.

The defendant has come up to this Court in appeal against this order. A preliminary objection was taken by the respondent that no appeal lies against the order which, on the face of it, was passed under O. 38, R. 5 (3). I shall consider this objection later on. The affidavit in support of the application filed by the plaintiff in the Court below is wholly inadequate and is in fact no affidavit at all. In para. 3 it is stated that the respondents intend to misappropriate their property at Lahore with the object that the applicant may not get anything in case a decree is passed in his favour in the above-noted case. In para. 4 it is stated that the respondents dishonestly intend to withdraw the security deposited in respect of the Majestic Talkies. In paras. 7 and 8 it is stated that the respondents have already misappropriated the furniture, motor, electric fans and other goods belonging to them and lying in the Excelsior Theatre and that the Elphinstone Theatre has been closed for the last five or six days. There is nothing in this affidavit to show how the plaintiff came to know the intention of the defendants to misappropriate the properties in the Elphinstone, Excelsior and Majestic Talkies and also their object that the plaintiff may not get anything in case a decree is passed in his favour. The same remark applies to para. 4 of the affidavit. Again it is not explained how a party can misappropriate its own property and yet the allegation is made in paras. 3 and 7 of the affidavit that the defendant was committing such misappropriation. The affirmation attached to the affidavit is wholly insufficient. It does not give any details as to what portion of the affidavit was based upon the personal knowledge of the deponent and what allegations were founded upon information and whether he believed it to be true.

The provisions of O. 38, Rr. 5 and 6 are very drastic, as the plaintiff can secure a very great advantage over his opponent in the earlier stages of the litigation long before the merits of the controversy are

tried out. The Court should be fully satisfied on a proper affidavit or other material before it takes any action under O. 38, Rr. 5 and 6. It should not paralyse the defendant against whom the suit is brought by lightly making an order of attachment before judgment. In the present case, as already mentioned, the affidavit on which the Court below acted, was wholly incompetent and was not in law an affidavit at all: vide the observations of Tek Chand, J., in 106 I C 808 (1) and 46 Bom 431 (2). Again, no notice, which is clearly contemplated by O. 38, R. 5, Civil P. C., was issued to the defendant directing him within a fixed time either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security. The Court at once proceeded to pass an order under the provisions of O. 38, R. 5 (3). The provisions of this sub rule permit a conditional order to be passed for the attachment of the whole or any portion of the property, but it must be clearly understood that this order takes effect only if action has been taken under O. 38, R. 5 (1), Civil P. C., and that proper notice has been issued. Here no notice whatsoever was issued, and therefore no foundation was laid for action being taken under O. 38, R. 5 (3), Civil P. C. Before passing an order of attachment before judgment the Court must faithfully and strictly carry out the stringent procedure as laid down in O. 38, R. 5, Civil P. C., and no short cuts are permissible: vide, 106 I C 808 (1) and 57 I C 907 (3).

The question now arises whether an appeal lies. The authority of a learned Single Judge of the Lahore High Court reported in 107 I C 276 (4) goes to show that an order like the one passed by the Subordinate Judge in the present case must be deemed to have been one under

1. Kanshi Ram v. Hindustan National Bank Ltd., 1928 Lah 376=106 I C 808.
2. Sennaji Kapurchand v. Pannaji Devi Chand, 1922 Bom 276=64 I C 580=46 Bom 431=23 Bom L R 1228.
3. Abdul Karim v. Nur Mahomed, 1920 Cal 526=57 I C 907.
4. S. Jai Dev Singh v. S. Jai Singh, 1928 Lah 445=107 I C 276.

O. 38, R. 6, Civil P. C., and is therefore appealable under O. 43, R. 1 (1): vide also 23 I C 107 (5). In this view of the matter an appeal lies to this Court. Even assuming for the sake of argument that the order in question is not appealable, the memorandum of appeal under the circumstances of the case may be treated as an application for revision, and this Court can interfere on the ground that the order of the Court below is unjust and unfair and was passed in defiance of the legal procedure prescribed by the Code. Whatever view may be taken I set aside the order of the Court below and dismiss the application of the plaintiff. The plaintiff respondent to pay the costs of the application throughout. The stay order is discharged.

R.M.

Order set aside.

6. Nathu Mal v. Kishori Lal, 1914 All 511=23 I C 107.

A. I. R. 1936 Lahore 35

TEK CHAND AND CURRIE, JJ.

Sat Narain—Plaintiff—Appellant.

v.

Pheroze Behramji and others — Defendants—Respondents.

First Appeal No. 2276 of 1934, Decided on 15th May 1935, from order of Senior Sub-Judge, Delhi, D/- 5th October 1934.

(a) Pre-emption—Cause of action—Plaintiff merely alleging in plaint that he has right of pre-emption without specifying grounds of his claim—Grounds specified in replication—Pleading taken as whole discloses cause of action with sufficient clearness.

Where the plaintiff states in the plaint in a pre-emption suit that he has a right of pre-emption, but does not specify the grounds on which he bases his claim, it cannot be said that the plaint does not disclose a cause of action. It is merely not sufficiently specific, but if in his replication the plaintiff clearly states that he claims the right of pre-emption by reason of his being co-sharer in the property sold and as the owner of contiguous property, the pleadings taken as a whole make the plaintiff's position quite clear; and it cannot be said that they do not disclose the plaintiff's cause of action with sufficient clearness: 42 I C 268 and 1933 Lah 774, *Disting.* [P 36 C 2]

(b) Punjab Pre-emption Act (1913), S. 3 (5)—Sale of insolvent's property by Official Assignee does not amount to act in execution of order of Court—Sale is subject to right of pre-emption.

The act of an Official Assignee in selling the property of an insolvent is not an act in execution of the order of a Court and the sale is therefore subject to the right of pre-emption: 1935 Lah 268 (F B), *Foll.* [P 37 C 1]

Kishan Dayal and Bhagwant Dayal—for Appellant.

Mehr Chand Sud and Achhru Ram for *Mehr Chand Mahajan and Govind Ram Khanna*—for Respondents.

Tek Chand, J.—The property in dispute is a part of the estate of R. B. Sri Kishan Das of Delhi, who was adjudicated insolvent by an order of the Bombay High Court. On adjudication his estate vested in the Official Assignee. On 30th July 1932, the Official Assignee sold the property in dispute to the Bank of Upper India (in liquidation). On 19th April 1933 the plaintiff Sat Narayan, who is one of the sons of the insolvent, instituted the present suit for pre-emption of the properties sold by the Official Assignee to the Bank of Upper India. In the body of the plaint it was stated that the plaintiff had got a right to pre-empt the property in dispute, but the incidents of the right on which the claim was based were not specified. The defendant Bank filed a lengthy written statement pleading inter alia (1) that the sale, having been effected by the Official Assignee, must be taken to have been made in execution of an order of a Court, and therefore was exempt from pre-emption under S. 3 (5), Punjab Pre-emption Act, and (2) that the plaint did not disclose a cause of action as the plaintiff had not specified the incidents on which he based his alleged claim. In his replication the plaintiff traversed the first plea, and as to the second he stated clearly that he claimed pre-emption by reason of his being (a) a co-sharer in the property, and (b) the owner of a house which is contiguous to the property sold. The learned Sub-Judge, Sardar Sewa Singh, framed a preliminary issue:

Whether the sale by the Official Receiver was not a sale within the meaning of S. 3 (5), Punjab Pre-emption Act.

After hearing arguments he passed an order on 31st May 1934, deciding this issue in favour of the plaintiff. He then framed 14 other issues one of which was:

Whether the plaint disclosed a cause of action, and, if not, what was the effect of the particulars of the right of pre-emption given in the replication by the plaintiff.

At this stage Sardar Sewa Singh was transferred and his successor, Mr. Abdul Rab, decided this issue against the plaintiff, holding that the plaint as framed did not disclose a cause of action and

that the particulars given in the replication could not be taken advantage of by the plaintiff as supplying the defect. He accordingly dismissed the suit without deciding the issues on the merits. After examining the record and hearing counsel I have no doubt that the decision of the lower Court that the plaint did not disclose a cause of action, is incorrect. As stated already the plaintiff had stated in the plaint in general terms that he had a right of pre-emption, and though he did not specify the grounds on which he based his claim, it cannot be said that the plaintiff did not disclose a cause of action. All that can be said is that the plaint, as originally presented, was not sufficiently specific, but the matter was put beyond doubt in the replication, when the plaintiff clearly stated that he claimed to pre-empt the property by reason of his being a co-sharer in the property sold, and also as the owner of contiguous property. These particulars were supplied at the earliest possible opportunity and before the issues were framed. The pleadings taken as a whole made the plaintiff's position quite clear and it cannot be said that they did not disclose the plaintiff's alleged cause of action with sufficient clearness of precision.

The learned counsel for the respondents has referred us to 42 I C 263 (1) and 144 I C 822 (2). In both those cases, however, the plaintiff had originally based his claim for pre-emption on one particular ground, and then, after the trial had proceeded, and evidence led, he had attempted to change his front and to rely upon a totally different ground. This he was held not entitled to do. The present case is entirely different. Here there has been no 'departure' from the original plaint. All that the plaintiff did in the replication was to amplify the plaint and to clearly state his grounds of attack. The rulings cited have no bearing whatever. I hold that the decision of the learned Sub-Judge on this point is incorrect and must be set aside. Counsel for the respondent Bank attacked the finding of Sardar Sewa Singh on the preliminary issue and urged that the sale by the

1. *Zora Singh v. Jagta Singh*, 1917 Lah 801=42 I C 263=1917 P R 83.

2. *Rulia Ram v. Ram Chandra Das*, 1938 Lah 774=144 I C 822=14 Lah 807=35 P L R 96.

Official Assignee was not subject to pre-emption, under S. 3 (5), Punjab Pre-emption Act. This matter is concluded by a recent Full Bench of this Court in 155 I C 693 (3), where it has been held that the Act of an Official Receiver in selling the property of an insolvent is not an act in execution of the order of a Court and is, therefore, subject to the right of pre-emption. The result is that this appeal must be accepted, the judgment and decree of the lower Court set aside and the case remanded under O. 41, R. 23, Civil P. C., for decision of the remaining issues. Court-fee on this appeal shall be refunded. As the plaintiff had not expressly stated in the plaint the grounds on which he claimed pre-emption he is not entitled to the other costs of the litigation and I would accordingly leave all parties to bear the costs incurred by them up to date in both Courts.

Currie, J.—I agree.

R.M./R.K.

Appeal accepted.

3. Gurbakhsh Singh v. Sardar Singh, 1935 Lah 268=155 I C 693=16 Lah 178=37 P L R 402 (FB).

A. I. R. 1936 Lahore 37

ADDISON, AG. C. J. AND DIN
MOHAMMAD, J.

Ghulam Mohammad Khan and others
—Defendants—Appellants.

v.

Samundar Khan and others — Plaintiffs—Respondents.

First Appeal No. 1544 of 1932, Decided on 7th June 1935, from decree of Senior Sub-Judge, Attock, D/- 27th June 1932.

(a) Evidence Act (1872), S. 35—Documents containing mere opinion of Government officers who have held no personal inquiries are not admissible.

The documents consisting of mere opinions expressed in Secretariat correspondence which passed between various officers of the Government who had held no personal inquiries in the matter are inadmissible in evidence. [P 38 C 2]

(b) Civil P. C. (1908), O. 41, R. 27 (1) (b)—Additional evidence can be admitted only when appellate Court requires it.

Under O. 41, R. 27 (1) (b), it is only where the appellate Court 'requires it (i.e., finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. The legitimate occasion for the exercise of this discretion is not, whenever before the appeal is heard a party applies to adduce

fresh evidence, but when on examination of evidence as it stands, some inherent lacuna or defect becomes apparent. It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands: 1931 P C 143, *Foll.* [P 39 C 1]

(c) Practice—Pleadings—Particular passage should not alone be looked into to determine nature.

It is not possible to expect any extreme degree of exactitude in the pleadings drafted in the Mufassil Courts, nor is it fair to confine oneself to a particular passage therein while determining their true nature. It must be taken as a whole. [P 39 C 2]

(d) Punjab Land Revenue Act (17 of 1887), S. 45—Entry in record of rights in favour of defendants—Any person aggrieved by it can file suit under S. 42, Specific Relief Act.

Section 45, Punjab Land Revenue Act, clearly empowers any person aggrieved by an entry in the record of rights to seek relief under S. 42, Specific Relief Act. It is for the plaintiffs to decide whether they feel aggrieved by any such entry, and if the plaintiffs assert that they are so aggrieved, the defendants cannot be allowed to urge that the plaintiffs should not feel aggrieved and be not permitted to knock at the door of the Court. [P 39 C 2]

(e) Punjab Land Revenue Act (17 of 1887), S. 45—Entry in record of rights—Subsequent declaratory suit—Cause of action arises when plaintiff feels aggrieved and not from date of entry—Suit is governed by Art. 120, Lim. Act.

A suit for a declaration in respect of an entry made in record of rights filed under S. 42, Specific Relief Act, read with S. 45, Punjab Land Revenue Act, is governed by Art 120, Lim. Act. The cause of action in all such cases would accrue when the plaintiff feels aggrieved and not from date of entry. [P 40 C 2]

(f) Limitation—Person continuing in possession in spite of adverse entry in revenue papers—No question of limitation arises.

Where a person continues in possession of proprietary rights in spite of an adverse entry appearing in revenue papers, no question of limitation arises: 1919 Oudh 80, *Appl.*

[P 40 C 2]

(g) Custom (Punjab) — 'Ala malik' and 'talukdar' differences explained.

The words 'ala malik' literally mean 'superior proprietor', and the word 'talukdar' conveys the idea of a land-holder or an overlord. A talukdar may be an ala malik, but it is not necessary that he should be so. The status of ala maliks carries with it certain privileges which a mere talukdar does not enjoy and hence the important distinction between these two different kinds of tenures. An ala malik may inter alia be entitled to all the unculturable land in the village; he may possess a right of reversion or in other words the right of succession to all lands whose owners die without an heir; he is entitled by the law of pre-emption to exercise a preferential right of purchase on the sale of inferior proprietorships and he may claim a share of the sale money for himself if the inferior pro-

prietorships are sold. But a talukdar is not entitled to any such privileges. [P 40 C 2, P 41 C 1]

(b) **Record of Rights — One sided entries made by illegal procedure cannot prejudicially affect interest of others.**

Where the procedure adopted in the preparation of record of rights is illegal, the one-sided entries therein cannot prejudicially affect the interests of others. [P 41 C 2]

(i) **Evidence Act (1872), S. 35 — All views expressed before final stage is reached are not admissible — Only final decision is admissible — Other requirements necessary mentioned.**

The very wording of S. 35 conveys the idea of a duty imposed upon the maker of the entry by law or his official position to record the information he possesses or has gathered in an official document of the nature described therein. It further imports that the entry will be of a permanent nature and thus excludes all such writings as are merely of an ephemeral character; and in so far as they do not incorporate the result of personal inquiries, are not intended to be used for reference in future. Another idea which runs underneath this section is that the person making the entry should be such as is invested with authority to record a decision which, so far as the matter before him is concerned, will be final. It thus excludes all views expressed before the final stage is reached and makes only those decisions relevant which constitute the final word in the matter. Hence letters which have passed between the various officials cannot be admitted under S. 35 so as to make the remarks made therein as legal evidence in the case; and if the final conclusions arrived at are recorded in the settlement papers those are the only documents which can be consulted in the decision of these cases. [P 41 C 1, P 42 C 1]

(j) **Custom (Punjab)—Ala maliks — Mere provision for payment of dhauri and juti tax is not enough to confer status of ala maliks.**

The fact that the dhauri and juti tax is provided for in a village, by itself is not enough to confer the status of ala maliks especially where there is no indication in the entry itself as to person or persons responsible for its payment or as to the method of its realization and where it has not been established that this tax was ever collected. [P 42 C 1]

Shuja ud-din and Mohammad Munir—for Appellants.

Durga Das Jain, Inder Dev and Ram Lal Anand I—for Respondents.

Din Mohammad, J.—There are five appeals before us, viz. Civil Appeals Nos. 1544 and 1545 of 1932, and Civil Appeals Nos. 1081, 1082 and 1083 of 1933. They have arisen out of five suits brought by the proprietors of five villages, namely Pind, Ahmadal, Utran Maghian and Jangla, respectively, against Khan Bahadur Nawab Gulam Mohammad Khan and others, popularly known as the Maliks of Pindigheb. In each case the proprietors claimed

full ownership of the lands in their possession and denied the status of ala maliks claimed by the defendants in relation to them. The Pind and Ahmadal suits were instituted in the month of April 1932, while the Utran, Maghian and Jangla suits were instituted after the decision of the first two suits. The former two suits were decreed in favour of the proprietors and in those cases the defendants have lodged Appeals Nos. 1544 and 1545 of 1932. The latter three suits were dismissed and in those cases the plaintiffs have lodged Appeals Nos. 1081, 1082 and 1083 of 1933.

The main point for determination in all the five appeals is common, but in the interests of clarity and precision we have considered it proper to dispose of Civil Appeals Nos. 1544 and 1545 of 1932 in the earlier part of this judgment leaving the other three appeals to be dealt with later, as the subsidiary points raised by the defendant in the first set of appeals have not been raised in the second set, and the evidence relied on by the defendants in the second set of appeals was not adduced in the previous suits and could not, therefore, be referred to in their decision. Civil Appeals Nos. 1544 and 1545, as stated above, relate to the villages Pind and Ahmadal respectively. In these cases, counsel for the appellants has applied at the outset that he may be allowed under O. 41, R. 27, Civil P. C., to produce certain documents which he did not produce before, as he could not obtain them during the pendency of the proceedings in the trial Court. We have, however, decided not to allow this request. In the first place, as discussed in the connected appeals, the documents intended to be produced, consisting of mere opinions expressed in Secretariat correspondence which passed between various officers of the Government who had held no personal inquiries in the matter, are inadmissible in evidence. Secondly, even if they were admissible, we are not prepared to let them in at this stage. The affidavit put in by the appellants' agent is couched in very vague terms and does not mention when the copies were obtained and why they could not be had before. Besides, R. 27 of O. 41, Civil P. C., has been quite recently interpreted

by their Lordships of the Privy Council in 10 Pat 654 (1), and to allow this application will amount to a complete disregard of both the letter and the spirit of the law as enunciated therein. At p. 668 of the Report their Lordships observed as follows :

Under O. 41, R. 27 (1) (b), it is only where the appellate Court "requires" it (i. e. finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not, whenever before the appeal is heard, a party applies to adduce fresh evidence, but 'when on examining the evidence as it stands,' some inherent lacuna or defect becomes 'apparent'. This is laid down in the most positive terms by Lord Robertson in 81 Bom 381 (2). It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands.

We do not feel any inherent lacuna in the case, nor do we require these documents to be produced to enable us to pronounce our judgment thereon. We will therefore proceed with these cases as they were presented in the Court below. Counsel for the appellants has urged that the suit as framed did not lie, inasmuch as no suit for a declaration that the defendant does not possess a certain legal character claimed by him is competent. He has relied on the wording of S. 42, Specific Relief Act, as well as on that of S. 45, Land Revenue Act. It is no doubt true that a declaratory suit must claim for the plaintiff any legal character that is denied to him by the defendant, but the plaints in the suits before us, read as a whole, fulfil the requirements of law. It is not possible to expect any extreme degree of exactitude in the pleadings drafted in the Mufassil Courts, nor is it fair to confine oneself to a particular passage therein while determining their true nature. The plaints in both the suits start with a declaration of the real status of the plaintiffs, deny the claim of the defendants in relation to the lands possessed by them and end with a prayer for the declaration that the

defendants do not possess the status which is claimed by them. This prayer involves the real point at issue, viz., whether the plaintiffs are full owners of the lands possessed by them, and their ownership is not burdened with an encumbrance in the shape of *ala milkiyat* or superior proprietorship, as alleged by the defendants. This is what one understands from the plaints taken as a whole and this is what the defendants themselves understood the plaints to mean when they put in their pleas. So much so that they did not raise this technical point in the Court below. The point there raised and developed by them was that inasmuch as the plaintiffs could seek consequential relief in the form of correction of revenue entries, a suit for a mere declaration was not maintainable. That this is so will be obvious from the discussion of the Subordinate Judge under issue 1. The grounds of appeal were also confined to attacking the decision of the Court below on this point. It is too late in the day now to raise this highly technical plea and to entertain it would be most unfair to the plaintiffs. Had this plea been taken at the proper time when the pleas were put in, the plaintiffs could have easily amended the plaints and brought their prayer into line with the rest of the plaint and in accordance with the strict requirements of law. On these grounds we disallow this objection.

Counsel has further urged that the plaintiffs have no cause of action and hence their suits were incompetent. He has contended that no encroachment took place on the rights of the plaintiffs, that the defendants did not come into conflict with the plaintiffs in any manner and that beyond the existence of an entry in the revenue records which did not touch the plaintiffs at all nothing had happened which could have justified the institution of these suits. Here also he is mistaken. S. 45, Punjab Land Revenue Act, clearly empowers any person aggrieved by an entry in the record of rights to seek relief under S. 42, Specific Relief Act. It is for the plaintiffs to decide whether they feel aggrieved by any such entry, and if the plaintiffs assert that they are so aggrieved, the defendants cannot be allowed to urge that the plaintiffs

1. *Parsotim Thakur v. Lal Mohar*, 1931 P C 143 = 132 I C 721 = 58 I A 254 = 10 Pat 654 (P C).
2. *Kessowji Issur v. G I P Ry.*, (1907) 31 Bom 381 = 84 I A 115 = 9 Bom L R 671 (P O).

should not feel aggrieved and be not permitted to knock at the door of the Court. It is apparent that the names of the defendants were inserted in the column provided for the names of the *ala maliks* and this materially detracted from the status of the plaintiffs. Even an angel would have felt aggrieved in these circumstances, and we cannot blame the plaintiffs for being hypersensitive on this score. We hold, therefore, that the plaintiffs had a cause of action by virtue of S. 45, Punjab Land Revenue Act, read with S. 42, Specific Relief Act, when they came into Court, and that these suits were maintainable. Counsel has next urged that if the entry complained of afforded a substantial cause of action to the plaintiffs then, inasmuch as this entry was made in 1905-06, their suits are evidently time barred. This also is a belated attempt to create stumbling blocks in the way of the plaintiffs. It was alleged in the plaints that the defendants, taking undue advantage of their position, got these entries made in the *jamabandis* behind the back of the plaintiffs and that they learnt of these entries for the first time in 1929-30. The defendants in their pleas, dated 21st May 1932, traversed these allegations. Issues were struck on the 23rd May, but it appears that this objection was waived, as no issue was framed on this point. This fact is borne out by the judgment itself. The defendants again changed their mind and mooted this point at the time of arguments in the trial Court, and the Subordinate Judge decided this point against them on the merits. In the first place, in the face of the defendants' waiving this point at the time of the issues and thus depriving the plaintiffs of an opportunity of proving their assertions in the Court below, it would not be proper to allow them to raise this point in appeal. The bar of limitation is not patent on the face of the record. The plaintiffs, if confronted with this plea at the proper moment, could have led evidence to prove that they had no knowledge of these entries prior to 1929-30, and as the determination of this question is not possible without the introduction of these facts and as these facts have been withheld on account of the defendants' waiver, we are not prepared to allow the defendants to contest this

point before us. Secondly, to such suits Art. 120, Lim. Act, applies and the *terminus a quo* in such cases is when the cause of action accrues. Reading this Article with S. 45, Punjab Land Revenue Act, the cause of action in all such cases would accrue when the plaintiffs feel aggrieved, and in these circumstances, on the plaintiff's allegations, these suits will be within time. Moreover, as laid down in the authorities cited before the Court below, where a person continues in possession of proprietary rights in spite of an adverse entry appearing in the revenue papers, no question of limitation arises: vide 54 I C 317 (3). Even on the merits, therefore, there is no force in this contention and we overrule it. (His Lordship then examined the entry and held that that entry by itself could not be sufficient to confer upon the defendants the status claimed by them. The judgment then proceeded).

It may be useful here to explain what the term '*ala malik*' imports and how it is distinguishable from the term '*talukdar*'. A reference to pp. 217 and 218 of the Gazetteer of the Attock District will throw sufficient light on this matter. These are two out of several forms of proprietary tenures which were found to exist in some parts of this Province when the Punjab came under the British domination. The words "*ala malik*" literally mean "superior proprietor", and the word "*talukdar*" conveys the idea of a land-holder or an overlord. A *talukdar* may be an *ala malik* but it is not necessary that he should be so. All those persons who claimed this status at the time of the annexation of the Punjab by the British Government were really those petty chieftains who had settled with the Sikh Government for the payment of the revenue of locality in which they held sway or occupied some position of trust and responsibility. Though it is difficult to lay down any hard and fast rules which governed the settlement of such claims at the time of the first regular settlement, yet a study of the history of those times leads one to conclude that where the Government was satisfied that when the village had been founded by the ancestors of the claimants,

3. *Bhagwan Bakhsh Singh v. Sant Prasad* 1919 Oudh 80=54 I C 317=22 O C 369.

their status was recognised as that of *ala maliks*; but where this was not the case and it was only proved that under the Sikh rule the claimants had exercised some sort of superior rights or had helped in the realisation of land revenue, their rights were recognised as those of *talukdars* and the persons so recorded in the revenue papers were allowed a fixed percentage of the land revenue payable by the estate.

The status of *ala maliks* carries with it certain privileges which a mere *talukdar* does not enjoy, and hence the important distinction between these two different kinds of tenures. An *ala malik* may *inter alia* be entitled to all the unculturable land in the village; he may possess a right of reversion or in other words the right of succession to all lands whose owners die without an heir; he is entitled by the law of pre-emption to exercise a preferential right of purchase on the sale of inferior proprietorships and he may claim a share of the sale money for himself if the inferior proprietorships are sold. But a *talukdar* is not entitled to any such privileges. The following passage at p. 218 of the Gazetteer may be referred to with advantage:

The *talukdars* are sometimes *ala maliks* of the village and as such own all uncultivated lands and have been recorded as *ala maliks* in the papers. Elsewhere, they have no rights of any description in the *talukdari* villages except to receive these dues and they have nothing to do with the payment of the revenue.

From the evidence which has been summarised above, it is abundantly clear that the defendants hold a pure and simple status of *talukdars* without the appendage of superior proprietorship, and either on account of the influence they wielded in the locality or on account of political services rendered to the Crown by themselves or their ancestors, they were recorded as *talukdars* in the revenue papers. There was no separate column provided for this purpose in the *jamabandis* and consequently their names were entered in the column provided for *ala maliks*, but it was expressly mentioned therein that they were *talukdars*. Accordingly they cannot claim any higher status than what was conferred upon them in the revenue records. It is also significant that even these entries were made for the first time in 1905-06 by the *ipse dixit* of the

Revenue Officers responsible for the preparation of the records and not as the result of any mutation which under the law in force it was necessary to do, if it was intended to confer any status on them or to derogate from the title of the plaintiffs. The procedure adopted being illegal, these one-sided entries cannot prejudicially affect the interests of the plaintiff. (His Lordship then examined Appeal No. 1545, and after dismissing it took up Appeals Nos. 1081, 1082 and 1083 of 1934, and after referring to certain documents, the judgment proceeded). These documents are all letters addressed by one official to another incorporating his own opinions on the claim put forward by the *Maliks* of Pindigheb. These opinions are mainly based on the individual predilections of the writer for the *maliks* with a view to strengthen the position advocated by him. The recommendation made in some of these letters were not even accepted in the form as made and it was only the final result of this correspondence that was eventually incorporated in the settlement records. Those entries alone can be admissible and not the views expressed by the different officials at any intermediate stage. For the admissibility of these letters, counsel for the respondents has relied on S. 35, Evidence Act; but in our opinion that section does not warrant such a conclusion. The section reads as follows:

An entry in any public or other official book, register or record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in the performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

In the first place, neither these letters are public or official books, registers or records as provided for by S. 35, nor are the opinions expressed therein such entries as are contemplated by this section. The very wording of the section conveys the idea of a duty imposed upon the maker of the entry by law or his official position to record the information he possesses or has gathered in an official document of the nature described therein. It further imports that the entry will be of a permanent nature and thus excludes all such writings as are merely of an ephemeral character and in so far

as they do not incorporate the result of personal inquiries, are not intended to be used for reference in future. Another idea which runs underneath this section is that the person making the entry should be such as is invested with authority to record a decision which so far as the matter before him is concerned will be final. It thus excludes all views expressed before the final stage is reached and makes only those decisions relevant which constitute the final word in the matter. Tested in the light of these observations, it will be obvious that these letters which have passed between the various officials cannot be admitted under S. 35 so as to make the remarks made therein as legal evidence in the case. The final conclusions arrived at were recorded in the settlement papers and those are the only documents which can be consulted in the decision of these cases. (After dealing with evidence, the judgment proceeded). In the Utran case, besides other documents, the plaintiffs have produced a certified copy of an entry in the wajibularz to which is appended a note which says that by order of the Settlement Officer, dated 31st August 1864, talukdari dues were granted to the Malik of Pindigheb. In this case also the defendants were described as mere talukdars upto 1905-06 and it was for the first time then that their names were inserted in the jamabandi in the column of ala maliks and in the Muafi records the words "adna maliks" or inferior proprietors were used for the de facto proprietors. But as remarked above, this entry made behind the back of the plaintiffs, does not derogate from their right at all. The fact is that the dhauri and juti tax is provided for in the case of this village too; but that by itself is not enough to confer the status of ala maliks on the defendants, especially as, firstly, there is no indication in the entry itself as to the person or persons responsible for its payment or as to the method of its realisation and secondly, it has not been established that this tax was ever collected.

The remarks made above in relation to the Utran case apply mutatis mutandis to the Maghian and Jengla cases also, with this distinction that on the record of the Maghian case there is a detailed order of Major Cracroft, dated 3rd August 1864, refusing the claim of the

defendants as ala maliks and assigning to them the talukdari dues only. If, as alleged by the defendants, the terms "ala malik" and "talukdar" are interchangeable, there was no point in the defendant's claiming the status of ala maliks at the time of the first regular settlement and no reason why the authorities concerned should have denied the status of ala maliks to them and conferred upon them the status of talukdars only. We have given our best consideration to these cases and have reached the conclusion that these three appeals must succeed. We therefore set aside the order of the Court below and accept these appeals with costs throughout.

K.S.

Order accordingly.

A. I. R. 1936 Lahore 42

TEK CHAND AND CURRIE, JJ.

C. N. Chandra and others—Plaintiffs
—Appellants.

v.

Dwarka Das — Defendant — Respondent.

First Appeal No. 543 of 1934, Decided on 21st May 1935, from decree of Senior Sub-Judge, Multan, D/- 21st December 1933.

(a) Mortgage—Mortgage with possession—Mortgagee's suit against lessees of mortgagor for rent—Decree—Failure to execute decree—Mortgagee was in position of lessor, hence held responsible for execution of decree though lease effected by mortgagor.

A mortgagee who was in possession of the mortgage property instituted a suit for rent against the lessees on the property. He obtained a decree against the lessees but failed to execute it:

Held: that the mortgagee was himself in the position of the lessor; hence he was the person responsible for the execution of the decree and not the mortgagor though the lease was effected by the mortgagor. Therefore he must make good to the mortgagor the loss caused by the non-execution of the decree, [P 44 C 1]

(b) Mortgage — Interest — Mortgage with possession—Mortgagee to take income in lieu of interest—Balance to be paid by mortgagor — Compound interest chargeable if failure to pay as stipulated—Income of property insufficient to cover interest—Mortgagee's failure to inform mortgagor accordingly—Mortgagee held not entitled to compound interest.

In a mortgage with possession it was stipulated that the mortgagee should absorb the income of the mortgaged property towards interest on the mortgage amount, and in case the income fell short of the amount of interest accrued due, the mortgagor should make good the balance thereof. In case of failure to pay the interest as

agreed the mortgage amount was to carry compound interest at a higher rate. The income of the property was found to be insufficient to cover the interest. The mortgagee however failed to inform the mortgagor about the shortage:

Held: that the mortgagee was not entitled to charge compound interest. [P 44 C 1]

Bishen Narain, Kishen Dayal, S. I. Puri for M. L. Puri and S. R. Sawhney—for Appellants.

Hargopal and Sewa Ram—for Respondent.

Currie, J.—The facts leading to this litigation may be briefly stated. On 21st October 1924 Khota Ram and others mortgaged with possession their share in Daya Pindwala well consisting principally of a garden to Dwarka Das for a sum of Rs. 11,000. The mortgage money was to carry interest at the rate of 12 annas per cent per mensem. The mortgagee was to be in possession and realise the income which was to be credited against interest. If any default in payment of interest were made, the amount was to carry compound interest at 1 per cent per mensem. On 23rd March 1930 the mortgagors executed an agreement to sell to one Thakar Das for Rs. 30,000, of which Rs. 15,000 was to remain with Thakar Das, to pay off the mortgage held by Dwarka Das. Any excess or deficit in the amount due to the mortgagee was to be adjusted between the vendors and the vendee. The vendee sued for specific performance of this agreement and the matter was compromised on 29th April 1930 and the deed registered. On 21st August 1930 Thakar Das applied to the Revenue Courts for redemption of the mortgage on payment of Rs. 11,000, alleging that the produce had exceeded the amount due as interest and that really less than this amount was due. He deposited that amount on 2nd September 1930. The mortgagee claimed a sum of Rupees 16,641-0-9 plus Rs. 276 interest on the expenses and future interest. The Revenue Assistant, by his order of 20th February 1932, came to the conclusion that a sum of Rs. 15,989-4-0 was due. This amount was deposited under protest a few days later. On 11th April 1932 the mortgagee sued for a declaration that he was entitled to a sum of Rs. 2,100 over and above the amount allowed by the Revenue Assistant. On 7th May 1932 the vendee sued

for a declaration that not more than Rs. 11,000 was payable. The vendee's suit was dismissed by the learned Senior Subordinate Judge, while he decreed a sum of Rs. 1,749-14-6 with future interest in favour of the mortgagee.

The decision of the trial Court was based on the mortgagee's account, which the Court held must be considered conclusive under the terms of the mortgage. It is clear however that the condition which occurs in Cl. (3) of the mortgage deed relates only to petty expenses incurred for repairs to the well, etc., and payment of revenue such as are detailed in that clause. The principal ground taken by Mr. Kishen Dayal on behalf of the appellants is that the mortgagee under the provisions of S. 76, T. P. Act, was under an obligation to maintain regular accounts of the income and expenditure, and that as he has failed to do so he should be allowed nothing by way of interest. The rulings cited in support of the proposition that the whole of the interest should be wiped out proceed on the particular circumstances of those cases. The principle governing such cases is that laid down in 44 I C 9 (1) that where the mortgagee has failed in his duty in respect of keeping of account, every presumption is to be taken against him. In the present instance the mortgagee did file certain accounts, or rather a statement of accounts supported by receipts from the purchasers of fruit. The account as prepared by him is given at p. 160 of the paper book. For the first two years he has allowed a sum of Rs. 348 on account of the year 1924-25 and Rs. 327-8-0 on account of the year 1925-26. Actually the land was leased for those two years at the rate of Rs. 1,000 per annum. He realised Rs. 348 from the lessees and succeeded in ejecting them after 18 months and then realised Rs. 327-8-0 as the owner's share for sale of the fruit. He accordingly sued the lessees for the sum of Rs. 1,152, i. e. Rs. 1,500 on account of 18 months, less the amount Rs. 348 already received, and obtained a decree for Rupees 1,152 from the revenue Court. He attempted to execute this, but according to his own account has realised nothing, and the execution proceedings were

1. *Allah Yar v. Thakur Das*, 1918 Lah 314=44 I C 9=24 P L R 1918.

eventually filed in default of payment of process fees in August 1930. The mortgagors were impleaded by him as defendants in these proceedings and he claimed that Khota Ram, mortgagor, was the person really responsible for effecting the lease in favour of these persons. However, it is clear that he was in the position of, lessor himself and as such responsible for executing the decree. The lease money represents the value which the parties attached to the land at the time and credit should actually in my opinion, be given in the account.

The next item attacked is that of compound interest. This has been allowed throughout. It is contended on behalf of the appellants that it was the duty of the mortgagee to inform the mortgagors annually if the income received was not sufficient to cover interest on the mortgage and if any amount was due from them. In view of his failure to do this it is obvious that he is not entitled to compound interest specially in view of the fact that he has maintained no regular accounts. I therefore disallow the item of compound interest entirely. A sum of Rs. 184-10-6 was allowed for miscellaneous expenses in connection with the well and payment of revenue. Cl. (3) of the mortgage deed provides that no objection will be taken to the account prepared by the mortgagee as regards these items. This item, therefore has been rightly allowed. In addition, the vendee claimed credit for certain items which had been disallowed by the Revenue Assistant and the trial Court. The first of these was on account of chhirkao, that is to say, payments made by the Municipality for water used for sprinkling on the roads. There is no evidence however worth the name to show that any sum on this account ever reached the mortgagee's hands though the tenants did collect something. This item, in my opinion, cannot be allowed. A further item was claimed on account of some shisham trees which were alleged to have been sold for Rs. 120, but the evidence produced in support of this item was worthless. The item was rightly disallowed. A further sum was claimed on account of earth and water alleged to have been paid for by Ch. Narain Singh in connection with certain building operations, but this claim has not been

pressed. Finally a claim was made on account of Rs. 410 for pomegranate trees which were alleged to have been removed from the nursery attached to the well and transferred to the mortgagee's own garden. In support of this the principal witness is Allah Wasaya. He was a tenant under the mortgagee and is still a tenant. This man throughout has stated that 410 plants were removed and there appears to be no reason to doubt this evidence. Admittedly the mortgagee has a pomegranate orchard at his own well, though he says that it was in existence when he obtained the land by pre-emption. I therefore hold that the vendee was entitled to claim credit for these trees. As regards the value to be attached to the trees the evidence varies.

In my opinion the amount should be allowed at the rate of eight annas per tree, giving a total of Rs. 205. Thus the account ran as follows:

Due on account of principal	Rs. 11,000-0-0
Due on account of interest after deducting receipt shown by the mortgagee plus the sum of Rs. 1,152	4,033-0-0
Due on account of expenses allowed	184-10-6
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Total	15,217-10-6
Deduct on account of value of pomegranates	205-0-0
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Total due to the mortgagee	15,012-10-6
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This is practically the sum that the parties themselves estimated to be due when they allowed Rs. 15,000 in the sale deed. Accordingly we accept the appeal and pass a declaratory decree declaring that the amount due on the land was Rs. 15,012-10-6. As neither party has succeeded in full, we leave the parties to bear their own costs throughout.

Tek Chand, J.—I agree.

S.R.

Appeal allowed.

* A. I. R. 1936 Lahore 45

(Special Bench)

ADDISON, JAI LAL AND ABDUL
RASHID, JJ.*In the matter of Stamp duty on security bond executed by Murad Ali.*

Civil Ref. No. 51 of 1935, Decided on 31st October 1935, from Financial Commissioner, Revenue, Punjab, Lahore, D/- 23rd April 1935.

* Stamp Duty — Security bond—Insolvent asked to execute security bond — Art. 57 of Stamp Act applies to such bonds and not Art. 15, Sch. 1.

A person who had applied to be adjudged insolvent was asked by the Court to execute a security bond for Rs. 500 with one surety, to secure the insolvent's attendance in Court till the decision of his application. Accordingly a security bond was executed on a stamp of one rupee only. The question was whether this security bond was adequately stamped :

Held : that the bond had been executed to secure the due performance of a contract made by the insolvent to appear, and the surety to produce him in Court, under the provisions of S. 21, Provincial Insolvency Act. Therefore, Art. 57, Stamp Act, was applicable to bonds of this description. Art. 15, Sch. 1, Stamp Act, was not applicable and a maximum duty of Rs. 7-8-0 under Art. 57, Sch 1, Stamp Act, as amended by the Punjab Act, was leviable on a bond given under the provisions of S. 21, Provincial Insolvency Act : 1933 Lah 1004, Appl. [P 46 C 1]

Anant Ram Khosla—for Secy. of State.

Order.—This reference under S. 57, Stamp Act has been made by the Financial Commissioner, Punjab, under the following circumstances : An application was made under the Provincial Insolvency Act for adjudicating one Pir Bakhsh an insolvent. The Senior Subordinate Judge, Rawalpindi, in whose Court the application was made, acting under S. 21, Provincial Insolvency Act, directed the alleged insolvent to execute a security bond in the sum of Rs. 500 with one surety to appear in Court till the case was finally decided, and in accordance with this order a bond was given by Pir Bakhsh with Murad Ali as his surety. It was stamped only with a court-fee stamp of one rupee and a question having arisen whether it was sufficiently and properly stamped, the Financial Commissioner has referred the matter for decision by this Court.

The Financial Commissioner is inclined to the view that the article applicable to

the bond in question is Art. 15, Sch 1, Stamp Act. That article provides for stamp duty on a bond which is not a debenture and has not been otherwise provided for by the Indian Stamp Act or by the Indian Court fees Act. It is clear that, as the learned Financial Commissioner has remarked, this is a residuary article and we have, therefore, to see whether there is any other article of the Indian Stamp Act or any provision of the Court-fees Act which is applicable to the bond in question. The only article in the Indian Court-fees Act applicable to bonds is Art. 6, Sch. 2, which applies to a bail bond or other instrument of obligation given in pursuance of an order made by a Court or Magistrate under any section of the Code of Criminal Procedure or the Code of Civil Procedure and is not otherwise provided for in the Act. Now, it is obvious that the bond in this case was not given under any of the provisions either of the Criminal Procedure Code or of the Civil Procedure Code. Therefore, Art. 6 of the Court-fees Act is not applicable to it and no other provision of the Act has been brought to our notice which could be made applicable.

Coming to the Stamp Act, besides Art. 15 there are two articles which need consideration, viz. Arts. 40 and 57. Art. 40 which regulates stamp on a mortgage deed, expressly excludes a security bond from its operation. Moreover it is to be noted that no immoveable property was mortgaged in the bond in question. Art. 57 governs the case of a security bond or mortgage deed executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract. The duty to be levied is the same as the duty on a bond under Art. 15 if the amount secured does not exceed Rs. 1,000, and in any other case it is Rs. 5, which has been increased to Rs. 7-8 in this province by an amendment of the Indian Stamp Act by a local Act. The question then is whether the security bond in question can be held to have been executed to secure the due performance of a contract, as obviously it was not executed by way of security for the due execution of an office, or to account for money or other property.

In 15 Lah. 78 (1) a Division Bench of this Court held that a bond given for refund of the money realised by a decree-holder in case of success of the appeal by the judgment-debtor was governed by Art. 57, Sch. 1, Stamp Act, as amended by the Punjab Act 8 of 1922. The bond in that case was given under the provisions of the Civil Procedure Code and, though the question was not directly decided, it appears that the learned Judges held that it was executed to secure the due performance of a contract. In my opinion the bond in the present instance also is of a similar nature, that is to say, it has been executed to secure the due performance of a contract made by the insolvent to appear, and the surety to produce him, in Court under the provisions of S. 21, Provincial Insolvency Act. My opinion therefore is that Art. 57, Stamp Act is applicable to bonds of this description. The learned Assistant Legal Remembrancer, who appeared for the Crown, also supported this view. I would therefore hold that Art. 15, Sch. 1, Stamp Act, is not applicable and that a maximum duty of Rs. 7.8.0 under Art. 57, Sch. 1, Stamp Act, as amended by the Punjab Act 8 of 1922, is leviable on a bond given under the provisions of S. 21, Provincial Insolvency Act, and I would answer the reference accordingly. As in the present case the bond was for a sum of Rs. 500, the duty would be Rs. 3.2.0 in this Province.

Addison, J.—I agree.

Abdul Rashid, J.—I agree.

B.D.

Reference answered.

1. Tullah Shah Ram Saran Shah v. Ghulam Hussain etc., 1933 Lah 1004=147 I C 671=15 Lah 78.

A. I. R. 1936 Lahore 46

COLDSTREAM AND BHIDE, JJ.

Richhpal—Defendant—Appellant.

v.

Sujan Singh—Plaintiff—Respondent.

Second Appeal No. 2049 of 1930, Decided on 7th December 1934, from order of District Judge, Hissar, D/- 21st July 1930.

(a) Punjab Tenancy Act (1887), S. 77 (3) Cl. H—Occupancy holder mortgaging tenancy with possession—Landlord claiming possession on ground that tenancy was extinguished and by dispossessing mortgagee—Suit falls under S. 77 (3), Cl. H.

Where the occupancy holding was alleged to be mortgaged with possession in favour of mortgagee by the last occupancy holder, and the landlord wants to dispossess him, a suit for such a relief would clearly fall under Cl. (h) of S. 77 (3) of the Act and the mere fact that the landlord is claiming on the ground that the tenancy had become extinct on the death of the last occupancy holder would not make any difference: 32 P R 1912, *Foll.* [P 47 C 1]

(b) Punjab Tenancy Act (1887), S. 77 (3)—Civil Court finding it necessary to decide matter coming under S. 77 (3)—Whole suit becomes triable by Revenue Court.

In a suit for possession of tenancy as soon as the civil Court finds it necessary to decide any matter which is cognizable exclusively by a Revenue Court under S. 77 (3) of the Act, its jurisdiction is ousted and the whole suit becomes triable by a Revenue Court. [P 47 C 2]

R. C. Soni, M. C. Mahajan and Shamair Chand—for Appellant.

J. L. Kapur and J. N. Aggarwal—for Respondent.

Bhide, J.—Mt. Lado, the last holder of the occupancy tenancy in dispute having died, the land was mutated in favour of Gobinda, Richhpal and Sundu (defendants 1 to 3). The landlords thereafter instituted the present suit for possession of the land on the ground that defendants 1 to 3 were not entitled to succeed and that the tenancy had become extinguished in default of heirs. The suit was resisted by defendants 1 to 3 on various grounds and one of the points raised by them was that the suit was triable by a Revenue Court and not by a civil Court. This contention was not upheld and the suit was decreed by the trial Court. On appeal the learned District Judge confirmed the decree of the trial Court to the extent of the shares of the landlords who had instituted the suit. From this decision defendants 1 to 3 have preferred a second appeal.

On behalf of the appellants, the question of jurisdiction was again raised before us and it was contended that the suit being triable by a Revenue Court, the decree passed by the Court below in favour of the respondents was wholly without jurisdiction. This contention was based firstly on the ground that the land having been mutated in favour of the appellants as occupancy tenants, and the plaintiffs having also realised rent from the appellants for about six years, the appellants must at any rate be held to be tenants and the suit was therefore one between landlords

and tenants. As the suit was for ejectment of the appellants and the question of occupancy rights was also in dispute, it was contended that it was necessary for the Court to decide matters falling within the purview of Cls. (d) and (e) of S. 77 (3), Punjab Tenancy Act. It was further contended that as Mt. Lado had mortgaged the holding in favour of appellant Gobinda, and the plaintiffs were seeking to dispossess him without payment of the mortgage charge, there was also an issue between the parties falling within Cl. (h) of the same section. In view of these facts, it was urged that civil Courts had no jurisdiction to try the suit and the plaint should have been returned to the plaintiffs for presentation to the Collector as required by the proviso to S. 77 (3), Punjab Tenancy Act. I do not think there is any force in the first contention. The plaintiffs sued the defendants as trespassers and not as tenants and the Courts below have not come to any finding that the appellants were treated by the plaintiffs as tenants. Nor was the learned counsel for the appellants able to point out any evidence worth the name on the record to show that the plaintiffs had recognised the appellants as tenants.

The second contention of the learned counsel, viz., there was an issue between the parties falling under Cl. (h) of S. 77 (3), Punjab Tenancy Act, which required decision in the suit, appears however to be correct. There is no doubt that the occupancy holding was alleged to be mortgaged with possession in favour of the appellant Gobinda by Mt. Lado, the last holder, and the plaintiffs wanted to dispossess him. A suit for such a relief would clearly fall under Cl. (h), S. 77 (3), Punjab Tenancy Act, and the mere fact that the plaintiffs were claiming on the ground that the tenancy had become extinct on the death of Mt. Lado would not make any difference: cf. 32 P R 1912 (1). The learned counsel for the respondents contended that the issue affected only one of the appellants, but this is immaterial, for according to the proviso to S. 77, Punjab Tenancy Act, referred to above, as soon as the civil Court finds it necessary to decide any matter which is

cognizable exclusively by a Revenue Court under S. 77 (3), Punjab Tenancy Act, its jurisdiction is ousted and the whole suit becomes triable by a Revenue Court. The contention of the learned counsel for the appellants on this question of jurisdiction must therefore prevail.

The suit has been however tried on merits on all the necessary issues and I do not think the parties have been prejudiced. Under S. 100, Punjab Tenancy Act, I would, therefore, accept the appeal; and setting aside the decree of the learned District Judge direct that the decree passed by the trial Court be registered as a decree of the Collector and that the appeal presented to the District Judge be returned to the appellants for presentation to the proper Court. I would leave the parties to bear their costs in this Court as well as the District Judge's Court in view of all the circumstances of the case.

Coldstream, J.—I agree.

B.D.

Appeal allowed.

A. I. R. 1936 Lahore 47

COLDSTREAM, J.

Chaman Lal and another — Accused—
Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1015 of 1935, Decided on 10th October 1935, from order of Sess. Judge, Shahpur, D/- 1st July 1935.

Criminal Trial—Fresh complaint—Inquiry under S. 202 — Complaint dismissed — Fresh complaint on same facts should not be entertained.

Though a previous order dismissing a complaint under S. 202 is not a bar to the institution of a fresh complaint, it is only in exceptional circumstances that the second complaint should be entertained on the same facts, for instance where the order of dismissal was manifestly perverse or foolish or based upon an incomplete record. But where a previous complaint was dismissed after a due inquiry under S. 202, Criminal P. C., a fresh complaint based on the same facts should not be entertained.

[P 48 O 1,2]

Ram Lal Anand II for J. L. Kapur—
for Petitioners.

Basant Kishen for Govt. Advocate—for
the Crown.

Order.—Two brothers, Mahram and Mowaz of Bhera, mortgaged a house by registered deed executed on 26th

1. *Changu v. Mahomed Bakhsh*, (1912) 82 P R 1912=8 I O 666.

September 1924 in favour of one Ram Jowaya. The mortgage was with possession. Ram Jowaya died and was succeeded by Ralla Ram, who is said to be insane. In December 1930 Mahram took the house on lease from Ralla Ram. He made default in payment of rent and Ralla Ram obtained an ejectment decree against him on 16th November 1931. In execution of that decree Munshi Ram, a process server, with Chaman Lal and Basant Ram, nephews of Ralla Ram, went to the house to take possession of it on 5th June 1934. On 9th June 1934 Mowaz instituted a complaint in a Magistrate's Court in Sargodha accusing the process-server, Chaman Lal and Basant Ram of criminal trespass. The case was sent for enquiry under S. 202 to the Tahsildar, who, after recording the statements of four witnesses, reported that the case was false and had been made only for the purpose of evading delivery of the house to the mortgagee. Upon this report the Magistrate dismissed the complaint on 9th August 1934. In November 1934, three months later, Mowaz submitted a similar complaint to another Magistrate in Sargodha accusing the process-server, Chaman Lal and Basant Ram of criminal trespass on the same facts which had been alleged in the previous complaint. He made no mention of the previous complaint. The Magistrate recorded the evidence of the four witnesses whose statements had been taken by the Tahsildar and framed a charge against Chaman Lal and Basant Ram.

Chaman Lal and Basant Ram applied to the Sessions Judge for a recommendation to this Court for revision of the order. The learned Sessions Judge, while recording in his judgment that he was inclined to think that the Magistrate would have been well advised in dismissing the complaint and refusing to entertain it, nevertheless refused to interfere, mainly, it seems, because he thought the application was belated. Chaman Lal and Basant Ram have now come to this Court on revision and ask for the proceedings in the Magistrate's Court to be quashed. As has been pointed out on many occasions by this Court, though a previous order dismissing a complaint under S. 203 is not a bar to the institution of a fresh complaint, it is only in exceptional circumstances

that the second complaint should be entertained on the same facts, for instance where the order of dismissal was manifestly perverse or foolish or based upon an incomplete record. There are no such exceptional circumstances in the present case. On the contrary it is clear that the order dismissing the complaint on 9th August 1934 was passed in view of the report based upon the whole evidence produced by the complainant. It is also manifest that the Tahsildar's recommendation was well grounded and was certainly not perverse and foolish. I accordingly accept this petition, and quashing the proceedings taken by the Magistrate dismiss the complaint of Mowaz against Chaman Lal and Basant Ram.

B.D.

Petition accepted.

A. I. R. 1936 Lahore 48

BHIDE, J.

Fateh Mohammad—Petitioner.

v.

Sardar Ali Shah—Opposite Party.

Civil Misc. Petn. No. 464 and Appeal No. 291 of 1935, Decided on 11th October 1935, from order of Din Mohammad, J., D/- 30th April 1935.

(a) Review—Erroneous admission of fact by counsel is not sufficient ground.

An erroneous admission of fact made by counsel cannot be considered to be a good ground for review. [P 49 C 2]

(b) Mahomedan law — Mutwalli—Decree declaring person as Mutwalli is not capable of execution—Remedy of Mutwalli is not under S. 144, Civil P. C.

In a dispute about *takia*, a person was declared to be a Sajjadanshin and another a Mutwalli. They were allowed to take over the property of the *takia* and give security for the same till the decision of an appeal from the order declaring them to be Mutwalli and Sajjadanshin. The Mutwalli took charge of some of the property and died. The Court allowed the Sajjadanshin to take over the remaining property in spite of the objections of one F who claimed to have been appointed as a Mutwalli. Afterwards this F obtained a decree declaring him to be a Mutwalli, and made an application under S. 144, Civil P. C., to be restored with the property of the *takia*.

Held: that a declaratory decree to the effect that a person is a Mutwalli was incapable of execution. A Mutwalli entitled to get the property under a declaratory decree could not have his remedy under S. 144, Civil P. C. [P 49 C 1]

Mohammad Alam—for Petitioner.*Dev Raj Sawhney* — for Opposite Party.

Order.—This is an application for review of the order passed by Din Mohammad, J., in appeal on 30th April 1935. The material facts are that there has been a protracted litigation in connection with *takia* Shah Shohda at Ludhiana and eventually Sardar Ali Shah, respondent, and one Gahne Shah succeeded in establishing their claims as Sajjadanashin and Mutwalli respectively. From this decision an appeal was preferred by one Maula Shah to their Lordships of the Privy Council and this is still pending. The property belonging to the *takia* was in the hands of a receiver. Maula Shah made an application that the property should not be made over to Sardar Ali Shah and Gahne till the disposal of his appeal, but this Court allowed them to take it over on furnishing security. Part of the property was accordingly taken over by Gahne Shah but thereafter Gahne Shah died and the balance consisting of a sum of about Rs. 13,000 was taken over by Sardar Ali Shah. The respondent Fateh Mohammad claimed to have been appointed Mutwalli of the *takia* after the death of Gahne Shah, but his claim had not yet been established. The Court allowed Sardar Ali Shah alone to take the aforesaid balance of about Rupees 13,000 in spite of the objection raised by Fateh Mohammad, holding that there was no Mutwalli of the *takia*, at the time. Fateh Mohammad subsequently succeeded in appeal and got a declaratory decree to the effect that he was the Mutwalli of the *takia* and made an application under S. 144, Civil P. C., for restitution to him of the property taken over by Sardar Ali Shah and this application was granted by the Senior Subordinate Judge, Ludhiana.

From this decision the present appeal was preferred. The appeal was at first accepted on the ground that Fateh Mohammad was not a party to the suit and had therefore no locus standi to make any application under S. 144, Civil P. C. At the hearing it seems to have been admitted by both parties that Sardar Ali Shah was a stranger to the suit, but it is now stated that this admission was erroneous, and it is on this ground that the order in appeal is sought to be reviewed. I doubt if an erroneous admission of fact made by counsel can be considered to be a good

1936 L/7 & 8

ground for review. But apart from this there is, I think, no force in this application for review; for S. 144, Civil P. C., seems to be clearly inapplicable to the circumstances. The decree in consequence of which the property in dispute was made over to Sardar Ali Shah has not been varied. The order passed by this Court was that the property should be made over to the respondents, i. e. both Sardar Ali Shah and Gahne Shah on their furnishing security (vide., the order of this Court dated 9th July 1930). In pursuance of this order Sardar Ali Shah has got the property. The security was ordered to be furnished only to meet any claims arising out of the result of the appeal to the Privy Council and the present claim does not obviously fall within that category. Fateh Mohammad has moreover only obtained a declaratory decree to the effect that he is a Mutwalli and such a decree is incapable of execution. It may be that Fateh Mohammad as a Mutwalli is entitled to get the property from Sardar Ali Shah, but his remedy does not appear to me to lie under S. 144, Civil P. C.

I therefore dismiss this application. No order as to costs.

B.D. *Application dismissed.*

A. I. R. 1936 Lahore 49

JAI LAL, J.

Bhagwan Das—Plaintiff—Appellant.

v.

Gian Chand and another—Defendants—Respondents.

Second Appeal No. 603 of 1935, Decided on 10th October 1935, from decree of Dist. Judge, Attock, D/- 21st January 1935.

(a) **Hindu Law—Gift—Delivery of possession not essential—Property capable of being delivered—Donee capable of taking possession—Possession must be delivered.**

Passing of possession is not always necessary to validate a gift under the Hindu law, but it is an essential condition in order to make a gift valid if the property which is the subject-matter of the gift is capable of being given possession to the donee and the donee is capable of taking possession. [P 50 C 1]

(b) **Deed—Setting aside—Limitation—Donor executing gift deed of property—Possession not given to donee—Donor instituting suit to declare gift invalid—Time commences to run when donee attacks donor's title to property.**

A person executed a deed of gift of property but did not deliver its possession to the donee,

Donee got the property mutated in his name. On this, the donor brought a suit to declare the gift invalid :

Held : that as possession was never delivered to the donee, time for such suit began to run when the donee first attacked the title of the donor. [P 50 C 1, 2]

Badri Das—for Appellant.

Mehr Chand Sud—for Respondents.

Judgment.—On 29th November 1924 the plaintiff Bhagwan Das made a gift of a house in Campbellpur to the respondents, Gian Chand and Mt. Chandra-wali. It has been found that possession of the house was not given to the donees though it was provided in the deed of gift, which was a registered document, that the donor would be entitled to reside in one of the rooms of the house and actual possession of the remaining house had been or was to be given to the donees. After the date of the gift the donor remained in possession of the whole house throughout. In 1932 a mutation in respect of the house was made in the revenue records in favour of the donees. Consequently a suit was instituted by the appellant Bhagwan Das for a declaration that the gift was invalid because it was not accompanied by possession. The trial Court decreed the suit, but the District Judge on appeal has held, while agreeing with the trial Court that possession did not pass, that under the Hindu Law passing of actual possession is not necessary and therefore the gift was valid. He has also held that the suit was barred by time and further that it did not lie for a mere declaration because the plaintiff should have also asked for the cancellation of the deed of gift.

In my opinion the view of the District Judge on all these matters is erroneous. While it is true that passing of possession is not always necessary to validate a gift under the Hindu Law it is an essential condition in order to make a gift valid if the property which is the subject-matter of the gift is capable of being given possession of to the donee and the donee is capable of taking possession. There are some exceptions to this rule, e. g. when the donor and the donee stand in such relationship that the donor is practically the guardian of the donee or the property is not in possession of the donor but in possession of the tenants or even a trespasser and the donor has done all that is in his power

to divest himself of his ownership and dominion over the property and to vest the same in the donee. Another exception is where both the donor and the donee are living together in the gifted house. But these exceptions have no application to the present case where the house in dispute was in actual possession of the donor and could have been given to the donees. It has been found that the donor has throughout been living in the whole house and the donees never took possession of any part thereof. The rule laid down in para. 358 of Mulla's Principles of Hindu Law has full application to the facts of this case. Some cases cited at the Bar merely illustrate the instances that I have given above on both sides and do not in any way militate against the general rule that ordinarily possession must be given to the donee in order to create a valid gift under the Hindu Law.

The suit in my opinion was not barred by time. The plaintiff was throughout in possession and he need not have instituted a suit to have the gift declared void till the donees did something to attack his title, and the first attack by them was by getting a mutation sanctioned in their favour in 1932. I am also of opinion that under the circumstances it was not necessary for the plaintiff to have prayed for the cancellation of the deed of gift. The plaintiff's principal contention is that the transaction evidenced by the deed is not effectual because owing to the accompanying circumstances the deed did not transfer any valid title to the defendants. It is probable that if his main ground for relief had been that the deed of gift was ineffectual owing to his consent to it having been given under undue influence, fraud, misrepresentation, etc., or for some such reason, then it would have been necessary for him to have the deed cancelled. On all these grounds therefore I hold that the decree of the District Judge is erroneous and must be set aside. I accept the appeal, and setting aside the decree of the District Judge restore that of the trial Judge with costs throughout.

B.D.

Appeal allowed.

A. I. R. 1936 Lahore 51

TEK CHAND AND ABDUL RASHID, JJ.

Prem Das-Radha Kishen (Shop) and others—Plaintiffs—Appellants.

v.

Mohammad Hussan Khan and another—Defendants—Respondents.

First Appeal No. 12 of 1934, Decided on 17th December 1934, from decree of Dist. Judge, Dera Ghazi Khan, D/- 31st August 1933.

(a) Contract — Novation — Essentials of—Subsequent contract has to be complete and valid.

Where the debtors execute a pronote in favour of the creditors and subsequently they execute a bond for the same consideration, but there is a condition precedent to the validity of the bond which is not fulfilled, there is no novation of contract and the suit on the pronote is maintainable: 1925 *Mad* 261, *Foll*; 1923 *Lah* 396 and 21 *I C* 222, *Rel on*.

[P 53 C 2, P 54 C 1]

(b) Accounts — Accounts settled—Settled account gives rise to cause of action and cannot be re-opened except on ground of fraud or mistake.

Where accounts have been settled and agreed upon between two parties and one party promises to pay, a suit can be filed on that promise. A settled account gives rise to a cause of action and the creditor need not prove that the balance found is correct provided it is accepted as correct by the debtor. The debtor will not be allowed to re-open the settled account and to defeat the claim of the creditor, based on a pronote by contending that certain account books relating to a particular period have not been produced in Court. For a settled account cannot be re-opened except on specific allegations of fraud or mistake: 1923 *Rang* 304 and 1919 *Lah* 497, *Foll*.

[P 51 C 2]

(c) Decree—Construction — Instalments—Amount and period of instalments is matter of discretion of Court—it should be exercised within reasonable bounds.

Where the Court directs a decree to be paid by instalments, the amount of the instalments and the period for their payment is a matter for the discretion of the Court, which is to be exercised within bounds and not in a manner so as to constitute a virtual denial of the creditors' rights.

[P 55 C 1]

Where debtors want instalments to be fixed, they ought to place evidence on record to show their inability to pay in a lump sum. In the absence of such evidence, the Court is not entitled to presume debtor's inability to pay the amount due to the creditors in a lump sum: 1933 *All* 90, *Rel on*.

[P 55 C 1]

*J. N. Aggarwal and Asa Ram Aggarwal—*for Appellants.

*Badri Das, Ishwar Chandar and J. L. Kapur—*for Respondents.

Abdul Rashid, J.—This appeal arises out of an action brought by the Firm

Prem Das-Radha Kishen against Khan Bahadur Sardar Mohammed Hassan Khan (defendant 1) and Khan Bahadur Sardar Ghulam Haidar Khan (defendant 2) for recovery of Rs. 17,792 10-6 on the basis of a pronote dated 20th April 1929, executed by the defendants in favour of the plaintiffs. Defendant 2 is the nephew of defendant 1 and both of them belong to the family of Gurchani Chiefs. Jallab Khan, the grandfather of defendant 2, who was the first Tummandar, died in 1917. Thereafter defendant 2 became the Tummandar, but from 1917 to 1931 defendant 1 was acting as the Sarbrah Tummandar on behalf of his nephew. According to the plaint the dealings between the parties started in the year 1919. Prior to this, Lashkar Khan, the father of defendant 2, and Jallab Khan, his grandfather, had dealings with the plaintiffs. From the year 1919 to 1931, the defendants struck balances in the books of the plaintiffs and also executed several ruggas and pronotes in their favour. The last pronote was executed on 20th April 1929, and forms the basis of the present suit. On 25th June 1931 defendant 1, for himself and as "zimewar" of defendant 2, executed a bond in favour of the plaintiffs, whereby the entire amount due by the defendants was made payable by means of annual instalments of Rs. 500 each. The allegations of the plaintiffs were that defendant 1 had promised that he would get the signature of defendant 2 affixed to the aforesaid bond, and that it was distinctly understood that the parties would be bound by the terms of the bond only if defendant 2 agreed to abide by them; that defendant 2 refused to sign the bond, and that therefore the plaintiffs were entitled to institute the present suit on the basis of the pronote dated 20th April 1929.

Defendant 1 pleaded, inter alia, that the pronote dated 20th April 1929, (Ex. P/2) had been superseded by the bond dated 25th June 1931 (Ex. P/1); that there was no agreement on his part that he would get the signature of defendant 2 affixed to the said bond and that he was therefore liable for payment of the debt due from him according to the instalments fixed under the bond. It was further pleaded that at the time of the execution of the bond, the plaintiffs

had absolved defendant 2 from all liability and that the suit was liable to dismissal as it had been instituted before the first instalment had fallen due in due accordance with the terms of the bond. It was also stated in the written statement that the defendants had signed the balances without fully understanding the accounts and that the amount mentioned in the pronote was not really due to the plaintiffs. Defendant 2 pleaded that the plaintiffs had got a bond executed by defendant 1 in respect of the debt in dispute and had absolved him from all liability; that no suit was maintainable on the original pronote and that the acceptance of the bond by the plaintiffs from defendant 1 had the effect of discharging defendant 2 from all liability. On these pleadings, the trial Court framed the following issues :

(1) Is the suit premature against defendant 1? (2) Can the plaintiffs sue the defendants on the basis of the pronote (Ex. P-2) dated the 20th April 1929? (3) If so, was defendant 2 discharged and is he not liable? (4) Are the pronote (Ex. P-2) and the bond (Ex. P-1) without consideration? (5) Is the plaintiff entitled to any interest and compound interest? (6) Are the defendants entitled to instalments?

The learned Judge of the Court below was of the opinion that "strictly speaking" the suit against defendant 1 was premature, but that he was prepared to take an equitable view and would decide the case on the merits and not dismiss it on account of this technical defect. He held that the pronote (Ex. P-2), dated 20th April 1929, was cancelled by the execution of the bond (Ex. P-1) in June 1931; that the plaintiffs could not sue the defendants on the basis of the pronote and that defendant 2 was discharged as defendant 1 took the entire responsibility under the terms of the bond. He further held that the pronote was for consideration, but to a limited extent. On these findings he passed a decree in favour of the plaintiffs against defendant 1 for Rs. 9,976 and dismissed the suit against defendant 2. The decretal amount was made payable by annual instalments of Rs. 500 each. Against this decision, the plaintiffs have preferred an appeal to this Court. The most important point for determination in this appeal is whether there was any nova-

tion of contract on 25th June 1931, when the bond Ex. P-1 was executed by defendant 1 in favour of the plaintiffs, and whether the plaintiffs are debarred from maintaining the present suit on the basis of the pronote dated 20th April 1929. It is therefore necessary to quote the following passages from the bond in extenso :

I, Khan Bahadur Sardar Mohammad Hassan Khan, son of Nawab Jallab Khan, Gurchani for myself and as 'Zimmawar' of Sardar Ghulam Haidar Khan, son of Sardar Lashkar Khan, Gurchani, do hereby declare as follows :

A sum of Rs. 16,210 is jointly and severally due by me and Sardar Ghulam Haidar Khan aforesaid to the joint Hindu family of Bhai Radha Kishen, etc. The agreement as to the payment of the said amount is as under :

We will pay the above debt with interest at the rate of annas 7 per cent per mensem by instalments given hereinafter. In default of payment of any instalment according to the agreement, the obligee shall realize the entire amount due in a lump sum with interest at the rate of Re. 0-11-0 per cent per mensem from my and Sardar Ghulam Haidar Khan's persons and movable and immovable property without having any regard to the period of instalments or allow time for payment of the amount due with interest at the rate of Re. 0-11-0 per cent per mensem. No objection shall be raised thereto Moreover interest on an instalment paid shall be given credit for. Sardar Ghulam Haidar Khan and I, the executant, shall jointly and severally be responsible for payment of amounts due to the obligee. We will not raise any objection regarding each other's liability The account has been fully understood. There is no dispute about rendition of the account.

It is clear from the wording of the bond that it was executed by defendant 1 on his own behalf as well as on behalf of defendant 2. Moreover though it was signed only by defendant 1, the persons and properties of both the defendants were made liable for the payment of the debt due to the plaintiffs under the terms of this bond. Defendant 1 had no right to make the person and property of defendant 2 liable, and it is therefore obvious that it was the intention of the parties that the bond shall be signed by both the defendants. It has been established on the record that this bond was taken to defendant 2 on 13th April 1932, but he refused to sign it. Radha Kishen, plaintiff, appeared as a witness in the case and stated that the bond Ex. P-1 was executed by defendant 1 on his own behalf and on behalf of defendant 2; defendant 2 was not present at that time and that according to this bond both the defendants were liable

and that he did not mean to discharge Sardar Ghulam Haidar Khan, defendant 2. Sardar Ghulam Haidar Khan admitted in his evidence that he was not present at the time when his uncle Sardar Mohammad Hassan Khan executed the bond Ex. P-1; that it was brought to him by the plaintiff and that he refused to sign it. All the circumstances of the case point to the fact that the plaintiffs never intended to absolve defendant 2 from liability, and that at the time of the execution of the bond by defendant 1, it was clearly understood by the parties that the bond would be operative only after it had been signed by defendant 2. As defendant 2 refused to sign the bond, the bond remained incomplete and did not give rise to any valid contract between the parties. In these circumstances it cannot be held that there was any novation of contract, which had resulted in the execution of the bond dated 25th June 1931, by defendant 1 in favour of the plaintiffs. In other words, there was a condition precedent to the validity of the bond, and this was that defendant 2 would sign it. But as he refused to sign it, the bond never became operative.

Reference may be made in this connexion to 1925 Mad 261 (1), where it was held that it was open to the parties to a contract to supersede that contract by another contract, but in order to do so all the parties to the first contract must be parties to the second contract. In the case reported as 21 I C 222 (2), a hundi, by which the defendant promised to pay to one C or order Rs. 10,000 sixty days after date, was endorsed to the plaintiff Bank by the drawee. The defence was that the bank was not a holder in due course and that the hundi was discharged by a subsequent mortgage given by the drawee to the Bank by way of merger or novation and also that defendant being liable as a surety was discharged under S. 135, Contract Act. It was held in that case that the defendant not being a party to the novation (i.e., the contract of mortgage), S. 62 of the Act would not help him, and there was no recital or

evidence that the hundi was considered as discharged on the execution of the mortgage. There is not a tittle of evidence on the present record, either oral or documentary, with the exception of the statement of defendant 1, that the plaintiffs absolved defendant 2 from liability at the time of the execution of the bond. In fact the wording of the bond makes it perfectly clear that both the person and the property of defendant 2 were made liable for the payment of the debt due to the plaintiffs, and this could not be done unless it was intended that defendant 2 would sign the bond. If there was no novation of contract, it is evident that the plaintiffs are entitled to base their suit on the pronote, dated 20th April 1929, against both the defendants. Mere execution of a document by defendant 1 cannot absolve defendant 2 unless it is held that the bond gave rise to a fresh contract whereby defendant 2 was discharged from all liability.

Reference may be made in this connexion to 4 Lah 151 (3), where it was held that where a hundi, insufficiently stamped, is given in renewal of a prior hundi and a suit on the basis of the subsequent hundi is not maintainable owing to its not being properly stamped, the creditor can fall back on the prior hundi. S. 62, Contract Act, is no bar to his doing so. The second hundi would have operated as a discharge of the previous hundi, only if the second hundi was legally enforceable. It was for the defendants to prove that the right of the plaintiffs under the pronote had been extinguished. They have not tendered any evidence on this point. It was contended on behalf of defendant 1, that, at least so far as he was concerned, there had been a complete novation and therefore his liability under the pronote had been wiped out. This contention is wholly devoid of force in view of the finding already given that it was intended by the parties, at the time of the execution of the bond, that it would not become operative until both the defendants had signed it. Under the pronote both the defendants were liable to the plaintiffs and the bond was only intended to make the amount payable by

1. Ramasami v. Katayya, 1925 Mad 261=85 I C 297=47 M L J 840=48 Mad 698.

2. J. E. Loader v. Chartered Bank of India, Australia & China, (1918) 21 I C 222.

3. Rahmat Ali Muhammad Faizi v. Deva Singh Man Singh, 1929 Lah 396=75 I C 827=5 L L J 861=4 Lah 151.

instalments instead of being payable on demand. The plaintiffs however were not prepared to accept only one of the defendants as their sole debtor and to absolve the other from all liability. The bond not having resulted in a completed contract cannot be of any avail to defendant 1. I therefore hold that the suit on the pronote is maintainable against both the defendants.

It was contended on behalf of the respondents that the entire consideration for the pronote had not been received by them. It was urged that the plaintiffs had not produced their bahis with respect to the sum of Rs. 4,751-1-3 alleged to be due from Sardar Lashkar Khan, the father of defendant 2, nor had they produced the tombu of Nawab Jallab Khan relating to the sum of Rs. 7,850 alleged to be due by him to the plaintiffs. Exception was also taken to two other items of Rs. 617-8-0 and Rs. 181, the details of which had not been given in the accounts. All these items however relate to the period prior to 1919. The defendants struck a balance in the bahi of the plaintiffs on 16th March 1919 and admitted that a sum of Rs. 12,867-4-3 was due by them to the plaintiffs. The four items referred to above had been entered in the account prior to 16th March 1919, and by striking a balance on that day, the defendants admitted their liability for these four items. The defendants struck further balances on 27th March 1920, 13th March 1921, 25th March 1922, 22nd April 1923, 16th April 1924, 15th March 1925, 17th March 1926, 21st March 1927 and 15th April 1928, after fully understanding the accounts.

This fact has been mentioned in writing in Urdu characters at the foot of each balance, and each one of the balances has been signed by both the defendants. Both the defendants are Honorary Magistrates and can read and write Urdu. In these circumstances, it cannot possibly be held that the defendants struck these balances without understanding the accounts and that they did not satisfy themselves that the sums of Rs. 4,751-1-3 and Rs. 7,850 were actually due from Sardar Lashkar Khan and Sardar Jallab Khan respectively. No allegations were ever made by the defendants in their pleas or in their

statements in Court that any fraud had been practised upon them. In these circumstances, the defendants cannot be allowed to re-open a settled account and to defeat the claim of the plaintiffs based on a pronote by contending that certain account books relating to the period prior to 1919 had not been produced in Court. It was held in 6 Rang 538 (4), that where accounts have been settled and agreed upon between two parties and one party has promised to pay, a suit can be filed on that promise. A settled account gives rise to a cause of action and the plaintiff need not prove that the balance found was correct, provided it was accepted as correct by the defendant. It was held in 1 L L J 220 (5) that a settled account cannot be re-opened except on specific allegations of fraud or mistake.

It was urged by the learned counsel for the respondents that it was not sought to re-open a settled account, but that only four items were being challenged by the respondents as the accounts relating to these four items had not been produced in Court. As these four items were included in the very first balance struck by the defendants, it would amount to the re-opening of settled accounts, if the plaintiffs were required to prove that these four items had actually been advanced to the defendants or to Lashkar Khan and Jallab Khan before 16th March 1919. The defendants have obviously adopted this course, as two of these items relate to very large amounts and constitute the major portion of the claim of the plaintiffs. In conclusion, it was argued on behalf of the defendants-respondents that instalments should be fixed as it was clear from the terms of the bond that at one time the plaintiffs were prepared to accept payment of their dues by means of annual instalments of Rs. 500 each. The learned counsel for the appellants urged very strenuously that no evidence had been brought on the record to show that the defendants were unable to pay the amount due on the basis of the pronote in a lump sum, and that no instalments should be allowed, as the defendants were men of means and

4. Mg. Chit U v. Mg Pya, 1928 Rang 304=117 I C 572=6 Rang 538.

5. Suba v. Shahab Din, 1919 Lah 437=1 L L J 220.

position and could easily, if they wished to do so, pay the entire amount due to the plaintiffs in a lump sum.

It was observed in 54 All 539 (6) that where the Court directs a decree to be paid by instalments, the amount of the instalments and the period for their payment is a matter for the discretion of the Court; but it is a discretion which is to be exercised within bounds and not in a manner so as to constitute a virtual denial of the plaintiff's rights. So, where the amount of instalment was fixed at such a sum that it would take the plaintiff more than seven years to recover the decreed amount, and no future interest was allowed to him, the High Court altered the decree by doubling the amount of instalment and allowing future interest. In the present case, if the defendants wanted instalments to be fixed, they ought to have placed some evidence on the record to show their inability to pay in a lump sum. In the absence of such evidence, the Court is not entitled to presume that the defendants are unable to pay the amount due to the plaintiffs in a lump sum. For the reasons given above, I would accept this appeal, set aside the judgment and the decree of the lower Court, dated 31st August 1933, and in lieu thereof pass a decree in favour of the plaintiffs for Rs. 17,792.10.6 against both the defendants, with interest at the rate of 6 per cent. per annum from the date of the institution of the suit till realization. The respondents shall pay the costs of the appellants throughout.

Tek Chand, J.—I agree.

R.W./R.M. *Appeal allowed.*

6. Reoli Prasad v. Kunji Lal, 1933 Al 70 = 143 I O 44 = 54 All 539.

A. I. R. 1936 Lahore 55

ADDISON, AG. C. J. AND DIN

MOHAMMAD, J.

Chuni Lal, Official Receiver and others—Appellants.

v.

Jai Gopal and others—Respondents.

Letters Patent Appeal No. 60 of 1935, Decided on 16th July 1935, from order of Rangi Lal, J., D/- 28th February 1935.

(a) Maintenance—Attachment—Right of maintenance in the form of annuity and in lieu of share in estate is not exempt from attachment.

Where a right of maintenance is sought to be attached, the true test to lay down is whether such a right is purely personal, non-heritable and non-assignable, or it is an alienable and heritable right which takes the shapes of an annuity or has been granted in lieu of a share in an estate. If it is the former, it will be protected under the provisions of the Civil P. C., but if it is the latter, it will not be exempt from attachment. [P 58 C 2]

In a family governed by rule of primogeniture, a dispute between the two brothers K and J was decided by arbitration by which K was entitled to the whole of his father's property and J to a certain maintenance with a right of residence. On the award being challenged by J's son an agreement was entered into by the parties under which the monthly allowance of J was increased. J was given Rupees 20,000 and promised Rs. 3,000 on the occasion of marriage of each child and J and his son and descendants relinquished all rights to the property which they possessed and undertook to be bound by the agreement for all time to come. J was later on declared insolvent and the Official Receiver proceeded to attach the amount of maintenance recoverable by him (J) under the agreement:

Held: that the allowance payable to J was not a right to future maintenance which was exempt from attachment under the provisions of Civil P. C., but was in the form of annuity and was not therefore immune from attachment: 10 Cal 521, *Foll.*; 7 I C 80 and 1932 P C 216, *Disting.*; 1917 Mad 79; 30 Mad 279; 1921 Oudh 164 and 1921 All 120, *Appr.*

[P 58 C 2]

(b) Hindu Law—Impartible estate—Express renunciation by junior members of rights of succession—Incident of joint family will not apply.

In case of an impartible estate the right of survivorship will not be available if the family has disrupted and the junior members of the family have expressly renounced their right of succession. The incident of joint family will not apply: 1932 P C 216, *Rel. on.* [P 57 C 2]

Mehr Chand Mahajan—for Appellants.

Jagan Nath Aggarwal—for Respondents.

Din Mohammad, J.—This is a Letters Patent appeal from the order of Rangi Lal, J., dated 28th February 1935, accepting the appeal of Diwan Jai Gopal against a concurrent order of the Courts below holding the sums received by him as maintenance attachable in insolvency proceedings.

The facts bearing upon the point of law involved in this case may shortly be stated. Diwan Raj Kumar, a Rais of Lahore, died leaving two sons, Diwan Krishan Kishore and Diwan Jai Gopal. On the death of their father a dispute arose between the two brothers which was referred to the arbitration of Mr.

Atkins, Deputy Commissioner. He made an award on 9th March 1910 by which he held that the family was governed by the rule of primogeniture and that accordingly Diwan Krishan Kishore was entitled to the whole of the property left by Diwan Raj Kumar and that Diwan Jai Gopal was entitled to a maintenance of Rs. 120 per mensem and to some house property for residence, the allowance ceasing on the death of Diwan Jai Gopal's children. On 25th July 1910 the part of the award relating to Diwan Jai Gopal was modified by the consent of the parties to the extent of increasing the monthly allowance to Rs. 200 and extending the allowance to the male descendants of Diwan Jai Gopal from generation to generation. On the same day an application was made to the Court of the District Judge (old style), Lahore, for the award to be filed. This was done and the award was made a rule of Court. Sometime later the two minor sons of Diwan Jai Gopal brought a suit challenging the award, which was eventually decided against them by the High Court on 25th February 1921. In the meantime one of the minors died. The judgment in this case is reported as 2 Lah 114 (1) which may with advantage be referred to for the history of the family and the award. It appears that the surviving minor was not satisfied with this decision and consequently he applied for leave to appeal to His Majesty in Council. During the pendency of this application, a tripartite agreement was entered into on 17th December 1921 among the parties concerned. The minor, as one of the parties, was represented by his mother Shrimati Puran Devi and the other two parties concerned were Diwan Krishan Kishore and Diwan Jai Gopal respectively. It was agreed that the minor will withdraw his application for leave to appeal to His Majesty in Council and in lieu thereof the monthly allowance will be raised to Rs. 600, and that in addition to this Diwan Jai Gopal will be paid Rs. 20,000 in cash and will further be entitled to receive Rs. 3,000 on the occasion of the marriage of each child. By this agreement Diwan Jai Gopal and his son and descendants relinquished all rights to the property left by Diwan

Raja Kumar which they possessed, and undertook to be bound by this agreement for all time to come. In pursuance of this agreement it appears that the minor presented an application to this Court to withdraw his application for leave to appeal to His Majesty in Council and he also produced the agreement mentioned above incorporating the terms of the compromise which was the consideration for the withdrawal. The learned Judges constituting the Division Bench scrutinised the terms and came to the conclusion that it was in the interests of the minor appellant that the said compromise be effected and on this ground they sanctioned the withdrawal of the application on 22nd December 1921. It may be remarked that this agreement has all along been acted upon by the parties.

On 16th October 1933, Diwan Jai Gopal was adjudicated an insolvent and the Official Receiver proceeded to attach the amount of maintenance recoverable by Diwan Jai Gopal under the above agreement. On behalf of the insolvent an objection was raised that this maintenance was exempt from attachment under S. 28 (5) of the Provincial Insolvency Act read with S. 60 (1) (n), Civil P. C. The Insolvency Judge and the District Judge found against him, but on further appeal their order was set aside by Rangi Lal, J. Hence this appeal. The sole question that falls to be determined in this case is whether the maintenance received by Diwan Jai Gopal is a right to future maintenance which is exempt under the provisions of the Civil Procedure Code or whether this maintenance is in the form of an annuity and is not immune from attachment.

Counsel for the Official Receiver contends that this maintenance was earned by Diwan Jai Gopal in lieu of the share to which he was entitled in the property of his deceased father and is based on the agreement dated 17th December 1921. He urges that a future right of maintenance as contemplated by the Civil Procedure Code is confined to those cases only where the right terminates with the life of the person receiving the maintenance and is not intended to cover those cases where the maintenance is received in the shape of an annuity. Persons who are entitled to be main-

1. Dwarka Das v. Krishan Kishore, 1921 Lah 34 = 61 I C 628 = 2 Lah 114.

tained by the head of the family may receive an allowance which may be covered by the terms of the Civil Procedure Code, but in a case like the present, when a person surrenders his whole estate in lieu of a cash receipt and a fixed monthly allowance, the money thus received will be treated as a sort of commutation of his interest in the property. The insolvent, on the other hand, has urged that there is a clear indication on the record that this maintenance was allowed to him not in lieu of any share in the property to which he was found entitled but was merely a subsistence allowance to which any junior member of the family, found to be governed by the rule of primogeniture, would be ordinarily entitled. He bases his contention on the award pronounced by Mr. Atkins where, as stated above, it was remarked that Diwan Krishan Kishore alone will be entitled to the entire property left by his father and that the rule of succession in the family being that of primogeniture, Diwan Jai Gopal as a junior member of the family will be entitled to subsistence allowance only.

The authorities relied on by either side do not throw much light on the matter, yet it is possible to deduce certain principles of law which may govern the present case. It is no doubt true that originally this maintenance was treated as a mere subsistence allowance, but the subsequent litigation that took place has in our view changed the nature of the previous award. The minor sons of Diwan Jai Gopal were not prepared to admit that they themselves or their father had no interest in the family property, and for this purpose, they instituted a regular suit in a civil Court. The High Court came to the conclusion that the award was a sort of family settlement arrived at between the adult members of the family and so bound the minors also and on this ground dismissed their suit. The surviving minor did not accept this position and had actually presented an application for leave to appeal to His Majesty in Council claiming that he and his father had a share in the property and it was this dispute that was settled by the agreement executed on 17th December 1921.

By that agreement, as remarked above,

any right, title or interest that they possessed in the property was surrendered by Diwan Jai Gopal and his minor son, and it was in lieu of this surrender that he secured an increase in his allowance as well as other advantages which have been mentioned above. Had the matter rested with the award, the position may have been different, but as the affairs stand at present it is difficult to hold that the enhanced maintenance received by Diwan Jai Gopal was a mere subsistence allowance and did not represent the commuted value of his interest in the property. It is significant that the subsistence allowance originally granted under the award and subsequently modified by the consent of the parties before the award was made a rule of Court was only Rs. 120. Under the new agreement this allowance was increased to Rs. 600 and this excess of Rs. 480 cannot be accounted for otherwise than by the fact that Diwan Krishan Kishore wanted to secure a permanently good title in the property unassailable by Diwan Jai Gopal or any of his descendants. It further implies a sort of an admission on the part of Diwan Krishan Kishore that his brother had some interest in the property which he purchased in a way under the agreement. In this connexion the most important authority relied on by Rangi Lal, J., is 59 Cal 1399 (2) but it has no bearing on the case. The rule applicable here may be deducible from the principles of law enunciated there, but it does not help the insolvent in the least. Their Lordships of the Privy Council held as follows :

The right of survivorship is not inconsistent with the custom of impartibility and it applies to the devolution of an impartible estate in a Mitakshara joint family. In order to establish that the family has ceased to be joint, it is necessary to prove an intention, express or implied, on the part of the junior members to renounce their right of succession ; it is not sufficient to show a separation in food and worship merely.

It follows therefore that the right of survivorship will not be available if the family has disrupted and that where the junior members of the family have expressly renounced their right of succession, as in the present case the incident of joint family will not apply. It is not

2. Shiba Prasad Singh v. Prayag Kumari, 1932 P O 216=138 I O 861=59 I A 391=59 Cal 1939 (P O).

clear how the learned Judge of this Court came to the conclusion that this authority rendered any assistance to Diwan Jai Gopal. The estate did not retain its character of joint family property and even if Diwan Jai Gopal had any right, title or interest in the family property prior to the agreement of 17th December 1921, it no longer existed after the execution of that agreement. In 40 Mad 302 (3), the judgment debtor had been allowed an extra allowance payable in monthly instalments to enable him to maintain the dignity of his position as a retired karnavan of the tarwad. The learned Judges considered that the true test to be applied in such cases was whether the intention of the grantor was to create a purely personal right to receive certain sum of money in the grantee and consequently inalienable, or whether his intention was to create an interest in property, either a fund or an estate which should be treated as alienable property. It is obvious that the maintenance payable to Diwan Jai Gopal is heritable and as such it is assignable. This authority therefore will afford no help to the insolvent.

In 30 Mad 279 (4), the allowance sought to be attached was hereditary grant of paddy out of the melwaram of certain land and it was held that this being so, it was attachable. In 63 I C 851 (5), it was remarked that the right of maintenance contemplated by Cl. (1) (n) of S. 60 is the right of a particular individual to be maintained; it is a purely personal right and does not include an annuity conferred by a will, more especially where the allowance is not personal but heritable. In 10 Cal 521 (6), it was laid down that the heritable right to receive a certain monthly allowance originally assigned in lieu of a share of landed property is not a mere right to maintenance or anything else exempted by the proviso to S. 266, Civil P. C. [now S. 60 (1) (n)].

This appears to be very near to the present case.

In 7 I C 80 (7), the maintenance intended to be attached was the monthly allowance allowed to a daughter and it was held that her right to receive the monthly allowance was not liable to be attached, being a purely personal right to future maintenance.

In 43 All 617 (8), under a family arrangement between two brothers, the younger brother was given certain villages in lieu of maintenance. The grantee was to enjoy the income of the villages during his life, without power of transfer, and at the elder brother's death he was to become the full owner. It was held by a Bench of the Allahabad High Court that such property was not exempt from process in execution against the life-tenant. It will be obvious therefore that the true test to lay down in these cases is whether the right of maintenance intended to be attached is a purely personal right not heritable and not assignable, or it is an alienable and heritable right which takes the shape of an annuity or has been granted in lieu of a share in an estate. If it is the former, it will be protected under the provisions of the Civil Procedure Code, but if it is the latter, it will not be exempt from attachment. The terms of the agreement, dated 17th December 1921 make it abundantly clear that the allowance granted to Diwan Jai Gopal was to continue in his family from generation to generation. It is also clear, as discussed above, that it was granted to him at the time when his minor son was putting forward a claim to a share in the property and that in lieu of this maintenance and certain other advantages, both father and son renounced their right in the estate itself. On the proposition of law deducible from the authorities cited above, it cannot but be held that the maintenance allowance payable to Diwan Jai Gopal is not a mere right to future maintenance as contemplated by S. 60 and is therefore not immune from attachment.

In these circumstances we accept the appeal, set aside the order of the learned Judge of this Court and restore that of

3. Palikandy Mammad v. C. K. Valia Appa, 1917 Mad 79=34 I C 391=40 Mad 302=30 M L J 361.

4. Vaidyanatha Sastriar v. Venkata Rama, (1907) 30 Mad 279=17 M L J 373.

5. Madan Lal v. Ambika Bakhsh, 1921 Oudh 164=63 I C 851=24 O C 250.

6. Salamat Hussain v. Luckhi Ram, (1884) 10 Cal 521.

7. Tara Sundari Devi v. Saruda Charan, (1910) 7 I C 80.

8. Sunder Bibi v. Rajender Narain, 1921 All 120=63 I C 181=43 All 617=19 A L J 648.

the Insolvency Judge. The appellant will get his costs before us.

R.W./R.M.

Appeal accepted.

A. I. R. 1936 Lahore 59

HILTON AND RANGI LAL, JJ.

Muhammad Nawaz Khan—Defendant—Appellant.

v.

Manga Khan and others—Plaintiffs—Respondents.

First Appeal No. 1871 of 1929, Decided on 2nd July 1934, from decree of Senior Sub Judge, Campbellpur, D/- 13th June 1929.

Custom (Punjab)—Ancestral property.

Among the Awans of Tallaganj Tahsil, Attock District, a proprietor cannot make an unequal distribution of ancestral property amongst his sons : 114 P R 1913 and 1914 Lah 227, *Foll* ; 100 P R 1912 and 88 P R 1911, *Not foll*.

[P 59 C 2]

Nand Lal and Pran Nath Mehta—for Appellant.

Ghulam Mohyuddin and L. M. Datta—for Respondents.

Hilton, J.—Ranmast Khan, an Awan of Lawa in the Tallaganj Tahsil of the Attock District, made a gift to the defendant Muhammad Nawaz Khan, his son by one wife, of both land and house property. The plaintiffs are four sons of Ranmast Khan by another wife and have been given a decree for possession of a $\frac{4}{5}$ th share of certain fields measuring 480 kanals 13 marlas out of the gifted land, on the ground that it was ancestral property of Ranmast Khan and could not be gifted by him to one son so as to make an unequal distribution of it between his sons. Their suit was dismissed in respect of the rest of the land and the house property on a finding that these were the self acquired property of Ranmast Khan.

Both sides have appealed, but the appeal of the plaintiffs has not been pressed and I would therefore dismiss it, but would make no order as to costs. In the appeal of the defendant, Dr. Nand Lal argued that an Awan proprietor can gift his ancestral land and he relied upon 100 P R 1912 (1) and 83 P R 1911 (2).

1. Nur Khan v. Sarfaraz, (1912) 100 P R 1912=16 I C 21.

2. Khuda Bakhsh v. Wahamali, (1911) 88 P R 1911=10 I C 86.

In the former authority no decision was given by the Court to the effect that an Awan proprietor who has sons can make an unequal distribution between them and the latter authority, which was that of a single Judge, was not followed in 114 P R 1913 (3) and 72 P R 1914 (4), both of which support the view that an unequal distribution amongst sons cannot be made by an Awan proprietor of Tallaganj. I see no reason for not accepting these decisions, particularly as they accord with the custom laid down in the *riwaj-i-am* of the Tallaganj Tahsil. Dr. Nand Lal also relied on one instance contained in the judgment Ex. D-3, but that does not help the appellant, as a perusal of the judgment in question shows that it was a case of self-acquired property.

It was also argued for the appellant that some of the land which has been held by the trial Judge to be ancestral is not proved to be so. An examination of the Special Qanungo's report on the revenue records, upon which the trial Judge relied, shows that fields numbered 89, 90, 91, 92, 93 and 94, the total area of which is 29 kanals 18 marlas, are not proved to have been owned by Muhammad Khan, father of Ranmast Khan, in the Settlement of 1880. The judgment of the trial Court on this particular point is incorrect. These fields should have been excluded from the plaintiffs' decree. I would accordingly accept the appeal of the defendant-appellant to this extent that the decree is modified and the suit of the plaintiffs is dismissed in respect of fields numbered 89, 90, 91, 92, 93 and 94, measuring 29 kanals 18 marlas. I would leave the parties to bear their own costs of the defendant's appeal in this Court.

Rangi Lal, J.—I agree.

K.S.

Appeal partly accepted.

3. Khuda Bakhsh v. Ahmad Khan, (1913) 114 P R 1913=19 I C 469.

4. Lal Khan v. Nura, 1914 Lah 227=25 I C 556=72 P R 1914.

A. I. R. 1936 Lahore 60

COLDSTREAM AND ABDUL RASHID, JJ.

Ali Mohammad—Defendant—Appellant.

v.

Sant Lal and others—Plaintiffs and Defendant—Respondents.

First Appeal No. 101 of 1935, Decided on 18th July 1935, from preliminary decree of Sub.Judge, First Class, Jhang, D/- 13th August 1934.

(a) **Mortgage—Recitals—Burden of proof—Mortgagor stating in mortgage deed that they have proprietary right in land mortgaged and that they are entitled to make the mortgage—Suit on basis of mortgage—Mortgagors denying proprietorship in land on date of mortgage and contending that they were not entitled to make it—Onus is on them to prove that their statements in mortgage deed were untrue.**

A mortgage deed set forth that the land mortgaged was the property of the mortgagors on the date of the mortgage, it being recorded as such by an entry in a Dakhila, and that the mortgagors were not members of an agricultural tribe being members of the Teli Chohan Tribe. On a suit being brought on basis of the mortgage, the mortgagors contended that the mortgage was void and unenforceable as the mortgagors had no proprietary right in the land on the date of the mortgage and as it was in contravention of the Punjab Land Alienation Act which did not allow a mortgage to be made by member of an agricultural tribe in favour of a member of a non-agricultural tribe. The mortgagors claimed to be Chohans belonging to a got of Rajputs, an agricultural tribe :

Held : that the onus was on the mortgagors to show that their statements in the mortgage deed that the land had become their property on the date of the mortgage and that they were members of Teli Chohans, a non-agricultural tribe were untrue. [P 61 C 2; P 62 C 1]

(b) **Custom (Punjab)—Applicability—Telis are distinct tribe and are true caste—All Teli Chohans are not Rajputs.**

The Telis are a distinct tribe in the Punjab and are a true caste and not merely followers of an occupation. All Teli Chohans are not necessarily Rajputs. [P 62 C 2]

Nawal Kishore, R. K. Tandon and A. N. Chona—for Appellant.

J. L. Kapur and M. C. Shukla—for Respondents.

Coldstream, J.—One Fatteh Muhammad was given as a tenant a grant of land in Chak No. 268 in Jhang Tahsil in 1907. On 15th December 1926 his sons Ali Muhammad, Haji Muhammad and Muhammad Aqil paid to Government the sum of Rs 348-5-9 necessary to obtain proprietary rights in the land. On 22nd December 1926 Ali Muhammad and his

brother Muhammad Aqil executed and registered a deed of mortgage in respect of this land which measured 222 kanals 19 marlas in favour of Hari Chand of Maghiana for Rs. 3,920. The deed stated that the mortgagors were Chohan by caste, that they were previously owners of a two thirds share of the mortgaged property and had purchased the remaining third share from their brother Haji Ahmad who had been paid Rs. 3,500, as its price out of the consideration for the mortgage. It was also mentioned in the deed that the land had been recorded as the mortgagors' by an entry made in a dakhila (voucher or receipt form) No. 49 dated 15th December 1926. A postscript to the deed noted that the mortgagors were non-agriculturists, being members of the Teli Chohan tribe. On 18th March 1927 the sons of Fatteh Muhammad were recorded as owners of the land by mutation in the land revenue records.

By partition of family property the mortgage rights passed to Sant Lal and Ramaya Lal, uncle and father of Hari Chand in 1931. On 21st December 1933 Sant Lal, Ramaya Lal and Hari Chand instituted in the Court of the Subordinate Judge, First Class, Jhang, the suit out of which this appeal arises against Ali Muhammad and Muhammad Aqil for recovery of Rs. 7,887-12-9, principal and interest, by sale of the mortgage property. The suit was resisted by Ali Muhammad alone on the grounds that the mortgage was a void and unenforceable transaction because the land mortgaged was at the date of this deed the property of Government which the defendants were not competent to alienate without the Commissioner's sanction and because the mortgage was in contravention of the Punjab Alienation of Land Act, the mortgagors being Chohans who belong to a got of Rajputs, an agricultural tribe of the district, and the mortgage being of a kind which the Act did not allow to be made by a member of an agricultural tribe in favour of a member of a non-agricultural tribe.

The learned Subordinate Judge held that the mortgagors were not members of an agricultural tribe, being Teli Chohans and not Chohan Rajputs as they claimed to be, and that the mortgage was therefore not in contravention of the Alienation of Land Act. On the

other main issue his finding was that although at the time of the execution of the deed the mortgagors had not "technically acquired proprietary rights" and the mortgage "would have been void without the consent of the Commissioner," the mortgage was nevertheless enforceable in accordance with the principle embodied in S. 43, T. P. Act, and S. 18, Specific Relief Act, as they subsequently became full proprietors of the land. He also held that the mortgagors were estopped from pleading that they had no title in the land conveyed. On these findings he granted the plaintiffs the decree they sought, the decree being *ex parte* against Muhammad Aqil.

Against this decree Ali Muhammad has appealed. It is contended before us that the learned Subordinate Judge ought to have held upon the evidence that the mortgage was void because the mortgagors had no proprietary title to convey and were forbidden by statute to alienate their tenancy without sanction and because it was in contravention of the Punjab Alienation of Land Act. As already mentioned the sale deed set forth that the land had become the property of the mortgagors on the 15th December 1926 by virtue of an entry in a dakhila No. 49 dated 15th December 1926. The onus was therefore rightly placed upon them to show that this statement was incorrect. Their counsel argues that this onus has been discharged by the production of a copy of the mutation order of 18th March 1927 by which they were recorded as proprietors in place of the Crown. This document contains a note by the patwari reporting the matter for mutation orders as follows :

Proprietary rights were granted as per order dated 6th January 1927 passed by the Deputy Commissioner on the basis of dakhila No. 49 made on 15th December 1926 in lieu of Rupees 848-5-9.

The sanctioning order of the revenue officer runs:

with reference to the Deputy Commissioner's order dated 6th January 1927 mutation of names in respect of the grant of proprietary rights (in the) entire Khata No. 47 . . . is sanctioned in favour of Ali Muhammad, Haji Muhammad and Muhammad Ali all three in equal shares as shown in the new entry.

It is argued that this proves that it was not until 6th January 1927 that the proprietary rights vested in Fattah Muhammad's sons. But this is not the

case. We do not know what the orders of 6th January 1927 were. The natural assumption is that before the price of the land was deposited orders were passed by the Deputy Commissioner sanctioning the purchase of the rights by Fattah Muhammad's sons and that the sale was complete when the price was deposited. The dakhila itself has not been produced. There is no justification for supposing that the mortgagors' statement, made in the deed a few weeks after the money had been deposited, that their proprietary title had been recorded was untrue. Appellant's counsel relies strongly on a statement made by the patwari as defendant's witness that the proprietary rights were conferred on 6th January 1927.

But it is obvious that the Patwari's statement was made simply on a reference to the mutation of 13th March 1927, for the original papers were not with the Patwari, nor is there any reason to suppose that the Patwari had any means of knowing at what precise time the defendants obtained title. We have been referred by appellants' counsel to the rules now in force which regulate the grant of land in the colony. These show that in the case of a tenant of a peasant grant, as the mortgagors' seems to have been, the mere fulfilment by the grantee of certain conditions will not result in the acquisition of proprietary rights, but that after certain necessary conditions have been fulfilled it is still open to the Deputy Commissioner to refuse to convey the land to the tenant in proprietary right if he has not conducted himself properly. From this we are asked to conclude that the payment of the purchase price by the appellants could not have conferred proprietary rights on them until the Deputy Commissioner passed a further order which order must be presumed to have been that of 6th January 1927. I see no force in this argument. In face of his solemn declaration in the deed it was for the appellant to prove positively that proprietary rights were not acquired by him and his brother on 15th December 1926 either because the Deputy Commissioner was making further enquiries or because some conditions still remained unfulfilled or for some other reason. This he has not done. That there may be cases in which peasant

grantees of colony land can acquire valid proprietary rights by the mere deposit of the necessary amount in the Government Treasury is clear from a Division Bench judgment of this Court in [Case No. 891 of 1933 (1)]. See also 8 P R 1915 (2). The appellants' evidence was clearly in my opinion insufficient to show that his statement that he had acquired proprietary rights of the land before the mortgage was untrue.

It is unnecessary in view of this finding to discuss the question whether the principle to which S. 43, T. P. Act, gives effect is applicable to this case, as the respondents' counsel contends it is on the ground that the mortgage did not purport to create any charge upon the tenancy but clearly mortgaged the proprietary rights which did exist at the time but were not vested in the mortgagors.

We have considered carefully the whole of the evidence relating to the tribe or caste of the appellant. It has been dealt with fully by the learned Subordinate Judge. Here again the onus lay very heavily upon him to prove positively that the statement in his deed that his tribe was teli Chohan and was a non-agricultural tribe was untrue. For the appellant the principal argument urged is that the mortgagors were really Rajputs of the Chohan got, that the word Teli was used merely as a description of a class of artisans (oil pressers) recruited from other tribes and that Fattah Mahommed's family so described themselves because they themselves once worked as oil pressers or that their family had at one time worked as such. The suggestion that Fattah Mahomed and his sons worked as telis was based simply on the statement made by the plaintiff Sant Lal (P. W. 5) that "at first they worked as oil pressers" but an inspection of the vernacular record shows that what Sant Lal said was that their ancestors used to do this work, that is to say that at one time the mortgagors' predecessors did the ordinary work of their tribe. Fattah Mahomed was an orderly of the Deputy Commissioner, Ali Mahommed was Head Clerk in the Dis-

trict Board Office, and there is evidence that for generations the family has not worked as telis. Ali Mahomed himself in giving evidence did not state that his ancestors within recent times were oil pressers, and there is no evidence at all that any of his predecessors did so. On the other hand we find that in the deed selling his share of the suit land to his brothers (P. W. 5/1) Haji Ahmad not only stated that his caste was teli but also that by occupation he was a shop-keeper and described his brothers as by caste Chohan telis by occupation service.

The proposition that the term teli Chohan by which Fattah Mahomed and his relations have described themselves in older deeds was evidence only that the tribe had once done teli work, has no more force, for the teli are a distinct tribe in the Punjab as is made clear in Rose's Glossary of Punjab Tribes and Castes (Vol. 3, pp. 462-63). No doubt it is there stated (p. 464) that some of the got, for instance the Chohan got are of ostensibly Rajput origin and the caste is apparently recruited from time to time by the absorption of telis by occupation,

but this statement does not mean that all Chohan telis are now Rajputs. According to Ibbetson's Punjab Castes (p. 647) the telis are a true caste and not merely followers of an occupation. From the evidence of the Sadr Patwari of Jhang (pp. 8 and 9 of the printed record) it would appear that there is no tribe called Rajput Chohan notified as an agricultural tribe in Jhang. The Jat Chohan are so notified. But the appellant never claimed to be a Jat. The fact that a person previously described as a Kamangar Chohan has had the entry of his caste altered into Rajput Chohan does not help the appellant. The oral evidence is not of a convincing kind and has rightly been rejected by the lower Court. Importance has been attached by appellant's counsel to three documents put in evidence by his client dating from before the execution of the mortgage. These are a certificate granted to Ali Mahommed on his passing the patwari's examination in 1904 (D-8) and two admission certificates (D-3) and (D-4) granted by the Head Master of the Islamia High School to Ali Mahommed's sons in 1924 and 1926. In these the caste of Ali Mahommed and his sons is put down as Chohan Rajput. The word Rajput in D-8 is

1. Kishan Singh v. Labh Singh, Case No. 891 of 1933 Decided on 14th January 1933.

2. Malap Kuar v. Hakim Singh, 1914 Lah 509= 28 I C 441=8 P R 1915.

as noted by the learned Subordinate Judge apparently an addition to the rest of the writing on the form in another ink by a different pen and in another hand, and its evidence is worthless. As regards the school admission certificates I have no doubt that Ali Mahommad reported his sons to be Rajputs with a view to social and official advancement.

To the pedigree table produced by the appellant's Mirasi witness Allah Ditta, D. W. 20, no evidentiary value can be attached. It is a most suspicious document. The plaintiffs did not rely only upon the statements made by Ali Mahommad and Mahommad Aqil in the mortgage deed. There is also the deed of sale in their favour executed by their brother Haji Mahommad (P. W. 5/1) to which I have already referred. In 1901 relations of the appellant described themselves as telis in a registered sale deed (P. W. 3/1). Before the Registrar they said they were telis known as Chohan. In 1905 Mohammad Aqil cousin of the appellant described himself as Chohan teli in a mortgage deed (P. W. 3/2). In 1917 Ali Mohammad and his two brothers stated that they were teli Chohans when registering a deed (P. W. 1/1). In the revenue records prior to the mutation following on the mortgage in dispute they were recorded as teli Chohan.

The Privy Council judgment in 6 Lah 269 (3) cited by appellant's counsel was upon a wholly different set of circumstances. The revenue records in that case supported the appellant's case which was that he was of the Mohal got, a sub-tribe of Rajputs. It was proved that there was no other tribe except that of Rajputs which contained a got of the name of Mohal. It was admitted that if the appellant was a Mohal his claim to be a Rajput would be established. This judgment has no application here. My conclusion is that the lower Court's decision on this part of the case was correct. I would accordingly dismiss the appeal with costs.

Abdul Rashid, J.—I agree.

R.M.

Appeal dismissed.

S. Ghulam Rasul Khan v. Secretary of State, 1925 P. C. 170=86 I O 654=6 Lah 269=52 I A 201 (P.O.).

A. I. R. 1936 Lahore 63

BHIDE, J.

Basanti Devi—Decree-holder — Petitioner

v.

Amin Chand and another—Judgment-debtor—Opposite Parties.

Civil Revn. No. 8 of 1934, Decided on 29th June 1934, from order of Dist. Judge, Sialkot, D/- 31st July 1933.

Appeal—Forum—Valuation—Objection to—Application under P. 20, Sch. 2, Civil P.C.—Value for purposes of jurisdiction fixed—Valuation cannot be questioned in execution proceedings.

Where in an application under Para. 20, Sch. 2 Civil P. C., the value for the purpose of jurisdiction is fixed, the valuation cannot be questioned in execution proceedings when the objection is not taken in the proceedings under Para. 20, Sch. 2 or in any appeal arising therefrom: 1934 Lah 804, *Rel on*.

Shamair Chand—for Petitioner.

Nawal Kishore—for Opposite Parties.

Order.—Civil Appeal No. 8 of 1934 and Civil Revn. No. 8 of 1934 are connected and will be disposed of together. These arise out of execution proceedings relating to a decree passed on the basis of an award on an application under Para. 20, Sch. 2, Civil P. C. In the application, the value for the purpose of jurisdiction was given as Rs. 5,000. Execution proceedings were taken in the Court of the Senior Subordinate Judge, Sialkot, and the learned Judge passed an order on the 4th of August 1932, holding that Mst. Basanti Devi could execute the decree in respect of an item of 1325 but not in respect of the ornaments or any share out of the sum of Rs. 4,500. From this decision, an appeal was presented to the District Judge, who was of opinion that the value of the property in dispute being more than Rs. 5,000 the appeal lay to this Court. The appeal was accordingly returned for presentation to this Court. The decree-holder has now come up to this Court, and has filed a petition for revision of the order of the learned District Judge along with the appeal.

It is contended on behalf of the decree-holder that the value for jurisdiction having been fixed in the original application at Rs. 5,000 the valuation cannot now be questioned in execution proceedings. This contention appears to me to be sound. According to S. 11 of the Suits Valuation Act, the value

of a suit cannot be questioned in appeal except when the objection is taken at the earliest stage and it is shown that the objector has been prejudiced. In the present instance, the objection was never taken in the proceedings under S. 20, Sch. 2 of the Civil P. C. or any appeal arising therefrom and it seems to me clear that the objection cannot now be raised in execution proceedings. A similar view was taken by a learned Judge of this Court in Civil Appeal 921 of 1933 (1).

I, therefore, accept the petition and set aside the order of the learned District Judge in which he has held that he had no jurisdiction to entertain the appeal and direct that the memorandum of appeal be returned to the decree-holder for presentation to the learned District Judge for disposal on merits. In view of all the circumstances, I leave the parties to bear their costs.

R.M./R.K. *Petition accepted.*

1. *Gian Chand v. Charanji Lal* 1934 Lah 804 = 155 I C 229 = 36 P L R 238.

A. I. R. 1936 Lahore 64

BECKETT, J.

Nand Kishore—Appellant.

v.

Madan Lal and another—Respondents.

Second Appeal No. 861 of 1931, Decided on 11th July 1934.

Hindu Law — Debts — Father — Decree against—Creditor can proceed against joint family property—Right is not lost by subsequent partition.

A creditor has a right to proceed against the joint family property in execution of a decree against father before partition takes place and this right is not lost when a portion of the joint family property passes into the occupation of one member of the family under a partition: 1931 All 512 and 1929 All 726, *Foll*; 1928 Mad 657, *Not foll.* [P 64 C 2]

Bishan Naraia—for Appellant.

Mathra Das—for Respondents.

Judgment.—The facts of this case are simple. The plaintiff obtained a decree against Manohar Lal and had some family property attached in execution of the decree. Madan Lal, son of Manohar Lal, then raised an objection in the executing Court to the effect that the property under attachment has passed to him on partition. The objection was upheld and the property was released from attachment. The decree-holder has now brought the present suit for a declaration that the property is

still liable to attachment in execution of his decree.

It has been found that there was a partition between Madan Lal and his father and that this partition was not the result of fraud or collusion; but the debt was incurred before the partition took place. The trial Court held that this was sufficient to render the property liable to attachment. On appeal to the District Judge it was held that the property which had passed to Madan Lal on partition might be liable for the satisfaction of his father's debts incurred before the partition took place, but that the creditor could only obtain this satisfaction in a suit to which Madan Lal was a party, and could not attach the property in execution of a decree passed against his father alone. The plaintiff's suit was accordingly dismissed, and he has come up in second appeal.

The decision of the lower appellate Court follows the view which has been consistently taken by the High Court of Madras, as will be seen from the judgment of the Full Bench in 51 Mad 361 (1). On the other hand, a different view has been taken by the High Court at Allahabad. The question now in issue came up for decision in 51 All 932 (2) which was followed by the Full Bench decision in 53 All 868 (3). The view taken therein is based on the principle that the creditor has a right to proceed against the joint family property in execution of a decree against the father before partition takes place, and that this right is not lost when a portion of the joint family property passes into the occupation of one member of the family under a partition. This view seems to be more in consonance with the view taken by this Court in analogous cases than the view taken in Madras.

I accept the appeal, and restore the decree of the trial Court, but leave the parties to bear their own costs in this Court and the lower appellate Court, in view of the conflicting decisions on the subject.

R M./R K. *Appeal accepted.*

1. *Subramania Ayyar v. Sabapaty Ayyar*, 1928 Mad 657 = 110 I C 141 = 51 Mad 361 = 54 M L J 726 (F B)
2. *Kishan Sarup v. Brijlaraj Singh*, 1929 All 726 = 121 I C 257 = 51 All 932 = 1929 A L J 941.
3. *Bankey Lal v. Durga Prasad* 1931 All 512 = 135 I C 139 = 53 All 868 = 1931 A L J 917 (F B).

A. I. R. 1936 Lahore 65

COLDSTREAM AND JAI LAL, JJ.

Central Bank of India, Ltd., Lahore—Appellant.

v.

(Firm) Jawahir Singh-Harnam Das and others—Respondents.

First Appeal No. 618 of 1932, Decided on 14th February 1935, from decree of Senior Sub-Judge, Multan, D. 10th February 1932.

Mortgage—Equitable mortgage—Letter offering title-deed as security—Title-deed not accompanying letter—Held letter did not create equitable mortgage and was not compulsorily registrable.

Where in a letter the defendant wrote offering certain title-deed as security but the title deed was not sent with the letter and left it open to the creditor bank to lend money either with or without accepting the security offered:

Held: the letter could not therefore embody operative agreement or record the real transaction of the title-deed, the executing of the pro-note and the advance of the loan. The fact that the letter may be evidence of the transaction will not make it compulsorily registrable. Nor did the letter require registration even if the advance was conditional on its being written: *Case law Ref.* [P 66 C 2]

M. C. Mahajan and Tirath Ram—for Appellant.

Jagan Nath Aggarwal, Bishen Narain and J. G. Sethi—for Respondents.

Coldstream, J.—On 16th December 1927 the firm Jawahar Singh Harnam Das signed letter addressed to the Agent of the Central Bank of India, Ltd., at Lahore applying for a loan of Rupees 75,000. The letter stated that the applicant would execute a promissory note for the amount of the loan and deposit as security for the loan the deed by which they had purchased a cotton factory at Mian Channum in Multan District. On the same day the firm executed a promissory note for Rs. 75,000 payable on demand carrying interest at one per cent above the local Imperial Bank of India rate subject to a minimum rate of 9 per cent per annum. They also on the same day gave the Bank's Agent a letter assuring the Bank that the property, the title-deed of which had been deposited, was free from all incumbrances. The deed had been in the Bank's possession since before 16th December. On 13th September 1929 the firm mortgaged the factory to Arura Mal Durga Das and two other firms for Rs. 39,000. In the mortgage deed it was stated that the factory

was already mortgaged to the Central Bank of India for Rs. 75,000 by means of deposit of title-deeds. On 23rd May 1930 the Bank instituted a suit in the Court of the Senior Sub-Judge of Multan to recover Rs. 84,862-2-0 from the firm by sale of the factory. The members of the firm were found to have been declared insolvents and the Court impleaded the Official Receiver. There were also impleaded for the trial the legal representatives of one Jawala Das to whom the firm of Khan Chand Sawaya Ram, one of the pusine mortgagees, had transferred their mortgage rights.

The suit was contested on many grounds but only two of the pleas concern us now—one that the amount due upon the promissory note was less than that claimed as a sum of Rs. 3,944-15-6 which had been repaid ought to have been credited against the principal debt, and other that "no lawful mortgage had been effected in favour of the plaintiffs by means of deposit of title-deeds" because the letter of 16th December 1927 which constituted the agreement between the parties, being unregistered and unstamped could not create a charge upon the factory and could not be received in evidence of the mortgage oral evidence of which was excluded by S. 91, Evidence Act. The learned Sub-Judge found force in these pleas. He found the amount due on the promissory note to be Rupees 71,055-0-6 and passed a simple money decree for this sum.

Against this decision the plaintiffs have appealed, the contention pressed on their behalf being that on the finding of the lower Court itself that the plaintiffs were entitled to credit the sum of Rupees 3,944-15-6 as interest, the decree should have been one for Rs. 80,917-2-6 and that the learned Sub-Judge erred in deciding that defendants' letter of 16th December 1927 was a document which required registration under the provisions of S. 17, Registration Act. That there is force in the first of these contentions is not disputed by respondents' counsel. The learned Sub-Judge's calculation of the amount due to the plaintiffs upon the promissory note is inconsistent with his finding that the payment of Rs. 3,944-15-6 was not shown to have been wrongly credited by the plaintiffs. Respondents' counsel admits that on this point the appeal must succeed. The

letter signed by the plaintiffs on 16th December 1927 is the Exhibit P-20 at p. 65 of the printed record. It runs as follows :

"Dear Sir,

We beg to apply for a loan of Rupees 75,000 on the following terms :

1. The loan shall be repayable on demand and we shall pass a demand promissory note for the amount.

2. The rate of interest shall be 2 per cent over Bank rate with a minimum of 9 per cent per annum with half yearly rests.

3. The loan to be secured by equitable mortgage by way of deposit of title-deeds of our property and/or against other securities detailed below:

Details of title-deeds and/or other securities. Sale-deed dated 30th August 1923, by Janda Singh Dhana Singh, in favour of Harnam Das and Ram Lal in respect of 37 kanals 12½ marlas land together with 70 ginning machines, press, other machinery and buildings fixed and built thereon.

4. We are to make out a marketable title to the property before the loan is made.

5. We will pay all costs of investigation of title and all your costs of getting the properties offered as security valued by your Engineer and all your costs charges and expenses in the matter between Attorney and client on demand notwithstanding that for any reason other than your wilful default the loan might not be made.

6. The property, if you so desire, will be insured in your name in the sum of Rs. 1,52,000 and we will duly pay all insurance premia as they become due and will keep up the insurance. If the property is already insured in the above amount we will assign the policy to you.

7. As regards the property above offered as security we declare that we are the sole absolute owners of the property and no one else has any share or interest in the property and the property is free from all encumbrances and is not subject to any mortgage or charge of any sort or kind and there is no suit proceeding or litigation pending in any Court in respect of the same and I have not received any notice from the Municipality or any other authority for the repairs or other-

wise in respect of the property or the use thereof.

Yours faithfully,

16-12-1927 Bhai Jawahar Singh Harnam Das."

It is admitted by counsel that the sole point for decision is whether this letter required registration and was therefore, inadmissible in evidence in the absence of registration, that is to say, whether this document constituted the bargain between the parties or is merely evidence of a transaction independently completed by the deposit of the deed. What has to be determined is whether the letter purported or operated to create, declare or assign a right, title or interest in the factory. The fact that it was signed on the day on which the deposit was made is immaterial [See 105 I C 765 (1)]. Read by itself it is obvious that it could not embody the bargain between the parties. The letter did not accompany the title-deed for the defendants' case was that the deed was already with the Bank, with whom the defendants had already been negotiating for the loan. The case is clearly distinguishable from that dealt with by the Privy Council in 1923 P C 50 (2). In that case the letter which was held by their Lordships to constitute the bargain between the parties expressly authorised the mortgagee to hold certain title-deeds accompanying the letter as security against the loans advanced. In the present case the letter by itself created no charge. It asked for a loan, offering a title-deed as security and left it open to the Bank to lend the money either with or without accepting the security offered. It could not therefore embody operative agreement or record the real transaction which effected not by the letter but by the deposit of the title-deed, the executing of the pro-note and the advance of the loan. The fact that the letter may be evidence of the transaction will not make it compulsorily registrable. Nor did the letter require registration even if the advance was conditional on its being written [See 1931 P C 36 (3)]. That the

1. Punjab National Bank, Ltd v. Mulji Morarji, 1928 Sind 17=105 I C 765=22 S L R 222.
2. Subramanian v. Lutchman 1923 P C 50=71 I C 650=50 I A 77=50 Cal 338=1 Rang 66 (PC).
3. Sundarachariar v. Narayana Ayyar 1931 PC 36=131 I C 928=58 I A 68=54 Mad 257 (PO) -

letter did not as a fact embody the agreement seems to me clear from the fact that while the proposal made therein was that the interest should be two per cent above the prevailing Bank rate, the loan advanced on the pro-note was to carry interest at one per cent above this rate.

Respondents' counsel has referred us to a number of rulings in which documents relating to the deposit of mortgage deed as security for loans have been held to require registration. None of these is of a nature similar to the document with which we are concerned. In 1920 Cal 312 (4) the document in question was a letter expressly putting it on record that title-deeds deposited were to be held as collateral security. The document alone created the charge and without it there would have been nothing to attach the debt to the deposit of the deeds. In the present case the connection between the loan and the deposit of the deed is proved by an entry in the Bank's register of 16th December 1927, recording the advance of Rs. 75,000 and the deposit of the title-deed. In 138 I C 247 (5) also the document held to be inadmissible because it was unregistered was a memorandum containing the words:

having placed in your hands the securities as per list mentioned on the reverse as security... I hereby agree that in default of payment on demandyou shall be at liberty to sell all or any of such securities as shall be sufficient to reimburse to the Bank, etc.

The distinction between such a document and the defendants' letter is obvious. The documents in the other cases cited by respondents' counsel were of a similar character. To me it seems clear that the letter neither purported nor operated to create or declare any right, title or interest in the factory and that the Sub-Judge's decision on this point cannot be sustained. It is not disputed that on this finding the Bank is entitled to a decree for recovery of the loan by sale of the factory. We are informed by counsel that the factory has already been sold and the proceeds are deposited with the Receiver. I would accordingly accept the appeal with costs throughout against the contesting defendants and grant the Bank a decree for

4. Bhairah Chandra v. Anath Nath 1920 Cal 312=57 I C 686.

5. Bank of Northern India, Ltd. v. Narain Singh (1932) 138 I C 247.

Rs. 80,917-2-6 with interest at 6 per cent per annum from the date of the suit to the date of realisation, recoverable from the sale proceeds of the factory as a first charge or if these are insufficient from the first four defendants and their other property.

Jai Lal, J.—I agree.

K.S.

Appeal accepted.

A. I. R. 1936 Lahore 67

DALIP SINGH AND BECKETT, JJ.

Feroze Din—Defendant—Appellant.

v.

Fazal Qadar and another—Plaintiffs—Respondents.

First Appeal No. 2005 of 1929, Decided on 26th June 1934, from decree of Senior Sub-Judge, Gujranwala, D/- 10th May 1929.

Custom (Punjab)—Adoption—Awans.

There is no custom of adoption among the Awans of Garhi Awanan Gujranwala District.

[P 67 C 2]

Mahommad Tufail and Bashir Ahmad—for Appellant.

J. N. Aggarwal—for Respondents.

Dalip Singh, J.—This appeal can be disposed of on a short point viz., that the appellant has entirely failed to prove that there is any custom of adoption among the Awans of Garhi Awanan. The evidence of the appellant is to the effect that their custom is the same as that of Awans of Jhelum and Shahpur. The witnesses admit that no instance of adoption is known among them in Garhi Awanan and the customary law of the District is against the power to adopt. The *Riwaj-i-ams* of Jhelum and Shahpur have not been produced by the appellant either in the Court below or here. We have looked at the customary law of these Districts and they do not support the appellant's contention. The appellant also contends that the suit is barred by time but there is no good evidence to show that the plaintiff had any previous knowledge of any claim to adopt or of an adoption having taken place. Hence the appeal is dismissed with costs.

K.S.

Appeal dismissed.

A. I. R. 1936 Lahore 68

ADDISON, AG. C. J. AND DIN
MUHAMMAD, J.

Subedar Kesar Singh and another—
Plaintiffs—Appellants.

v.

Achhar Singh and others—Defendants
—Respondents.

Second Appeal No. 2026 of 1931, Decided on 25th June 1935, from decree of Dist. Judge, Dalhousie, D/- 5th August 1931.

(a) Custom (Punjab)—Riwaj-i-am of 1913 of Gurdaspur District—Answer to question 16 is not quite correct.

The reply to question 16 in the new riwaj-i-am of 1913 for Gurdaspur District, goes too far and has been made out of self interest inasmuch as it states that all collaterals, however remote exclude daughters: 60 P R 1889, *Rel on.*

[P 69 C 1]

(b) Custom (Punjab) — Succession — Randhawa Jats of Gurdaspur—Ancestral or self-acquired property — Collaterals within 4 degrees generally exclude daughters — Collaterals of 5th degree do not.

Among the Randhawa Jats of the Gurudaspur District, the daughters are generally excluded by collaterals within four degrees from inheriting the ancestral or self-acquired property of their father. The collaterals of the father belonging to the 5th degree are not however entitled to exclude the daughters: 1927 Lah 241, *fol.*; 1916 P C 129, *not foll.* [P 70 C 1]

*Devi Dayal and Harbhajan Das—*for Appellants.

*Har Dayal and Achhru Ram—*for Respondents.

Addison, Ag. C. J.—The land in dispute belonged to Attar Singh, a Randhawa Jat of village Ghanike Bangar in the Batala Tahsil of Gurudaspur District. He died some 40 years ago and was succeeded by his widow, Mt. Tabo. She gifted the land in April 1924 in favour of their two married daughters, Mt. Harkaur and Mt. Dai. After the death of Mt. Tabo, one set of reversioners sued the daughters for possession of their two thirds share of Attar Singh's land on the ground that they were entitled to succeed upon the death of the widow, who had no power to make a gift of it in favour of the daughters. Another set of reversioners brought a separate suit for their one-third share. During the pendency of the first suit, Mit. Singh, one of the plaintiffs died and that suit abated to the extent of his one-third share of the land in dispute. Thus, only one-third share of the land in dispute is now in suit

in each case. The Courts below have concurred in finding that the land is not ancestral and that the daughters succeed to their father's self-acquired land in preference to collaterals of the fifth degree. On these findings the two suits were dismissed by the trial Court and the appeals were dismissed. Against these decisions these two second appeals have been admitted to a hearing on certificates granted by the District Judge under S. 41 (3), Punjab Courts Act.

In the Customary Law of the Gurudaspur District, prepared in 1913, the Answers to Questions 16 and 17, as recorded at pp. 30 and 31, are in favour of the appellants. It is stated that the general rule is that daughters are excluded by the widow and male kindred of the deceased however remote, with certain exceptions which do not apply to the present case. It is also clearly stated that no distinction is made between immovable and moveable, ancestral and self-acquired, property of the father. In Appendix C, at p. 73, however a fairly large number of mutations are set out in which daughters inherited.

A customary law had been compiled in the 1893 Settlement. In it are the same questions 16 and 17 at pp. 18 and 19. The answer is still the same as regards question 17, namely, that there is no distinction between the immoveable and moveable, ancestral and self-acquired property of the father; and as this customary law was prepared at a time when the villagers were less sophisticated, there seems *prima facie* no reason to doubt the statement of custom contained in both of riwaj-i-ams in this respect. The answer to question 16, is however different. It was stated in 1933 that if there were near male kindred, daughters and their descendants did not inherit though they were entitled to maintenance until their marriage. A note was added that the exact limit of relationship within which near male kindred excluded daughters and their descendants was not fixed, though probably all male descendants of a common great-grandfather would, it was said, exclude daughters, as the latter's right of inheritance as such was very weak in this district. Reference was also made to 60 P R 1889 (1). The authority just referred to is an interesting

1. Ramzan Shah v. Sohna Shah, (1889) 60 P R 1889.

one. In that case the collaterals were of the fifth degree and it was held that they were too remote to exclude daughters. An interesting paragraph from this judgment may be quoted :

No doubt it has been held that daughters are generally excluded by nephews (though there are exceptions even to this), but in all cases where the collateral was more distantly related the question of custom has had to be made the subject of a special inquiry, the result of which has been sometimes for, sometimes against, the exclusion of the daughter ; the number of cases where it has been against exclusion naturally increasing, as the relationship of the collateral became more remote. But in each case the custom has been decided by special inquiry and not on general assumptions.

With great respect we endorse these remarks. In view of 60 P R 1889 (1) and of the entries in the *riwaj-i-am* of 1893, which was compiled shortly after the decision in that case, we think that the reply to question 16 in the new *riwaj-i-am* of 1913 goes too far and that it was made out of self-interest, inasmuch as it states that all collaterals, however remote, exclude daughters. It may be the case that, in the Punjab, custom can be regarded as something which does slowly and imperceptibly change and that it need not be absolutely invariable, though the latter is the usual conception of what custom is. But such a change would have to be gradual and a new custom cannot be created by the mere assertion of the various tribes at a subsequent Settlement. With respect to this matter, it has always appeared to us that the earliest *riwaj-i-am* serves as a very useful check on subsequent *riwaj-i-ams* and may even be regarded as the most important document in which custom has been recorded. It may here be stated that this affords an explanation to the somewhat large number of instances given in Appendix 'C' in the 1913 document where daughters are shown as inheriting. No inquiry was made as to how remote the collaterals were in these instances. That was probably because in 1913 the various tribes stated that the general rule was that daughters were excluded by collaterals, however remote. The first statement in the 1893 document was not looked at. Had that been done and had the instances, in which daughters inherited, been investigated to see what was the degree of relationship of the collaterals in each case, the 1913 docu-

ment would have been of much greater use.

Their Lordships of the Privy Council in 45 P R 1917 (2) held that the entry in the *riwaj-i-am* in favour of the succession of a daughter's son whose father was a *khanadamad*, in preference to collaterals, was a strong piece of evidence in support of such custom which it lay upon the plaintiff's collateral's to rebut, even assuming that there was a general custom of agnatic or collateral succession in default of male issue to the exclusion of female heirs among the agricultural tribes of the Punjab, about which the decisions of the Punjab Chief Court were by no means uniform. This means that the entries in the 1913 document must be considered in the first instance a strong piece of evidence which cannot be subtracted from by general consideration, such as statements to the effect that daughters could not have taken part in the inquiry and therefore any entry against them in the *riwaj-i-am* must be held to be of little value. That would be to go against the decision of their Lordships of the Privy Council, and this has already been pointed out in 8 Lah 281 (3), and in many other rulings. Since that time such authorities as 5 Lah 364 (4) have lost all importance as they proceed on the assumption that a custom opposed to so-called general custom (whatever that may mean) was not sufficient to shift the onus of proof on to the other side. In the present cases the District Judge has practically returned to 5 Lah 364 (4) and given importance to the consideration that daughters usually succeed in the Province according to general custom (which term is clearly a misnomer) to the self-acquired property of their father.

In this respect we are not in agreement with him, though we are of opinion that these appeals must be dismissed. As early as 1889, the proper principle was laid down and this was incorporated in the *riwaj-i-am* of 1893. In the present cases, the collaterals are of the fifth degree and according to the 1893 document, the usual rule in this district was that daughters were only excluded from

2. *Beg v. Allah Ditta*, 1916 P C 129 = 38 I C 354 = 44 I A 89 = 44 Cal 749 = 15 P R 1917 (P C).
3. *Lah Singh v. Mt. Mango*, 1927 Lah 241 = 100 I C 924 = 8 Lah 281.
4. *Gurdit Singh v. Mt. Malan*, 1925 Lah 35 = 84 I C 171 = 5 Lah 364.

inheriting the ancestral and self-acquired property of their father by collaterals within four degrees, while within those degrees there were exceptions, each case demanding a special inquiry as to what the exact degree of relationship was. In the present cases, there is nothing to show apart from the document of 1913, which is in this respect discredited, that collaterals of the fifth degree are entitled to exclude daughters. The appellants have therefore not proved their case. It is for these reasons that we dismiss these appeals with costs.

S.R.

Appeals dismissed.

A. I. R. 1936 Lahore 70

ADDISON AND DIN MOHAMMAD, JJ.

Hargobind and others—Defendants—Appellants.

v.

Gurdas Mal—Plaintiff and others—Defendants—Respondents.

Second Appeal No. 1589 of 1933, Decided on 15th January 1935, from decree of Dist. Judge, Jullundur, D/- 8th May 1933.

Punjab Tenancy Act (1887), S. 59—Transfer by widow of one co-tenant to landlord himself—Death of widow—Assignee from other co-tenant cannot challenge alienation by widow.

A widow's transfer in contravention of the provisions contained in S. 59, is not void but merely voidable, and that too, at the instance of the landlords only. Hence where a widow of one of the co-tenants transfers her rights to the landlord himself and dies, an assignee from the other co-tenant cannot attack the alienation he being a stranger to the family: 1928 Lah 932, *Ref.*; 2 P R 1914 (*Rev.*) and 1930 Lah 515, *Disting.* and 1930 Lah 942, *Rel. on.* [P 70 C 2; P 71 C 1]

Achhru Ram—for Appellants.

Jagan Nath Agarwala—for Respondents.

Din Mohammad, J.—Kanshi Ram, Mt. Dhan Devi and Gobind Ram possessed occupancy rights in 19 *kanals* 11 *marlas* of land situated in Banga. They held the land in the following shares:—

Kanshi Ram—1/6th.

Mt. Dhan Devi—1/3rd.

Govind Ram— $\frac{1}{2}$.

Kanshi Ram was adjudicated an insolvent in 1919 and his share on being sold by the Official Receiver was purchased by Gurdas Mal. Gobind Ram died in 1920 and his share went to the landlords in 1928 after a hard contest in the Courts between all the parties concerned inclu-

ding Gurdas Mal. In the same year Mt. Dhan Devi surrendered her rights in favour of the landlords and two years after she died. On 5th July 1930, the present suit was instituted by Gurdas Mal for possession of 5/6ths share of the land mentioned above alleging that being a joint tenant he was entitled to succeed to the land left by his co-tenants, Gobind Ram and Mt. Dhan Devi. The landlords resisted this suit on various grounds and contended *inter alia* that so far as Gobind Ram's share was concerned, the plaintiff being a party to the former litigation that was started on Gobind Ram's death was debarred from re-agitating the matter in the present suit and as regards Mt. Dhan Devi's share, the surrender in their favour was valid and the plaintiff had no *locus standi* to challenge it. The Subordinate Judge decreed the suit but on appeal the District Judge while reversing the decision of the trial Court in respect of Govind Ram's share maintained it as regards Mt. Dhan Devi's share. It is against this decision that the landlords have appealed. Counsel for the appellants contends that under S. 59, sub-S. (3) read with S. 60, Tenancy Act, the surrender even if assailable could be attacked by the landlords alone and by none else and that as the surrender in this case had taken place in favour of the landlords themselves, it was perfectly valid and unimpeachable. He further maintains that by S. 59, sub-S. (1), Cl. (c), on the termination of the widow's interest under S. 59, sub-S. 1, Cl. (b), it is only the male collateral relatives of the widow's deceased husband who are entitled to succeed to the occupancy rights and that an assignee from a co-tenant being a stranger to the family and not falling under that category has no right of succession and consequently no right of attack. He finally urges that even if it be conceded that the plaintiff was entitled to inherit the rights by virtue of the rule of survivorship among joint tenants, there was nothing left to be inherited at the time when the widow died.

We have given due consideration to these arguments and have come to the conclusion that this appeal should succeed. The law is quite clear on the point that a widow's transfer in contravention of the provisions contained in S. 59, is not void but merely voidable, and that too, at the instance of the landlords only.

(S. 60, Tenancy Act). Even therefore if the principle enunciated in 1928 Lah 932 (1), that a widow's surrender amounts to an alienation, be applicable here the plaintiff has no right to challenge the surrender in this case, 2 P R 1914 Rev (2), relied on by the respondent also does not advance his case any further. It does not lay down any law which is not already contained in the section itself and where it uses the words 'next claimant' it does so merely in reference to S. 59, sub-S. (1), Cl. (c) and not in any general sense so as to include even a person other than the 'male collateral relative of the deceased tenant.' Similarly nothing that is laid down in 1930 Lah 515 (3), militates against the view we have taken in this case. The surrender being complete two years before the widow's death, there was nothing left, as urged by Counsel for the appellants, which could have gone to the plaintiff and 1930 Lah 515 (3), applies only where the deceased tenant has a share in the holding which is to pass on his death. The law as to the right of challenging the widow's alienations in these circumstances has been laid down correctly in 1930 Lah 942 (4), and we are in entire agreement with that decision.

We hold therefore that the plaintiff had no *locus standi* to attack the surrender of her rights by Mt. Dhan Devi in favour of the landlords and accept this appeal. The suit is thus dismissed *in toto*. The parties will bear their own costs in the lower Appellate Court but the appellants will get their costs both here and in the trial Court.

K. S.

Appeal allowed.

1. Kanshi Ram v. Chet Kuer, 1928 Lah 932=111 I C 203=10 Lah 237.
2. Rugha v. Mughli, (1914) 2 P R 1914 Rev=25 I C 854.
3. Moti Lal v. Kartar Singh, 1930 Lah 515=127 I C 1=11 Lah 427 (F B).
4. Thando v. Hasham Ali, 1930 Lah 942=130 I C 517.

A. I. R. 1936 Lahore 71

ADDISION, AG. C. J. AND DIN MOHAMMAD, J.

Gurbakhsh Singh—Appellant.

v.

(Firm) Shankar Das-Sadhu Ram—Respondents.

Letters Patent Appeal No. 43 of 1935, Decided on 15th July 1935, from judgment of Agha Haidar, J., High Court, Lahore, D/- 26th February 1935.

(a) Appeal—Additional evidence—No party can as of right produce additional evidence—It is only when Court feels its necessity that it can be allowed to be produced.

No party is entitled as of right to fill up gaps in its evidence under O. 41, R. 27, Civil P.C. The mere negligence of a party in the trial Court is no excuse to let in evidence which it failed to produce at the proper time. O. 41, R. 27 confers a prerogative on the Court and not on the party and it is only when the Court feels the necessity of additional evidence that it can be allowed to be produced. [P 72 C 2]

Where therefore it is impossible for the appellate Court to pronounce judgment on the question at issue unless some additional evidence is brought on record and that evidence was not produced in the lower Court on account of the gross negligence and deliberate omission of party's agent who was conducting the case, the Court may allow the party further opportunity to produce the evidence. [P 72 C 1]

(b) Appeal—Additional evidence—Failure to produce evidence on vital issue in suit for some reason or other—Judgment pronounced on available record—Party aggrieved moving appellate Court for permission to produce evidence—Case is not governed by O. 41, R. 27, Civil P. C.

The words additional evidence in O. 41, R. 27 connote that the party in default has applied its mind to the issues in the case and adduced some evidence on them which at a later stage he finds it insufficient. But if for some reason or other no evidence was produced in the trial Court on a vital issue and the judgment was pronounced on the record as it stood and the party aggrieved moves the appellate Court afterwards to allow him to produce evidence in the case, his case is not governed by O. 41, R. 27 and different considerations prevail in giving him the permission applied for. [P 72 C 2]

Shamiar Chand and Qabul Chand—for Appellant.

Chiranjiva Lal Aggarwal and C. L. Vohra—for Respondents.

Din Mohammad, J.—This is a Letters Patent Appeal from the order of Agha Haidar, J., dated 26th February 1935, refusing to allow the appellant to produce additional evidence consisting of certain copies from the revenue records showing the land to be ancestral and dismissing the appeal in the absence of those documents. The sole point for consideration is whether the appellant should be allowed to produce this additional evidence under O. 41, R. 27, Civil P. C. Counsel for the appellant contends that the most important question in the case was whether the land sought to be attached was ancestral and although an issue had been framed to that effect the appellant's agent, who was conducting the case on his behalf, colluded with the decree-holder and failed to produce

copies from the revenue records which would have conclusively established the ancestral nature of the property. Counsel for the respondents on the other hand urges that in the first place the charge against the agent is unfounded and in the second place even if the agent were guilty of fraud or collusion, this is not a sufficient reason for admitting additional evidence at this stage. He had drawn our attention to 10 Pat 654 (1) in which at p. 668 their Lordships have observed that unless the Court feels an inherent lacuna or defect in the existing evidence and requires additional evidence to be produced to be able to dispose of the case, such evidence cannot be admitted. Even from the clear wording of R. 27 it is obvious that no party is entitled as of right to fill up the gaps in its evidence under this rule. We are also of opinion that the mere negligence of a party in the trial Court is no excuse to let in evidence which it failed to produce at the proper time. This rule confers a prerogative on the Court and not on the party and it is only when the Court feels the necessity of additional evidence that it can be allowed to be produced.

In this case, however, we feel the requirement ourselves as we think that it is not possible to pronounce our judgment on the question at issue unless the evidence intended to be produced is brought on the record. In our opinion the appellant's agent was guilty of gross negligence in not making any attempt to discharge the onus which lay on the appellant to prove the ancestral nature of the property and from the circumstances of the case we are inclined to think that this omission on his part was not innocent. He had to do nothing but to apply for the copies of the revenue records and although he had made a statement to the effect that he would produce the requisite copies, he failed to do so and thus betrayed the trust reposed in him by his principal. In the absence of this evidence it is impossible to decide the case and on this ground we allow the appellant further opportunity to produce these documents. There is another aspect also of looking at the matter. It is doubtful whether the prayer of the appellant does fall under O. 41, R. 27. It is not additional evidence that he wishes to produce

but he seeks an opportunity to produce evidence on a vital issue in the case on which no evidence whatever has been led. The words 'additional evidence' connote that the party in default has applied its mind to the issues in the case and adduced some evidence on them which at a later stage he finds insufficient. But if for some reason or other no evidence was produced in the trial Court and the judgment was pronounced on the record as it stood and the party aggrieved moved the appellate Court afterwards to allow him to produce evidence in the case, different considerations would prevail in giving him the permission applied for and his case will not be governed by O. 41, R. 27. But we need not discuss this point any further as we have already held that the appellant should be allowed to produce fresh evidence in this case.

The result is that we accept the appeal, set aside the order of the learned Judge of this Court as well as that of the executing Court and remand the case to the executing Court for re-decision in the light of the evidence admitted by us. The documents produced before us will be entitled to prove which property out of the property attached is ancestral. It is conceded before us that any property proved to be ancestral will not be attachable and the property not proved to be ancestral will not be immune from attachment. In view of the peculiar circumstances of the case the respondent firm Shankar Das-Sadhu Ram, will get its costs before us and before Agha Haidar, J. from the appellant. The respondent Lalta Parshad will bear his own costs in both the Courts.

R.M./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 72

JAI LAL AND COLDSTREAM, JJ.

Hanuman Prasad and another—Plaintiffs—Appellants.

v.

Mohammad Ismail Mohammad and others—Defendants—Respondents.

First Appeal No. 248 of 1931, Decided on 7th June 1935, from decision of Addl. Sub-Judge, Delhi, D/- 31st October 1930.

(a) **Burden of Proof — Suit under O. 21, R. 63, Civil P. C., by alienees of judgment-debtor — Alienees must prove not only transfer deed but also consideration and good faith.**

1. Parsotim Thakur v. Lal Mohur, 1931 PC 143 = 132 I C 721 = 58 I A 254 = 10 Pat 654 (P C).

In a suit under O. 21, R. 63, Civil P. C., by the alienees from a judgment-debtor, whose properties have been attached by the decree-holder as properties belonging to the judgment-debtor it is not sufficient for the alienees to prove the deed of transfer. The burden of proving that the transfer was for consideration and was in good faith also lies on them: 1932 *Lah* 174 and 1930 *P C* 255, *Rel on.* [P 74 C 2]

(b) **Mahomedan Law—Wakf—Property of small value left to wakif after wakf—No condition in wakf showing pious intention—Wakf mainly for maintenance of dependants—Wakif maintaining control over income during his life time—No provision for payment of debts—Wakf held not valid.**

The property which was left in possession of the wakif after the disposition by way of wakf was of a very small value. The deed of wakf itself did not indicate any pious intention on the part of the wakif and clearly shows that it was meant for the maintenance of the family and the dependants. During his life time the wakif was to have full control over the income and use of the property comprised in wakf and above all there was no provision made for the payment of the debts of the wakif:

Held: that the wakf was not a bona fide one and was invalid: 1929 *All* 277 and 1930 *All* 462, *Foll.* [P 76 C 1,2]

J. N. Aggarwal, J. L. Kapur and S. M. Sikri for Harish Chand—for Appellants.

Mian Ghulam Rasul Khan and Bishan Narain—for Respondents.

Jai Lal, J.—In 1921 Mohammad Siddiq purchased a 2/3rd share in a property situated in Delhi for Rs. 48,000 from Dwarka Dish and Ram Singh and in order to pay the purchase price he raised Rs. 25,000 by mortgaging the property to Chuni Lal by means of a mortgage deed dated 27th February 1922. The amount borrowed by him was to carry interest at 12 per cent per annum which was to be increased to 15 per cent per annum in case of default in payment of interest for three months. Nothing having been paid by him on this mortgage, on 5th March 1926 Chuni Lal served him with a lawyer's notice demanding payment and in default threatening legal action. After receipt of this notice on 23rd March 1926 Mohammad Siddiq sold a house owned by him for Rs. 1,500 to Mt. Sughra Jan. Then on 29th April 1926 he made a gift of another house owned by him in favour of Mt. Malak-un-Nisa. This lady sold this house to Mt. Kulsum Bi for Rs. 15,000. On the same day he executed another deed of waqf-alal-aulad whereby he vested practically the whole of the remaining unencumbered property owned by him in himself as a mutwalli and in others after his death with direc-

tions to repair the property out of its income and to pay the balance for maintenance to his descendants and other beneficiaries from generation to generation and provided that

If God forbid, my line of descent becomes extinct and that of the beneficiaries also becomes extinct the income accruing from the entire wakf property after deducting all the expenses as stated above should be spent on mosques, schools and orphanages and on poor and needy persons, etc.

It appears that one house still remained in the ownership of Mohammad Siddiq on this date. This was mortgaged by him to Mohammad Yasin for Rupees 1,200 on 27th April 1927. Chuni Lal instituted a suit against Mohammad Siddiq for recovery of the amount due to him under the mortgage. This suit was decreed on 28th March 1927, a plea raised by Mohammad Siddiq that he had paid Rs. 18,000 to Chuni Lal in reduction of the loan was found not to be established. A final decree for sale of the mortgaged property having been passed the property was put up to sale and it appears that the highest bid on 16th July 1927, for Rs. 14,000 was of Chuni Lal decree-holder. This auction was held in the presence of several persons. A report was made by the Court auctioneers and the sale was continued on 21st July but there was an advance of only Rs. 200 and that also by the decree-holder. Some objections were raised to the confirmation of this sale and on 23rd April 1928 one Abdul Wasiq professed his readiness to pay Rs. 15,000 for the whole mortgaged property which had been sold. With the consent of the decree-holder, Mohammad Siddiq, Abdul Basit and one Mohammad Farruq the Court passed an order that the sale shall be effected in favour of Abdul Wasiq if he paid Rs. 15,000 in the manner provided in the order failing which the sale in favour of the decree-holder Chuni Lal shall be confirmed. Abdul Basit not having paid the money as undertaken by him the sale was confirmed in favour of Chuni Lal who thereupon obtained a personal decree against Mohammad Siddiq for the balance due to him under the mortgage and in execution of this decree he attached the houses which had been transferred by Mohammad Siddiq by means of the four documents described above. Objections were raised by the respective alienees to the liability to

attachment and sale of these properties but they were disallowed by the executing Court. Consequently suits were instituted by the objectors to establish their respective titles to the properties. We are concerned with three of these suits in these appeals.

The suit by Mst. Kulsum Bi was dismissed and she has appealed to this Court (First Appeal 1117 of 1932). The suit by Mst. Sughra Jan was decreed by the trial Court but has been dismissed by the District Judge on appeal and she has presented Second Appeal No. 1128 of 1934. The suit by Mohammad Ismail and others claiming under the waqf-alal-aulad has been decreed and the decree-holder has presented Appeal No. 248 of 1931. Chuni Lal decree-holder having died during the pendency of these suits is represented by his son Hanuman Parshad in all these appeals. The same question is involved in all these appeals, that is whether the alienations by Mohammad Siddiq were fictitious and were made with the intention of defrauding his creditor Chuni Lal. A good deal of discussion before us in all the appeals centered round the question of burden of proof. The question, however, in my opinion, is not so very material in the circumstances of this case. But it is admitted that the initial burden of proof is on the plaintiffs who have been unsuccessful in their objections under O. 21, R. 58, Civil P. C. It is however claimed on their behalf that the burden of proof must be deemed to have shifted to the defendant on their establishing that the documents, relied upon by them respectively and purporting to have been executed by Mohammad Siddiq, were executed by him. In other words it was contended that the plaintiffs had merely to prove their deeds and not necessarily the alienations in their favour, that is to say, they need not prove that the transactions were genuine or that they were for consideration where they purported to be for consideration but that the moment they produced a registered sale-deed or a registered deed of gift or a registered waqf-nama the burden was shifted to the defendant to prove want of consideration and an intention to defraud the creditors on the part of Mohammad Siddiq. There is some authority of the Allahabad High Court in support of this contention, but I must follow the judgment of their Lordships

of the Privy Council in 35 C W N 324 (1). A perusal of the notes of arguments of counsel in that case shows that the question of burden of proof was argued before their Lordships and their Lordships held that a plaintiff in such cases must establish that the deed in his favour was bona fide and was intended to pass the initial interest in the property in his favour. In 12 Lah 763 (2), Harrison and Tek Chand, JJ., following the Privy Council case mentioned above observed:

It is settled law that in a suit under O. 21, R. 63, Civil P. C., onus lies upon the plaintiff, who had unsuccessfully objected before the executing Court, to establish both consideration and good faith for the transaction on which he relies.

In the present case, in my opinion, the plaintiffs have failed to establish the genuineness of the transactions in their favour. On the other hand the decree-holder has succeeded in establishing that they were not genuine and were effected to defeat him in recovering the money due to him under his mortgage and were therefore fraudulent. Kulsum Bi appellant claims to derive her title through Mst. Malak-un-Nisa. Mst. Malak-un-Nisa in her turn claims title through a deed of gift executed by Mahomad Siddiq on 29th April 1926. The trial Judge is of opinion that this deed of gift was fictitious and the sale deed in favour of Mt. Kulsum Bi also was a fictitious document, as no consideration was really paid though there was a show of passing of consideration on two occasions in the presence of the Sub-Registrar. Mt. Malak-un-Nisa is a daughter of Mahomad Siddiq's wife's sister and the deed of gift of property, which is alleged to have been sold soon after for Rs. 15,000, was made in her favour in lieu of past services and in order to enable her to maintain herself out of the income of the property. A condition was added in the deed that the donee was entitled to sell the property. The learned trial Judge is of opinion that this condition has been altered in the deed and that the alteration further strengthens the suspicious nature of the transaction. There is no doubt that the alteration is of a suspicious nature. Neither Mt. Kulsum Bi nor Mt. Malak-un-Nisa have gone into the witness box

1. Mahomad Ali Mahomad Khan v. Mt. Bismillah Begam, 1930 P C 255=128 I C 647=35 C W N 324 (P C).

2. Janki Das v. Gulzar, 1932 Lah 174=131 I C 383=12 Lah 763=32 P L R 350.

to prove the genuineness of the sale in favour of Mt. Kulsum Bi. It has not been shown from where Mt. Kulsum Bi got the money to pay for the purchase price. Mahomad Siddiq has not given evidence as to the circumstances and the reasons why he made a gift of such a valuable house to Mt. Malak-un-Nisa. The fact that the gift was made soon after a big creditor of Mahomad Siddiq had made a demand for money due to him further supports the conclusion of the learned trial Judge.

Great stress was however laid on behalf of the appellants—and this matter is common to all the appeals—that the value of the mortgaged property exceeded the amount due to Chuni Lal under the mortgage deed. This contention is based on a report of a Commissioner who was appointed by the Court when the mortgage suit was instituted by Chuni Lal against Mahomad Siddiq. On the institution of that suit the plaintiff alleged that the value of the mortgaged property was not sufficient to satisfy the mortgage debt and that the defendant was attempting to alienate his other property; he therefore applied that the defendant be restrained from alienating it as otherwise he would not be able to realize the amount due to him. A Commissioner was appointed to ascertain the value of the mortgaged property and he reported that it was Rs. 53,000 in round figures. This included about Rs. 17,000 costs of the structures on the land. The land was valued by the Commissioner according to the sale deed in favour of Mahomad Siddiq in 1921. He made no independent enquiry as to the value of the land. The senior Sub-Judge on receipt of the report rejected the application for injunction. It is claimed that this report shows that the value of the mortgaged property was more than the amount due to the mortgagee and therefore there could be no intention to defraud the creditor-mortgagee when Mohammad Siddiq transferred his properties. It is also true that Mohammad Siddiq paid Rs. 48,000 in 1921 for this land but it is established on the record and it is a matter of common knowledge that in 1921 prices of property in Delhi and other towns were at the highest and that they began to fall in 1923 and continued to do so for many years subsequently. The best proof of this fact is

that in two auction sales the highest bids were Rs. 14,000 and Rs. 14,200 respectively and those by the decree-holder and that in the beginning of 1928 the judgment-debtor was prepared to allow the property to be sold for Rs. 15,000 and the proposed purchaser did not pay even this amount. In my opinion therefore the value of the mortgaged property was not sufficient to pay the mortgage-debt and Mohammad Siddiq was aware of this fact; his subsequent conduct in transferring the whole of his property gratuitously and ostensibly otherwise also is an indication of the same fact. I have stated above that the alienations were effected by him soon after receipt of notice of demand from the mortgagee. The circumstances, in my opinion, leave no doubt that his motive was to save the property from his creditor.

The gift in favour of Mt. Malak-un-Nisa was a fraudulent transaction and the sale-deed by her to Mt. Kulsum Bi was a fictitious document. Out of Rs. 15,000 consideration for the sale, Rs. 6,000 was alleged to have been paid as earnest money in front of the Sub-Registrar when the receipt for the earnest money was registered, a transaction which in itself is an unusual one, and Rs. 9,000 is alleged to have been paid at the time of the registration of the sale-deed. It is true that there is no evidence that this money was actually returned to Mt. Malak-un-Nisa but the absence of the two ladies from the witness box makes the whole transaction a highly suspicious one. In my opinion the conclusion of the trial Judge is correct and I would dismiss the appeal of Mt. Kulsum Bi with costs. As to the sale in favour of Mt. Sughra Jan it would be observed that no consideration was paid in front of the Sub-Registrar. It was recited in the sale-deed that the consideration had already been received by the vendor Mohammad Siddiq. Mt. Sughra Jan is a relation of the vendor. The deed was executed soon after the notice and the District Judge finds that possession did not pass to the vendee. The fact that Mohammad Siddiq and Mt. Sughra Jan did not go into the witness box makes the transaction a suspicious one. There is, in my opinion, no force in this appeal either, and I would dismiss it with costs. As to the appeal by Hanuman Parshad

against the decree of the Additional Subordinate Judge upholding the wakf-alal-aulad there is no contention that the wakf was invalid under the provisions of Mahomedan law. The only question before us is whether it was a bona fide transfer or whether the motive of Mohammad Siddiq was to protect the property from his creditor Chuni Lal. As held by Sulaiman and Kendall, JJ., in 1929 All 277 (3) under the Mahomedan law itself no person can make a wakf of his entire property without making arrangement for the payment of his debts. The provisions of S. 53 do not in any way infringe any rule of the substantive Mahomedan law. The same opinion was expressed by Sulaiman, C. J., and Sen, J., in 52 All 710 (4). In the present case, it is true, Mohammad Siddiq did not make a wakf-alal-aulad in respect of the entire property owned by him but the property which was left in his possession was of very small value as it was mortgaged for Rs. 1,200 in 1928, therefore it may be assumed that the wakf comprised practically the whole of the property then owned by him and the same principle would apply to such a case as was applied by the Allahabad High Court to the transfer of the entire property by a person who owes money to other people. Mohammad Siddiq did not give any evidence in support of his case that he had made a bona fide wakf-alal-aulad. The terms of the wakf can legitimately be considered in deciding the question of his motive in making the wakf. There is no condition such as is usually found in such documents showing any pious intention of the wakif except the maintenance of his family and dependents. The entire profits are to be divided among his heirs according to their shares under the Mahomedan law. During his lifetime Mohammad Siddiq has full control over the income and its use. No provision is made for the payment of his debts. The other considerations mentioned above in respect of the two alienations apply to this transaction also. In my opinion there can be no doubt that the deed of wakf was executed by Mohammad Siddiq not with any pious object but with the

object of saving the property from sale at the instance of his creditor and consequently the wakf not being a bona fide one but effected to defraud his creditor is invalid and must be set aside.

It, however, appears that in para. 12 of the deed he set aside a vacant plot of land measuring one hundred standard yards for the construction of a mosque and it appears that a mosque has been constructed on it and there is evidence on the record that it is used by the public for prayers. In my opinion this land measuring one hundred yards with structures thereon should be deemed to be wakf property not necessarily under the wakf-alal-aulad but otherwise by virtue of actual dedication thereof to a religious purpose. I would therefore accept the appeal of Hanuman Parshad and dismiss the suit of Mohammad Ismail etc., with costs throughout except with regard to the land measuring one hundred yards and structures thereon as described above.

Coldstream, J.—I agree.

S.R.

Order accordingly.

A. I. R. 1936 Lahore 76

TEK CHAND AND DIN MOHAMMAD, JJ.

Piara Mal and others — Defendants—Appellants.

v.

Sham Das — Plaintiff and another — Defendant—Respondents.

First Appeal No. 2233 of 1928, Decided on 10th April 1934, from preliminary decree of Sub-Judge, 1st Class, Amritsar, D/- 6th June 1928.

(a) Costs—Assignee of equity of redemption not paying mortgagee but putting off payment on flimsy excuses but making pretence of readiness to pay money—No sufficient funds to pay at time of making so-called offers—Held he was liable to pay costs incurred by mortgagee in suit to enforce mortgage.

Where an assignee of the equity of redemption tried to put off payment on all kinds of flimsy excuses, taking care on each occasion to make a pretence of his readiness to pay the mortgage money and as a matter of fact he did not at the time of making these so-called offers, have sufficient funds at his disposal to make the payment as a result of which the mortgagee had to file a suit: [P 77 C 2]

Held: that the assignee was liable to pay costs of the mortgagee.

(b) Civil P. C., (1908), O. 24, R. 3—Defendant depositing money in Court but stipulating impossible conditions cannot escape payment of interest from date of deposit.

3. Ahmad Husain v. Kallu Mian Sajhi firm, 1929 All 277=117 I C 97=1929 A L J 460.

4. Bismilla Begum v. Tahsin Ali Khan, 1930 All 462=124 I C 722=52 All 710=1930 A L J 616.

Where the defendant deposits the amount in Court but stipulates such conditions as will make plaintiff unable to get payment and is thus himself responsible for non-payment to plaintiff, he cannot escape payment of interest from date of such deposit. And O. 24, R. 3, has no application to such a case. [P 78 C 1]

J. G. Sethi—for Appellants.

M. C. Mahajan and Charanjiva Lal Aggarwal—for Respondents.

Tek Chand, J.—This appeal arises out of a suit by a mortgagee against the assignee of the equity of redemption for recovery of the amount due on foot of the mortgage. The only points raised are whether the lower Court was right in ordering the defendant-appellant to pay the costs of the plaintiff-respondent in that Court and in making the plaintiff pay interest on the principal mortgage-money for the period during which the suit remained pending. The relevant facts are that on 11th July 1921 Mehr Chand, defendant 1, mortgaged a certain shop situate in the city of Amritsar to Sham Das plaintiff for Rs. 6,000, bearing interest at eleven annas per cent per mensem. The mortgage was with possession, and it is common ground between the parties that on the date of the mortgage the mortgagee entered into possession and let the property to certain tenants, who executed rent-deeds in his favour. About six years later, on 8th February 1927, the mortgaged property was sold in execution of a decree, which had been obtained by a third party against the mortgagor Mehr Chand, and was purchased by Piara Mal (defendant 2) appellant, subject to the plaintiff's mortgage charge. As already stated, the possession of the property was with the mortgagee, but the auction-purchaser Piara Mal, without paying off the plaintiff or obtaining his permission managed to take possession in his absence and got rent-deeds executed in his own favour by the tenants. Having thus obtained this position of advantage, he began to write letters to the mortgagee, expressing his readiness to pay the mortgage money, but never in fact paid or tendered a single pie. The mortgagee, who is a resident of a village in the Gurdaspur district, came to Amritsar more than once to receive payment, but the defendant put him off on frivolous excuses. The plaintiff then engaged a pleader, who made demands from the defendant, but without success. Nothing having been

paid, he brought a suit for recovery of Rs. 6,645 on 8th November 1927. The trial Court decreed the suit on 6th June 1928 for Rs. 6,330 with future interest at the contract rate, and allowed proportionate costs.

On appeal it has been urged by Mr. Sethi that the plaintiff should not have been allowed costs of the suit. Counsel has urged that the defendant was all along ready and willing to pay the amount due to the plaintiff, provided the latter delivered to him all the "papers" relating to the mortgage and that as the plaintiff failed to do so, the amount due was not paid to him. In my opinion this contention is not supported by the correspondence between the parties or the evidence produced at the trial, which we have carefully examined with the help of counsel. I agree with the lower Court that the defendant-appellant having unlawfully dispossessed the plaintiff from the property, which had been in his possession since 1921 in accordance with the terms of his mortgage, tried to put off payment on all kinds of flimsy excuses, taking care on each occasion to make a pretence of his readiness to pay the mortgage money. As a matter of fact, as is clear from his account with the Punjab National Bank as well as his own bahis, he did not, at the time of making these so-called "offers", have sufficient funds at his disposal to make the payment. It is also clear that the duration of the trial was prolonged unnecessarily by the defendant raising numerous pleas, which he was unable to substantiate. I hold that the defendant was rightly ordered to pay to the plaintiff his costs of the suit.

The second question relates to the small sum of Rs. 283-4, which has been decreed on account of interest on the mortgage money for the period during which the suit remained pending in the trial Court. Mr. Sethi points out that on 20th December 1927, the defendant actually deposited in Court Rs. 6,351-8 for payment to the plaintiff, and urges that interest should not have been allowed to the plaintiff after that date, as laid down in O. 24, R. 3. At the time of making the deposit however the defendant clearly made it a condition, that the amount should not be paid to the plaintiff until he produced the mortgage deed and "other papers" relating to the mortgage transaction, which were with

him. The plaintiff had maintained in the course of the correspondence, which had preceded the suit, that the only documents in his possession were the mortgage deed and some rent-deeds executed by tenants during the currency of the mortgage. All these documents he had filed with the plaint, when he had stated once again that he had no other documents with him. In spite of all this, the defendant insisted that there were "other papers" with the plaintiff and stated that the amount deposited by him should not be paid to the defendant until these papers had been produced.

An issue was accordingly framed on this point, but at the trial it was not shown what other papers the plaintiff had with him, which he should have produced. Indeed when the defendant was questioned about this point, in the course of his examination as a witness, he admitted that he had no knowledge of any such documents. It follows therefore that it was the defendant himself, who was responsible for the non-payment of the amount deposited by him in Court to the plaintiff, and he has himself to thank if his money remained without interest pending the decision of his pleas. Under the general law, as well as in accordance with the terms of the mortgage deed, the plaintiff was entitled to interest till the date of actual payment to him, and in the circumstances there seems to be no reason why it should have ceased to run from the date of the deposit, when the plaintiff was anxious to receive it and had in fact applied for its payment, but it was the defendant who insisted that it should not be paid until the termination of the trial. The rule laid down in O. 24, R. 3 has no application to these facts, and I have no doubt that the decision of the learned Subordinate Judge on this point is quite correct. The appeal fails and I would dismiss it with costs.

Din Mohammad, J.—I agree.

K.S. *Appeal dismissed.*

A. I. R. 1936 Lahore 78

COLDSTREAM AND JAI LAL, JJ.

Ram Singh—Plaintiff—Appellant.

v.

(Firm) Ram Chand-Tirath Ram and others—Defendants—Respondents.

First Appeal No. 1932 of 1933, Decided on 13th June 1935.

(a) **Partnership—Dissolution—Firm cannot become partner in another firm—Suit for**

dissolution—Declaration of partners made—Suit can proceed though originally plaintiff described themselves as firm.

A firm is not a legal entity or a 'person' capable of becoming, as a firm, a partner in another firm, but once a declaration of partners has been made under O. 30, R. 2, Civil P. C. a suit for dissolution can proceed although the plaintiffs had, in the first instance, described themselves as a firm: *Case law discussed.* [P 79 C 2]

(b) **Partnership—Partnership suit in name of firm can lie—Shares of partners can be determined in such suit.**

A firm is nothing but an association of individuals; therefore a partnership suit instituted in the name of a firm can lie. There is no reason why in such a suit two or more individuals should not be allowed to have their shares separated in one lump if they so desire. [P 80 C 1]

(c) **Partnership—Suit for accounts—Preliminary decree—Court may determine accounting party—Court may instruct to facilitate and regularise account.**

It is no doubt desirable that the Court passing a preliminary decree for taking of accounts should decide who is to be the accounting party. But it is open to a Court to give instructions at any time to facilitate and regularise the taking of accounts. [P 80 C 1]

J. G. Sethi and M. L. Sethi—for Appellants.

Badri Das and D. R. Sawhney—for Respondents.

Judgment.—Ram Singh, defendant 1 in the suit, from which this appeal arises, contracted with the military authorities on 19th September 1928, for the building of a fort at Thall in the North-West Frontier Province. He was joined in partnership by defendants 2 and 3 Gobind Ram and Banka Mal and the three worked together as "Ram Singh contractor." On 27th May 1930, the firm Tirath Ram-Ram Chand joined with "Ram Singh contractor" for the purpose of the contract. A formal deed of partnership was executed by Ram Singh, Gurditta Mal (as manager of the firm Ram Chand) Tirath Ram, Gobind Ram and Banka Mal. On 29th March 1932, a suit was instituted by the firm Tirath Ram-Ram Chand against Ram Singh, Banka Mal, Gobind Ram and one Makhan Singh (against whom the claim was dropped during the course of the proceedings) for dissolution of partnership and rendition of accounts in the Court of the Subordinate Judge, First Class, Rawalpindi. The suit was contested by the defendants other than Makhan Singh on numerous grounds of which it is only necessary, for the purposes of this judgment, to mention only one, namely, that the suit as framed could not proceed because a

firm, as such, could not be a partner in a firm and therefore could not sue for dissolution of partnership and rendition of accounts. The Subordinate Judge overruled this plea and granted the plaintiffs a preliminary decree directing that the partnership stood dissolved as from 31st March 1932, and specifying the share of the plaintiff firm to be 6-16th. It may here be mentioned that in response to a demand made under O. 30, R. 2, Civil P. C., the plaintiffs firm Ram Chand-Tirath Ram, had declared the name of the persons constituting their firm to be Tirath Ram-Gurditta Mal, Mani Ram, Jamna Das and Jetha Nand.

Against this decree the defendants have filed the appeal which is pressed on the grounds that the learned Subordinate Judge erred in law in holding that a firm is competent to sue as a partner of a firm, that his judgment is improper because he has not decided who was the accounting party, and that he was wrong in fixing 31st March as the date of the dissolution of the partnership. In support of his first contention that a firm cannot maintain a suit for dissolution of partnership appellant's counsel has cited 50 Cal 549 (1) and 55 Cal 551 (2) 124 I C 19 (3) and 140 I C 750 (4). The first of these judgments was in a case where the plaintiff had sued for a dissolution of partnership, one of the defendants being Johar Mal and Man Mull who were sued as a firm. In defence it was pleaded that these persons were not a firm and that as Johar Mull and Man Mull had not been joined individually, the suit was not maintainable inasmuch as all the members of the firm had not been impleaded. It was found as a fact that Johar Mull and Man Mull were not a firm but that Johar Mull and Man Mull had been sufficiently described in the plaint and were parties to the suit. In the course of his judgment Page, J., remarked that :

"A firm as such cannot be a member of a partnership—it is merely a collective name for the individuals who are members of the partnership. It is neither a legal entity nor a person

—A firm name in truth is merely a description of the individuals who compose the firm."

These observations were quoted with approval by a Division Bench of the Calcutta Court in 55 Cal 551 (2). That was not a partnership suit, but one brought in the name of a firm to recover money on the basis of a promissory note executed in favour of one member of the firm. It was held that although a firm is not a person or entity, the suit could not be thrown out on the mere ground that the holder of the promissory note was not the plaintiff firm, having regard to the fact that O. 30, R. 1, sub-R. (i), Civil P. C., provided a short method of describing the several partners if they wished to sue and therefore, all the partners might be taken to have been specifically stated in the plaint. In 124 I C 19 (3) the plaintiff was the daughter of a Hindu, who, along with other members of his family, owned a five anna share in the factory. She sued for a declaration of her ownership in the factory and for profits. Dealing with a proposition that the father's family was a partnership within a partnership, the learned Judges of the Allahabad Court remarked that this was a very peculiar view of law and held that the owners of the five anna share could not be regarded as forming a separate partnership and that there was only one partnership owning the whole factory. That a firm cannot be a partner of another firm and that participation in another firm by a firm is participation by its partners in its individual capacity was again noticed by Sulaiman, C. J., and Mukerji, J., in 54 All 846 (5) and by a Division Bench of this Court (Addison and Din Mohammad, JJ.) in C. R. No. 34 of 1934 (6).

In view of these pronouncements it must be held to be settled law that a firm is not a legal entity or a "person" capable of becoming, as a firm, a partner in another firm. There is at the same time equally good authority for holding that once a declaration of partners has been made under O. 30, R. 2, Civil P. C., a suit for dissolution can proceed although the plaintiffs had, in the first instance, described themselves as a firm. It is not disputed that the persons declared were partners at the time the

1. Seodayal Khemka v. Joharmull Manmull, 1924 Cal 74=75 I C 81=50 Cal 549.
2. Brojo Lal v. Budh Nath, 1928 Cal 148=105 I C 549=55 Cal 551.
3. Basanti Bibi v. Babu Lal, 1931 All 225=124 I C 19=1930 A L J 1517.
4. Kader Bux v. Bukt Behari, 1932 Cal 768=140 I C 750=86 C W N 489.

5. *In re* Jai Dayal Madan Gopal, 1933 All 77=143 I C 890=54 All 846=1932 A L J 999.
6. Sheo Narain v. Commissioner of Income-tax, 1935 Lah 896.

cause of action accrued and that in partnership with each other they claimed a share in the firm Ram Chand-Tirath Ram. They could, therefore, come forward together under the provisions of O. 30 and describe themselves by their firm name. As their names had been disclosed, the suit proceeded in accordance with the provisions of R. 2 (3) of that Order both in form and substance as if they had come into Court as plaintiffs individually. The question whether a suit for partnership accounts can be maintained by a firm came before the Calcutta Court in 140 I C 750 (4) and from the judgment of Ameer Ali, J., it would appear that objections were raised similar to those taken by appellants' counsel here. The learned Judge, while conceding that a firm is nothing but an association of individuals, found in this principle no obstacle to a partnership suit instituted in the name of a firm. In his view, the only question that arose from the fact that the suit was so instituted was what were the shares of each partner individually. We can see no difficulty here, for there is no reason why two or more individuals should not be allowed to have their shares separated in one lump if they so desire. Applying this reasoning to the present case, we find no force in the first contention urged.

It is no doubt desirable that the Court passing a preliminary decree for the taking of accounts should decide who is to be the accounting party. But it is open to a Court to give instructions at any time to facilitate and regularise the taking of accounts and in this case we are informed that the Subordinate Judge has struck an issue on the point and is deciding the matter. There is, therefore, no necessity for interference at this stage because the lower Court omitted in the first instance to conclude the dispute on this point. As regards the date of dissolution counsel agree that all transactions found to have been taken in good faith for the purpose of the partnership now dissolved up to the time the work was completed should be taken into account for a final settlement of the claims of all the parties. A direction to this effect will be added to the decree. Otherwise the appeal is dismissed. We make no order as to the costs of this appeal.

S.R.

*Appeal dismissed.***A. I. R. 1936 Lahore 80**

RANGI LAL AND MONROE, JJ.

Khair Ali Shah and another—Defendants—Appellants.

v.

Imam Shah and others—Plaintiffs—Respondents.

Second Appeal No. 2133 of 1930, Decided on 29th March 1935, from order of Dist. Judge, Sialkot, D/- 25th August 1930.

Custom (Punjab)—Adoption—Sayads.

Among the Sayads of village Kotli Khadam Shah in Tahsil Pasrur of the Sialkot district the adoption of daughter's son is not valid by custom in the presence of collaterals of the third degree. [P 81 C 2]

Barkat Ali—for Appellants.*Malik Mohammad Amin*—for Respondents.

Rangi Lal, J. — This judgment will dispose of Second Appeal Nos. 2133 and 2160 of 1930. The only point for decision is whether among the Sayads of village Kotli Khadam Shah in Tahsil Pasrur of the Sialkot district the adoption of daughter's son is not valid by custom in the presence of collaterals of the third degree. The initial onus of proving the alleged custom was undoubtedly on the adopted son. The entry in the *riwaj-i-am* of 1865 is "that a man could adopt his brother's son and in his absence a daughter's son or sister's son or a collateral's." In the *riwaj-i-am* of 1892 the relevant entry is as follows :

Varying answers were given by the different tribes but they all agree that an adoption must be within the clan from the near collaterals. Failing them in the third degree, a daughter's son can be adopted, and in his absence one of the agnates up to the third degree in the descending line. The Jats of the Raya Tahsil say that when there is none fit for adoption from among the agnates in the third degree the adoptor can adopt a daughter's son or a person of different tribe. The residents of Zafarwal Tahsil say that the adopted should be one of the agnates of the adoptor, those within the third degree having the first claim; and that a daughter's son can in no case be adopted; and that if there is no collateral the adopted should be of the same clan as the adoptor. All tribes of the Daska Tahsil say that in default of collaterals a daughter's son can also be adopted without any regard being had to the clan.

The village of the parties to this case was then in the Zafarwal Tahsil and therefore according to the above entry a daughter's son could in no case be adopted. The preface to the *Riwaj-i-am*

however, shows that the Sayads were not consulted at all during the inquiry. The entry is therefore of no value as a record of the customs of that tribe. In the latest *Riwaj-i-am* (1916) the relevant entry is as follows :

An agnate or a daughter's son or daughter's grandson or sister's son or sister's grandson may be adopted but near agnates have preferential claim as compared with the descendants of daughters or sisters. A great many Jats and Rajputs deny that a sister's or daughter's son can be adopted in the presence of any collateral. Among Arains, Awans and Kakkezais a daughter's son can be adopted even in the presence of a brother's son. The adopted son need not necessarily be of the same tribe or got.

It is clear that this entry divides collaterals into three categories. 1, a brother's son or sons 2, near agnates; and 3, all others. In the entry of 1865, the word 'bradarzada' has been used and its literal meaning is brother's son. There is no force in the contention that brother might also mean cousin. It is true that the word 'bhai' has been loosely used for a first cousin in some places, in the later *Riwaj-i-am*, but there are no grounds for holding that the word 'bradarzada' in the entry in question was intended to include a cousin's son. It would thus appear that there is a conflict between the entries of 1865 and 1916. According to the earlier entry, a daughter's son could not be adopted in the presence of a brother's son, but according to the later entry, a daughter's son could not be adopted even in the presence of near agnates. There is no doubt that collaterals of the third degree must be regarded as near agnates, because they are only one degree removed from a brother's son. The authority of this entry, is however considerably weakened by the following remarks made by the author in the preface :

The following statement gives the population of the various tribes whom it was proposed to consult with regard to this compilation, but Aroras, Bhatias and Chuhras did not attend in any Tahsil in sufficient numbers, while the attendance of Brahmans, Gujars, Kambohs, Kalals, Khattris, Lohars and Tarkhans, Mughals, Pathans and Sayads was also very meagre. Jats, Rajputs, Arains and Awans were present in large numbers and it might safely be said that as regards the dominant agricultural tribes of the Sialkot District this statement of tribal custom is based on a full enquiry. With regard to tribes who are not essentially agricultural I am not prepared to say that the answers to the questions in this volume correctly represent their customs.

Then follow a statement which shows that Sayads form only 1.4 per cent of the

1936 L/11 & 12

population of the district. They are certainly not an "essentially agricultural" tribe. It would appear that the only entry in favour of defendant is that of 1865, but the value of that entry has, been considerably lessened by the subsequent entries. Apart from this entry, there is no evidence in support of the custom relied on by the defendant. The witnesses who appeared on his behalf were not able to cite a single instance in which a daughter's son had been adopted in the presence of collaterals in the third degree. The judgments, of which copies have been placed on the record, all relate to Jats and are strictly speaking not in point. So far as Jats are concerned, there are numerous published cases in which it has been held that the adoption of a daughter's son is not valid. According to the *Riwaj-i-am* of 1865, the custom of the Jats and the Sayads was the same on this point. If those entries correctly represented the then prevailing custom, it is clear that the Jats have since then modified their custom and there are no particular reasons why the Sayads who live in the same locality should not have made a similar modification. Anyhow, the defendant on whom the onus lay failed to prove that his adoption was valid by custom. There was no other point argued before us, I would therefore dismiss both the appeals with costs.

Monroe, J.—I agree.

-K.S.

Appeal dismissed.

A. I. R. 1936 Lahore 81

ADDISON AG. C. J. AND DIN
MOHAMMAD, J.

Mistri Fazal Din and others—Plaintiffs—Appellants.

v.

Mian Karam Hussain and others—Defendants—Respondents.

Letters Patent Appeal No. 69 of 1935, Decided on 19th July 1935, from decree of Addl. Dist. Judge, Amritsar, D/- 28th June 1934.

(a) Mahomedan Law—Wakf—Will dedicating property for benefit of community—Unequivocal intention of testator clear—Object held definite and charitable hence valid wakf was created.

A will disclosed an unequivocal intention on the part of the testator to dedicate the property in suit for the benefit of the Muslim community on the occasions of their rejoicing and mournings.

Held: that the object of the waqf was not only definite and philanthropic but also charitable. Hence a valid waqf was created by the will: 1924 All 223, *Rel on*; 75 P R 1907; 78 P R 1912; 23 Bom 725 (P C); 1929 Bom 127 and 1931 Sind 75, *Disting.* [P 82 C 2, P 83 C 1]

(b) **Evidence—Admissibility—Document in two parts—One admissible and other not—Document cannot be rejected as a whole.**

Where a document consists of two separate parts, one of which is admissible and the other inadmissible, the document cannot be rejected as a whole. [P 83 C 1]

(c) **Will—Revocation—Property dedicated to wakf by will—Subsequent gift of his property by testator—Wakf property not included in gift—Gift cancels only part of will dealing with non-wakf property—Untouched part comes in operation on testator's death—Hence will could not be left out of consideration.**

A waqif by, means of his will created a waqf in respect of a certain property belonging to him. Later on he executed a deed of gift in favour of his nephew in respect of his property but therein he did not mention the property which was dedicated to the waqf.

Held: that the deed of gift did not cancel the will in toto but merely revoked that part of it which dealt with property other than wakf and that the testator's death at once brought that part of the will into operation which had been left untouched in the gift and therefore the will could not be left out of consideration in deciding the extent of the waqf property. [P 83 C 2]

Barkat Ali—for Appellants.

Mohd. Monir—for Respondents.

Judgment.—This is a Letters Patent Appeal from the Judgment of Agha Haider, J., dated 18th March 1935, reversing that of the District Judge dismissing the defendant respondents' appeal.

The sole question is, wheather a certain property left by one Fazal Hussain is waqf as claimed by the Muslim community of Amritsar whose representatives were the plaintiffs in the original suit and are now the appellants before us. The learned Judge has decided against the appellants on two grounds: (1) if the rely on the will of Fazal Hussain dated 27th June 1920, the waqf is void on account of uncertainty; and (2) if they seek assistance from the rent deed dated 28th April 1923, the document is inadmissible for want of registration.

We may say at once that the decision of the learned Judge cannot be maintained.

Taking the will first, we find that there is an unequivocal intention on the part of the testator to dedicate the property in suit, to 'rafah-i-am ahl-i-Islam shadi wa ghami' which literally

translated means for the benefit of the Muslim community on the occasions of their rejoicings and mournings. This is neither indefinite nor vague. Not only the community to be benefited is specified by this phrase but the object of the dedication is also well-defined. Any one who is acquainted with the social life of the Punjab Muslims knows full well what the words in the will import and to what occasions they refer. Among the class of people to which the founder of the waqf belonged, on the occasion of every funeral, members of the brotherhood assemble for some days after the obsequies are over and friendly visitors pour in all these days for condolence. Similarly, on the occasion of every marriage especially that of a female relation, marriage processions have to be feasted and entertained. In a town like Amritsar, where the population is congested and the people can hardly find room enough for themselves in their small houses, funeral or marriage parties cannot be lodged there. It is a real need to have a place reserved for such occasions where the residents of a Mohalla or a town belonging to a certain community may find accommodation and this want is felt by the rich and poor alike. Any public-minded man, therefore, who provides such a place does a real service to the community. The object of the waqf is not only definite and philanthropic but also charitable. "Charity" as popularly defined means 'any act of kindness and benevolence' especially 'that which is given in benevolence to the poor' and where rich and poor are benefited alike, it cannot be argued that the object is not charitable. 'Love towards our fellow beings' is considered to be the basic principle of charity and that feeling is displayed in abundance in the case of the gift before us.

We do not consider that the authorities relied on by the respondent render him any assistance, as they proceeded on their own facts and the objects of the waqf there had been described in different terms. In 75 P R 1907 (1), the bequest was for such charitable objects as the trustees should think proper or for such purposes as may bring eternal bliss for

1. *Shahab-ud-din v. Sohan Lal*, (1907) 75 P R 1907=168 P L R 1908=139 P W R 1907.

the testator. In 78 P R 1912 (2), the object of the trust was 'dharamarth.' Similarly in 23 Bom 725 (3), the bequest was for 'dharam'. In 116 I C 242 (4), the bequest was for 'khairat'. In 130 I C 556 (5), the bequest was for 'khairati' works. These terms were no doubt vague and uncertain, and the 'waqfs' were rightly disallowed; but, the object of the trust before us is as definite and certain as it could be. In a much weaker case than this where a dedication of a portion of a man's property had been made for the reading of fatiha and for 'amur-i-khair' (charitable purposes) including the maintenance of poor relations and dependants, it was held by a Division Bench of the Allahabad High Court that the waqf was valid according to Mahomedan Law: 45 All 152 (6). We hold, therefore, that the will created a valid waqf in the case before us. Coming now to the rent deed (Ex. P-2), the learned Judge has obviously missed the point that the document in question consisted of two parts, one executed by the lessees which was complete in itself and the other executed by the lessor himself in the form of a memorandum appended to the deed. It is no doubt true, that the latter offended against the law of registration but it is equally clear that the former did not. It is well-settled, that where a document consists of two separate parts, one of which is admissible and the other inadmissible, the document cannot be rejected as a whole. In the earlier part of the document, which is not inadmissible for want of registration, the property in suit is clearly described as waqf and the founder as its 'previous owner'. Even, therefore, if we ignore the latter part of the document, its earlier recitals lend a good deal of support to the plaintiffs' case.

Further, the learned Judge has not discussed another document which was relied on by the plaintiffs and which admittedly did not require registration. This is Ex. P-3 a rent deed dated 16th

2. Gurdit Singh v. Sher Singh, (1912) 78 P R 1912=14 I C 247.

3. Ranchhod Das v. Parbati Bai, (1899) 23 Bom 725=26 I A 71 (P C).

4. Mariambi v. Patmabai, 1929 Bom 127=116 I C 242=81 Bom L R 135.

5. Mahomed Ali v. Lakhmichand, 1931 Sind 75=130 I C 556=25 S L R 415.

6. Mukarram Ali Khan v. Anjuman-un-nissa, 1924 All 228=69 I C 886=20 A L J 924=45 All 152.

January 1926. This again is a valuable piece of evidence in support of the waqf and leaves no doubt about the intention of the founder. There is yet another circumstance which conclusively establishes the nature of the property in suit. On 8th April 1929, i. e., about a year and a half before the testator's death, he made a gift of his property in favour of his nephew, Ghulam Sarwar and therein he did not mention the property now in dispute. There was some misconception in the mind of the District Judge about the proper effect of this document on the earlier will. This misconception has not been removed in the judgment of the learned Judge of this Court. It did not cancel the will in toto as remarked by the District Judge but merely revoked that part of it, which dealt with the property other than waqf. The testator's death in December 1930 at once brought that part of the will into operation which had been left untouched in the gift, and the will, therefore, could not be left out of consideration in the decision of this case. Before we close, we may remark that it is only one brother of Fazal Hussain who is contesting this suit, his other brother, Subhan Ali, who even attested the will, is still siding with the plaintiffs. His sister, Rahmat Bibi, also attested the will and is indifferent in this case. In the result, being satisfied that the property in dispute is waqf, we accept the appeal, set aside the order of the learned Judge of this Court and restore that of the District Judge. The plaintiffs' suit will be decreed against the respondent with costs throughout.

S.R./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 83

DIN MOHAMMAD, J.

Lachu—Petitioner.

v.

Mohan Lal and others—Respondents.

Appeal No. 319 of 1935, and No. 2135 of 1934, Decided on 30th April 1935, from order of Dist. Judge, Hissar, D/- 11th August 1934.

Revision — Competency — Mortgagee becoming insolvent during pendency of suit — Unauthorised person applying to bring himself on record as assignee of Official Receiver, who did not choose to take steps to that extent — Application dismissed under O. 22, R. 8, Civil P. C.—Appeal allowed—Appeal held incompetent under S. 104, Civil P. C., read with O. 43—Arming unauthorised

person with authority to harass another amounted to miscarriage of justice, revision held competent.

K as a mortgagee brought a suit against H for an injunction to restrain him from interfering with his rights. During its pendency K was adjudicated insolvent. Notice was given to Official Receiver to continue the suit but he took no steps to bring himself on record. However R as assignee of receiver applied to be brought on record and wanted to continue the suit for his own benefit only. His application was rejected under O. 22, R. 8, and on appeal an objection was raised that no appeal was provided for under S. 104, Civil P. C., read with O. 43 against such an order. The lower appellate Court accepted the appeal treating the suit as one under O. 22, R. 10:

Held: that the receiver, not having been brought on record as the representative of the insolvent, was no party to suit and that having no interest in it, could not validly transfer it under O. 22, R. 10. Hence the suit being governed by O. 22, R. 8, was not appealable as no appeal had been provided against this order by S. 104 read with O. 43, Civil P. C.;

[P 84 C 2; P 85 C 1]

Held further: that to arm an authorised person with an authority to harass one to whom valuable right had been secured on account of the contumacious disregard of the law by the Official Receiver did clearly amount to a miscarriage of justice entitling the High Court to exercise revisional powers in such a matter.

[P 85 C 1]

L. M. Datta—for Petitioner.

Shamiar Chand—for Respondents.

Judgment.—Kishen Lal brought a suit against Har Sukh and others for a declaration that he was the mortgagee of certain land from them and for an injunction to restrain them from interfering with his rights. During the pendency of this suit Kishen Lal was adjudicated an insolvent. Thereupon notice was issued to the Official Receiver asking him whether he would continue the suit on behalf of the insolvent, but he took no steps whatever to bring himself on the record. One Kanshi Ram however claiming to be an assignee from the Official Receiver applied to be brought on the record in place of Kishen Lal and wanted to maintain the suit not for the benefit of Kishen Lal's creditors but for his own benefit only. The Subordinate Judge rejected his application dismissed the suit, presumably under O. 22, R. 8, Civil P. C. Kanshi Ram appealed to the District Judge against the order of the Subordinate Judge rejecting his application.

A preliminary objection was taken by the defendants before the District Judge that no appeal lay as the order of the Subordinate Judge was passed under O. 22, R. 8, and no appeal was provided for

under S. 104, Civil P. C., read with O. 43, Civil P. C., against such an order. The District Judge however overruled the preliminary objection, held the assignment as one under O. 22, R. 10, entertained the appeal and accepted it, thereby allowing Kanshi Ram to continue the suit. From this order the defendant has preferred an appeal. A preliminary objection has been taken before me that no appeal lies against the order of the District Judge. The objection is based on two grounds. In the first place it is urged that a second appeal is barred by S. 104 (2) from an order passed in appeal under this section. Secondly it is argued that the appeal purports to have been filed under O. 43, R. 1 (u), and as that sub-rule contemplates an appeal from an order remanding a case under O. 41, R. 23, Civil P. C., and as the order of the District Judge does not fall under that rule, no appeal is competent. In my opinion both these grounds are valid and the preliminary objection must prevail. Counsel for the appellant, realising the force of these objections, has urged that this appeal may be treated as a petition for revision and the order of the District Judge be set aside inasmuch as in entertaining the appeal he has exercised a jurisdiction which was not vested in him by law. This is no doubt so and I entertain this appeal as a petition for revision accordingly.

Order 22, R. 8, lays down that the insolvency of a plaintiff shall not cause the suit to abate unless the receiver declines to continue the suit, and further provides that if the receiver neglects or refuses to continue the suit, the Court may make an order dismissing the suit. In the case before me the receiver, in spite of notice and appearance in Court, did not choose to continue the suit and the Court had no option but to dismiss it. The receiver not having been brought on the record as the representatives of the insolvent plaintiff he was no party to the suit, and had therefore no interest in the suit which he could validly transfer under O. 22, R. 10, Civil P. C. Moreover, the word 'other' in R. 10 is significant and makes the rule applicable to those cases only which are not specifically dealt with before. In these circumstances the order of the Subordinate Judge evidently fell within the ambit of O. 22, R. 8, and not that of R. 10 and was consequently not

appealable as no appeal has been provided for against this order by S. 104, Civil P. C., read with O. 43, Civil P. C.

Counsel for the respondents has urged that as no miscarriage of justice has taken place, I should refuse to interfere on revision with the order of the District Judge, but I do not agree with him there. To arm an unauthorised person with an authority to harass the defendant to whom valuable right has been secured on account of the contumacious disregard of the law by the Official Receiver does, in my view, clearly amount to a miscarriage of justice entitling me to exercise my revisional jurisdiction in this matter. I hold therefore that no appeal lay to the District Judge and that his order setting aside the order of the Subordinate Judge cannot be maintained. I therefore accept the appeal, treating it as a petition for revision, with costs, and disallow the application of Kanshi Ram to be brought on the record of the original suit.

R.W./V.V.

Appeal dismissed.

A. I. R. 1936 Lahore 85

TEK CHAND AND CURRIE, JJ.

Udho Ram Sharma—Plaintiff—Appellant.

v.

Secy. of State—Defendant—Respondent.

First Appeal No. 1920 of 1934, Decided on 11th June 1935.

(a) Master and servant—Temporary employees—Extension of privileges regarding pension, leave, etc., does not raise their status to permanent ones—One month's notice is sufficient to dispense with their services.

The mere extension to the employees in a temporary establishment of certain privileges regarding pension and leave does not raise their position to that of employees in permanent service; nor does the fact that such an employee was given 8 months' notice instead of the usual one month provided for a temporary employee raise him to the status of a permanent employee: 1934 Rang 881 and 1934 Mad 516, *Disting.* [P 86 C 2]

(b) Pensions Act (1871), Ss. 4 and 11—It applies not only to political but to all pensions.

The Pensions Act does not refer only to political pensions, but relates to all pensions. [P 87 C 1]

Achhru Ram and Vishnu Datta—for Appellant.

Ram Lal and Suraj Narain—for Respondent.

Currie, J. — The appellant Pandit Udho Ram was employed for some 18

years as an upper subordinate in the Central Public Works Department, Delhi. He latterly acted as a Sub-Divisional Officer. While on leave his post was brought under reduction and his services were terminated with effect from 21st July 1929, the date on which his leave expired. On 10th July 1931, he instituted a suit against the Secretary of State for India in Council claiming Rs. 80,000. This amount was made up as follows: Rs. 48,000 as damages on account of the pay that he estimated he would have drawn had he been allowed to serve up to the age of 55; Rs. 22,000 as commutation value of the pension he would have got had he been allowed to serve up to the age of 55 and Rs. 10,000 as damages on account of loss of reputation and honour. It was urged also that he was entitled to a pension of Rs. 97-12-0 per mensem but this has been reduced by the Chief Engineer to Rs. 92-1-0 per mensem. The plaintiff's suit was dismissed on the ground that he was a temporary employee on a monthly basis. As regards the question of his pension it was held that any suit as regards this would be barred under the provisions of S. 4, Pensions Act. The plaintiff has appealed against this decision. For the Secretary of State it has been urged that the Crown can dispense with the services of its servants at pleasure. In this connection the learned counsel cited 57 Mad 857 (1), and an unreported ruling of this Court given in C. A. 1813 of 1933 (2). For the appellant two unreported rulings delivered by a Bench of this Court in C. As 628 and 692 of 1931 were cited. There is a clear conflict of authority on this question but in view of the conclusion which I have reached regarding the nature of the plaintiff's employment it is unnecessary to discuss this point further. The question in the present case is whether the plaintiff was a temporary employee or no. Admittedly when first employed he was employed as a temporary upper subordinate. From the classification list which has been filed it appears that the whole of the establishment of upper subordinates employed in the Central Public Works Department, Delhi, were

1. Rangachari v. Secy. of State, 1934 Mad 516=154 I C 884=57 Mad 857.

2. Jammu v. Secy. of State, since reported in 1935 Lah 669=155 I C 895=37 P L R 370.

classed as temporary servants. It was only on 19th October 1933, according to the evidence of D. W. 1 that the department was made permanent. The appellant's service book shows that throughout he was classed as a temporary upper subordinate. According to the evidence of P. W. 1 Nanak Chand, Superintendent of Chief Engineer's Office, and D. W. 1 Labhu Ram, Assistant in the Chief Engineer's Office, every temporary employee has to sign the form D/1 which is printed at p. 89. This is a declaration to the effect that he has been made acquainted with the conditions prescribed for temporary employees in the Buildings and Roads Branch, Punjab Public Works Department, as laid down in D/2 printed at p. 88 and is willing to accept employment under them. These conditions appear in the Public Works Department Manual and were certainly in force as early as 1907 as they appear in the edition of that work issued in that year. The plaintiff denied that he had ever signed such declaration and his declaration form was not forthcoming though Nanak Chand, P. W. 1, deposes to having seen a form which purported to have been signed by Udho Ram and search was made for this form in the office records. In my opinion there is no reason to doubt that the plaintiff did sign such a form when he entered service as the Public Works Department Manual very definitely lays down that such a form is to be signed by every one who is engaged as a temporary employee. In any case there is not the least doubt that the plaintiff was fully aware of the fact that he was a temporary employee and was not ignorant of the terms of service governing such employees.

It is however argued on his behalf that though originally his service was temporary the conditions of the contract were abrogated subsequently and his status was raised to that of a permanent employee by the fact that the Government of India in November 1931 by letter No. 1390-E. B. dated 30th November 1921 (Ex. P-1) allowed temporary upper subordinates to count their temporary service for pension and also granted concessions regarding leave waiving the restrictions imposed in Art. 242 (a), Civil Service Regulations. It is argued that as the concessions regarding leave and pension, thus granted to the

upper subordinates were the same as those enjoyed by the permanent establishment, therefore the provisions of S. 96-B, Government of India Act and the rules made thereunder govern their service. Reference is made to R. 55 which prescribes that no order of dismissal, removal or reduction shall be passed on a member of a Service unless he has been informed in writing of the ground on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. This procedure admittedly was not followed in the present case. It is urged that the upper subordinates have been treated on the same footing as permanent employees. Reference has been made to 12 Rang 556 (3) in which it was held in the case of a Head Clerk employed in the Port Office that as such employees have always been treated by Government as subject to the Fundamental Rules they were entitled to the protection afforded by S. 96-B, Government of India Act and the rules framed thereunder. That case however proceeded on its own facts which were very different to those of the present case. Further, in that case there is nothing to show that the establishment employed in the Port Office was temporary. Here there is not the least doubt that the upper subordinates in the Central Public Works Department, Delhi, have throughout been classed as temporary establishment.

The mere extension to them of certain privileges regarding pension and leave would not, in my opinion, raise their position to that of employees in permanent service. It is argued that the plaintiff was given three months notice instead of the usual one month provided for temporary employees. Actually however the notice given to him (printed at p. 63) was to the effect that his services would not be required after the expiration of his leave. This was dated 25th April 1929, and his leave expired on 21st July 1929 so that it actually was not three months' notice. It appears however from the letter of the Chief Engineer (Ex. P/12-P/13) that the Chief Engineer adopted the course that he did for the purpose of obtaining a pension for the plaintiff. He remarks at p. 56 :

If therefore I had merely given Pandit Udho Ram a month's notice without reducing his post of temporary upper subordinate, he could not have hoped to have obtained a pension to which he would otherwise be entitled under the Article quoted above (426).

From this it is argued that he should have been considered to have been a member of the permanent service to which ordinarily that Article applies. There is however in my opinion, no force in that contention as the provisions relating to pensions have been extended by the Government of India letter to temporary subordinates and it is clearly laid down in that letter that the service was temporary. I am therefore of opinion that there is no doubt that Pandit Udho Ram was throughout merely a temporary employee and as such his services could have been dispensed with at one month's notice. The mere fact that he was given more than a month's notice and was allowed a pension does not in itself alter his status. The suit therefore as far as it relates to damages for loss of future emoluments on account of wrongful dismissal must fail. As regards the claim with respect to his pension it appears that if his average salary had been reckoned at Rs. 345 per mensem he would have been entitled to Rupees 97-12-0. This sum of Rs. 345 was made up of Rs. 270 substantive pay and Rs. 75 charge allowance. Apparently while on leave he was not allowed to draw Rs. 75 and thus his average salary was reduced and consequently the amount of his pension was fixed at Rs. 92-1-0. It is clear however that under the provisions of S. 4, Pensions Act no Civil Court can entertain any suit relating to any pension . . . whatever may have been the consideration for any such pension or grant.

It has been urged that Pensions Act refers only to political pensions, but it is clear from S. 11 which mentions pension granted on account of past services or present infirmities, or as a compassionate allowance that it relates to all pensions. This is further made clear by the fact that among the Acts which were repealed by that Act is given in Sch. 4, Act 4 of 1849 an Act for securing military and naval pension and super-annuation allowances. It is clear therefore that under the provisions of S. 4, Pensions Act no claim could be entertained regarding his pension. In these circumstances the plaintiff's suit was, in my opinion, rightly dismissed and his appeal

must fail. I would therefore dismiss the appeal with costs.

R.W./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 87

MONROE, J.

K. Raushan Din and others—Plaintiffs—Appellants.

v.

H. Mohd. Sharif and others—Defendants—Respondents.

Second Appeal No. 1594 of 1934. Decided on 6th July 1935, from decree of Addl. Dist. Judge, Lahore, D-30th April 1934.

Mahomedan Law—Wakf—Burial ground—Wakf may, in absence of direct evidence of dedication be established by evidence of user—Evidence must be of public user.

A wakf in respect of a burial ground may in absence of direct evidence of dedication, be established by evidence of user; but the user from which dedication can be implied must be clearly established and must be of such a character as to be consistent with dedication. Such user or dedication is required to be public user or dedication. Where the evidence shows no more than that certain persons were many years ago buried in the place, it does not amount to evidence of public user: 1924 *Mad* 577, *Foll.*; 1921 *Lah* 303 and 1930 *Oudh* 245, *Ref.*

[P 88 C 1]

M. Feroze Din Ahmad—for Appellants.

Mohd. Hussain and S. Sardul Singh for Sundar Singh—for Respondents.

Mohd. Sharif in person.

Judgment.—The claim in this suit is for a declaration that certain land is waqf property and there are grave-yards there and that the plaintiffs and other Muhammadans have the right to say prayers and offer funeral prayers there and that the defendants have no rights to use the land as their personal property and that the defendants considering it their own exclusive property cannot use it for their own purposes. The claim originally extended to several khasra numbers but this appeal is confined to one number only, namely No. 2338, which was held by the trial Judge to be waqf property; the other numbers were held by the trial Judge not to be waqf and no appeal was taken against this decision: on appeal to the District Judge No. 2338 was held not to be waqf property. The argument for the appellant before me is sweeping: it is that the plaintiffs as Mahomedans are interested in the plot because it once was a grave-yard and have a right to the declaration sought. The learned District Judge has

found that the plaintiffs have no right peculiar to themselves; their allegation that they had in conjunction with other Mahomedans the right to say prayers on this land appears to be without foundation; it has not been found that any such right has ever been exercised. The learned Judge has also found, in my opinion correctly, that when used as a graveyard, the graveyard was a private one and no one had any right of burial in it: the owners chose to use it for themselves: it has ceased to be used as a burial ground for 30 years. The learned Judge has also found that the plaintiffs have no special interest in the graves which are on the spot now in question. I may add that I have found nothing on the record to show that this suit was brought by the plaintiffs on behalf of the Mahomedans generally: they claimed that their ancestors were buried in this land and this claim they have not established.

The learned counsel for the appellants cited many cases in support of the plaintiffs' claim to show that a waqf may in the absence of direct evidence of dedication be established by evidence of user and that if land has once been dedicated as a cemetery it must always be regarded as a cemetery, unless it becomes unfit for such a use. These propositions are well supported by the cases cited, of which I need only mention 1921 Lah 303 (1), 1930 Oudh 245 (2), and I accept them as settled law: but the user from which dedication can be implied must be clearly established and must be of such a character as to be consistent only with dedication. The present case seems to me to be indistinguishable in principle from 83 I C 536 (3). In that case the propositions set out about were accepted by the learned Chief Justice of the High Court at Madras who held that the user of land as a Mahomedan burial ground for a long time would itself make the land waqf though there was no public dedication but the mere fact that the land was entered in the Municipal registers as a burial ground in the name of a private owner who had no representative capacity was insufficient proof of user or dedication, and in the learned Chief Justice's opinion such user or dedication was re-

quired to be public user or public dedication. In the present case the evidence shows no more than that certain persons were many years ago buried in the plot: there is no evidence of public user. Accordingly, I dismiss this appeal with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1936 Lahore 88**

JAI LAL AND SALE, JJ.

Jawala Singh and others—Defendants—Appellants.

v.

Thakar Singh and others—Plaintiffs and another—Defendant—Respondents.

First Appeal No. 1179 of 1933, Decided on 11th June 1935, from decree of Sub-Judge, First Class, Amritsar, D/- 29th May 1933.

(a) Custom (Punjab) — Succession — Randhawa Jats of Amritsar District — Non-ancestral property—Daughters oust collaterals beyond 5th degree.

Among Randhawa Jats of Amritsar District daughters oust collaterals beyond the fifth degree in succession to non-ancestral property: 1935 Lah 419 and 1935 Lah 408, *Rel. on*; 1922 Lah 392 and 1933 Lah 898, *Dissent.*; 1928 Lah 305, *Foll.* [P 92 C 1]

(b) *Riwaj-i-am* — Evidentiary value of — Entry as to special custom—Admissibility of — Onus of rebuttal.

An entry in the *Riwaj-i-am* recording a special custom is admissible to prove the statement alleged therein even if the statement be unsupported by instances and the onus of rebuttal is upon the party disputing the correctness of the entry: 1927 Lah 241 and 1928 P C 294, *Rel. on.* [P 90 C 1]

(c) *Riwaj-i-am* — Evidentiary value of — Settlement Officer's opinion is entitled to consideration.

In discussing the *Riwaj-i-am* entry the opinion of the Settlement Officer must be deemed to qualify the nature of the answers recorded in the *Riwaj-i-am* itself. For his opinion is entitled to due weight and has the effect of lessening the burden cast on the parties: 1930 Lah 761 and 1935 Lah 419, *Foll.* [P 90 C 2].

Asa Ram for J. N. Aggarwal and J. N. Aggarwal—for Appellants.

J. R. Agnihotri for M. C. Mahajan and M. C. Mahajan—for Respondents.

Sale, J.—This is an appeal against a decree of the Senior Subordinate Judge, Amritsar, granting to the plaintiffs a declaration of title with the possession of an area of 1,021 kanals of land situated in the village of Pandori Hassan in the Tarn Taran tahsil of the Amritsar dis-

1. Umar Din v. Mst. Aishan, 1921 Lah 303.

2. Abdul Ghafoor v. Rahmat Ali, 1930 Oudh 245 = 122 I C 326 = 7 O W N 382.

3. Abdul Rahiman v. Murugappa Naicker, 1924 Mad 577 = 83 I C 536.

strict. The suit arises out of a disputed claim to succession which opened out on the death of the widow of the last male-holder Ala Singh. The parties are Randhawa Jats and the contest is between the daughter's sons of the last male-holder whose claim has been decreed by the lower Court and the collaterals in the eighth degree. The material findings of the lower Court which have been contested in appeal are (1) that the land in suit is ancestral and (2) that the daughter's sons of the last male-holder have a preferential right to succeed as against the defendants who are his collaterals in the eighth degree. In arguing the appeal, Mr. Aggarwal has treated as a matter of secondary importance the first point regarding the ancestral nature of the land. Although attacking the decision of the lower Court that the land is ancestral, his main contention is that whether the land is ancestral or not, the daughters (and therefore admittedly the daughter's sons) are by the special custom embodied in the Riwaj-i-am of the Amritsar district excluded by collaterals, however, remote. It is necessary, however, first to decide the nature of the land in suit, whether ancestral or not ancestral. The onus of this issue (No. 3 on the lower Court's record) is printed as being laid on the plaintiffs, i. e., daughters's sons. Admittedly, however, this is an error or a misprint. It is conceded in appeal that the onus of establishing that the land is ancestral lies on the defendant-collaterals.

To discharge this onus, the appellants' counsel relies solely on a presumption sought to be drawn from the fact that the parties whose common ancestor appears in the pedigree table, belong to different pattis holding approximately equal shares. But the facts do not admit of any such presumption. It appears from the kaifiyat shajra nasab of the 1865 settlement (Ex. D/5) that the village after a long period of desertion was re-founded by three persons—Hasan, Vik and Kirtu. It may be that these three persons were the descendants of the original founders, but the point is immaterial. The parties to this suit are descended from only one of the persons who re-founded the village, viz., from the Hassan. Ala Singh the last male-holder belongs to one of the two pattis into which this Hassan divided his share, while the collaterals belong to

the second patti. It is true that each of these pattis hold about equal shares. But none of the khatahs are joint of the parties; nor is it proved that the parties or their predecessors-in-interest have throughout held the same land. From the revenue extract Ex. D. W. 2/1, it seems that the name of Ala Singh, the last male-holder, through whom the plaintiffs' claim, appears for the first time as an owner in 1892 under circumstances that are obscure. It is not known how Ala Singh acquired the land and it is manifestly impossible to presume that he inherited the land in unbroken succession from the common ancestor Hassan. The rulings cited by the lower Court as quoted on behalf of the collaterals to establish the presumption that the land is ancestral, have been rightly distinguished by the trial Judge and it is unnecessary to discuss them here. No other authorities have been cited in appeal. We are of opinion that the trial Judge was right in holding that the land in suit is not ancestral.

The next question for consideration is the claim made on behalf of the collaterals that even in the case of non-ancestral land, collaterals as remote as the eighth degree exclude daughters. It is admitted that this claim is contrary, not only to Hindu law, which recognises the rights of daughters, but also to the generally accepted customary law of the Province embodied in para 23 of Rattigan's Digest of Customary law which gives a preferential claim over daughters to collaterals only up to the fifth degree. Mr. Aggarwal has, however urged that there can be no question of any general custom in this case. The basis of his claim is the special custom embodied in Answers to Questions 60 and 61 of the most recent riwaj-i-am of the Amritsar district compiled by the Settlement Officer, Mr. Craik (now Sir Henry) in 1914. The finding of the lower Court is that while this riwaj-i-am entry is undoubtedly in favour of the defendant-collaterals (with the consequence that the onus of proving their claim lies on the daughter's sons), the presumption in favour of the collaterals has been rebutted by the evidence produced in this case which establishes, in the opinion of the Senior Subordinate Judge, that among the Jats of the Amritsar district daughters oust collaterals beyond the fifth degree. It is settled by

Privy Council decision in 45 P R 1917 (1), as interpreted in 8 Lah 281 (2) and 10 Lah 86 (3), that an entry in the *riwaj-i-am* recording a special custom is admissible to prove the statement alleged therein, even if the statement be unsupported (as in the present case) by instances, and places the onus of rebuttal upon the party disputing the correctness of the entry. But a discussion of the material *riwaj-i-am* entries is necessary in order to determine the weight of the onus which is thus cast on the daughter's sons. In reply to Question 60, it is said that:

nearly all tribes state that daughters are excluded by male lineal descendants . . . similarly nearly all of them say that agnates, however remote, exclude daughters.

Certain exceptions are given, but the case of Randahwa Jats (the parties now in suit) is not amongst those exceptions. Again it is mentioned in a note to Answer 60 that the exclusion of a daughter is so strict that even in those cases where there is no agnate at all, she is deprived of succession. At the same time no instances of this exclusion are quoted. On the contrary it is mentioned that the *riwaj-i-am* of 1865 (the previous settlement) is silent as to the exclusion of daughters by agnates, and in the English copy of the present *riwaj-i-am* the Settlement Officer goes on to express his opinion that the feeling against daughters which is the basis of the replies given, is "rather a prejudice than a true statement of custom." In reality, he adds in his reply to Question 61, which relates to the distinction between the rights of inheritance of daughters to ancestral and non-ancestral property, that, daughters have a right to exclude agnates with respect to non-ancestral property, though the right is seldom asserted.

Further in the introduction to the *Riwaj-i-am*, it is stated that :

As regards daughters the custom is anything but uniform; the general trend of opinion is that daughters succeed to the non-ancestral property to the exclusion of agnates.

These entries in the *Riwaj-i-am* together with the opinions expressed by the Settlement Officer thereon were considered in the judgment of a Division Bench of this Court cited as

1. Beg v. Allah Ditta, 1916 P C 129=38 I C 354=44 I A 89=44 Cal 749=45 P R 1917 (P C).
2. Labh Singh v. Mango, 1927 Lah 241=100 I C 924=8 Lah 281.
3. Vaishno Ditti v. Rameshri, 1928 P C 294=113 I C 1=55 I A 407=10 Lah 86 (P C).

1933 Lah 898 (4), (Addison and Bhide, JJ.) in which Addison, J., following the trend of the discussion of Campbell, J., at p. 301 of 8 Lah 281 (2), made observations to the effect that the private opinion of the Settlement Officer in this matter is of no importance and should not be held to vary or affect the replies of the tribes themselves. This view of the Settlement Officer's opinion was not however accepted by Tek Chand, J., in 1930 Lah 761 (5), who in discussing this same *Riwaj-i-am* entry considered that the opinion expressed by the Settlement Officer must be deemed to qualify the nature of the answers recorded in the *Riwaj-i-am* itself. More recently in 1935 Lah 419 (6), Skemp, J., also referring to this *Riwaj-i-am* entry pointed out that it was the part of the Settlement Officer's official duty to express his opinion. Para 565 of Douie's Punjab Settlement Manual lays down :

Wherever it appears to a Settlement Officer that any answer embodies rather a vague popular sentiment, or a feeling of what ought to be, than what is actually customary, he should not fail to note the fact.

This is precisely what the Settlement Officer has done in the present case and in agreement with the views expressed in 1930 Lah 761 (5) and 1935 Lah 419 (6), we consider that in the absence of any instances quoted in the *Riwaj-i-am*, the Settlement Officer's opinion is entitled to due weight and has the effect of lessening the burden cast on the daughter's sons in the present case. While therefore the material replies in the *Riwaj-i-am* constitute some presumptive proof in favour of the collaterals, the presumption is weakened by the contrary opinion of the Settlement Officer himself. With these observations, we pass to consider the instances quoted in the present case. There are no instances of any evidential value pointing to the exclusion of daughters by agnates in the case of non-ancestral property, whereas there are undoubtedly well authenticated instances, which tend to confirm the view of the Settlement Officer, that daughters have been preferred to collaterals in succession to non-ancestral property. We would ignore the instances

4. Santa Singh v. Mt. Santi, 1933 Lah 898=144 I C 483.
5. Dhara Singh v. Armi, 1930 Lah 761=126 I C 434.
6. Narain Singh v. Mt. Basant Kaur, 1935 Lah 419=35 P L R 229.

quoted by witnesses on both sides which are unsupported by documentary evidence, though we would in passing refer to the evidence of one of the collaterals' own witnesses, D. W. 22. Jagat Singh, a lambardar of a village of Randhawa Jats, who expressed the view that daughters have preference over collaterals in the case of succession to self-acquired property. On behalf of the collaterals, reliance was placed on three judicial instances.

(1) Exhibit D/3, a judgment relating to the Randhawa Jats of Kairowal in the Tarn Taran tahsil by a Subordinate Judge 2nd Class, dated 2nd December 1919. This was the case of a gift and the appointment of an heir; it was held that the land in suit was ancestral and that the appointment of a daughter's son as heir is not recognized in the presence of collaterals of the fourth degree. This is certainly not a good instance in a contest between daughter's sons and collaterals of the eighth degree in succession to non-ancestral property.

(2) The same observations apply to the second judicial instance (Ex. D-6), (a previous judgment of the Subordinate Judge who decided the present case) in a contest relating to Man Jats between daughters and collaterals in the fifth degree. The trial Judge has given good reasons for distinguishing this judgment. Lastly there is one High Court judgment by Addison and Bhide, JJ., printed on p. 72 of the record which has already been noticed in another connexion as 1933 Lah 898 (4). It was herein held following the Riwaj-i-am of the district that

daughters or their sons are not entitled to inherit even the self-acquired property of their father amongst Jats of the Amritsar district.

It is necessary however to point out that this decision was not based on any instances, but followed merely from a consideration of the onus of proof arising from the entries in the Riwaj-i-am (excluding the Settlement Officer's opinion). We have already given reasons for differing from the view taken in this judgment regarding the presumptive value of the Riwaj-i-am. In the present case numerous instances have been quoted on behalf of the daughter's sons to show that daughters do sometimes exclude collaterals. We do not therefore consider that this judgment provides a satisfactory pre-

cedent in support of the collaterals' contention. Other judgments have been cited, but they all relate to Kambohs; and since it has not been shown that Randhawa Jats follow the same custom as Kambohs, we do not consider it necessary to examine these decisions.

On behalf of the daughter's sons, counsel cites four judicial instances. We would ignore the first case 3 Lah 257 (7), since the judgment is open to the criticism of not having been decided in accordance with the views of the Privy Council on the value of the Riwaj-i-am given in 45 P R 1917 (1). But in 1935 Lah 408 (8), a Division Bench (Hilton and Din Mohammad, JJ.), held that Khaira Jats of the Amritsar district are governed by the general custom of the Punjab as recorded in para 23 of Rattigan's Digest of Customary Law, whereby daughters were given preference over collaterals in matters of succession. It is not clear in this case, whether the land in suit was ancestral, or non-ancestral. Again, in 1935 Lah 419 (6), a Division Bench of this Court held that among Sarai Jats of the Amritsar District daughters exclude collaterals from succession to the self-acquired property of their father. Again, in 9 Lah 352 (9), a Division Bench of this Court held, following Rattigan's Digest of Customary Law, para 23, that the rule in the Amritsar district is that daughters exclude collaterals in succession to self-acquired property. It has thus been held on three recent occasions by different Division Benches of this Court that in the Amritsar district, amongst Jats, daughters exclude collaterals in succession on to the self-acquired property. In addition, counsel Mr. Mehr Chand Mahajan for the daughter's sons, has referred to a number of mutations showing that daughters have succeeded in preference to the collaterals. Some of these instances are quoted in the extract prepared by the Girdawar printed on p. 1 of the supplementary paper book covering a period between 1893 and 1913, though it must be noted that the evidential value of this extract is not great, since out of the nineteen instances quoted, only three refer to Jats and none

7. Gurdit Singh v. Ishar Kaur, 1922 Lah 392=68 I C 551=3 Lah 257.
8. Thakar Singh v. Mt. Dhankaur, 1935 Lah 403=157 I C 114=37 P L R 225.
9. Pir Bakhsh v. Ghulam Bibi, 1928 Lah 305=107 I C 280=9 Lah 352=29 P L R 475.

of these are Randhawa Jats. But there is no instance to the contrary.

But amongst Jats we have the following additional instances: (1) Wasawa Singh's case, mutation Ex. P/18, proved on p. 16 of the printed record in which a daughter succeeded in preference to the collaterals. (2) Khemi's instance, 1919, mutation Ex. P/12, in which a daughter succeeded in preference to collaterals of the seventh degree. In this case an inquiry was ordered into custom by the revenue authorities and it was found that the collaterals only exclude daughters up to the fifth degree. (3) Ghasita Singh's case, mutation Ex. P/14, in which a daughter succeeded in preference to the collaterals of the eighth degree. (4) The next is Bhag Singh's case, mutation Ex. P/26, proved by P. W. 6, in which the adoption of a daughter as heir in preference to the collaterals was admitted. (5) Mt. Premi's case, mutation Ex. P/10 relating to 1918 by which a daughter succeeded in preference to collaterals in the seventh degree. The collaterals appealed to the Collector, but the appeal was dismissed. (6) Nandan's instance, 1917, mutation Ex. P/13. This relates to self-acquired property amongst Randhawa Jats in which a daughter was preferred to collaterals of the eighth degree. (7) Mutation Ex. P/25 of 15th June 1919 by which a daughter succeeded in preference to the collaterals of the ninth degree. (8) Mutation Ex. P/27 relating to 1931 is a similar instance. Finally, there are Exs. P/4, P/5 and P/6 which are judgments by the District Judge, Amritsar, dated 1920, 1919 and 1917, respectively, in which daughters were preferred to collaterals of the sixth degree. From this discussion, it appears that whereas the collaterals have not been able to produce a single well authenticated case to justify their claim that collaterals of the eighth degree should exclude daughters, numerous instances have been proved in which daughters have been given preference over collaterals less remote than the collaterals in the present case.

We agree therefore with the lower Court in holding that the daughter's sons have succeeded in rebutting such presumption as may be considered to arise against them by reason of the *riwaj-i-am* of the Amritsar district; and we hold that their claim has therefore

been rightly decreed. We therefore dismiss the appeal with costs.

R.W./V.V.

Appeal dismissed.

A. I. R. 1936 Lahore 92

ADDISON AND DIN MOHAMMAD, JJ.

Nazir Din and another — Plaintiffs — Appellants.

v.

Mohammad Shah and others — Defendants—Respondents.

First Appeal No. 2380 of 1926, Decided on 22nd October 1934, from decree of Senior Sub-Judge, Gurdaspur, D/- 16th April 1926.

(a) Mahomedan Law — Gift — Undivided shares of agricultural estate can form subject of gift — Donor and donee related as grandfather and grandson — Donor need not physically part with possession — Mere intention on his part to treat property as that of donee and to divest himself of his own ownership is sufficient.

In case the donor and the donee are related to each other as grandfather and grandson, it is unnecessary that the donor should physically part with the possession of the property. A mere intention on his part to treat the property as that of donee and to divest himself of his own ownership, is enough to constitute a valid gift. An undivided share of agricultural estates can be made the subject of gift and in such cases, if mutations take place subsequently on the basis of the shares defined in the gift, even if no actual partition takes place between the various owners of the said property, the gift cannot be impugned on that score. Hence if in a registered deed, which is solemnly executed after undergoing all the formalities of law, there is a clear declaration made that the donor parts with his dominion over the property and transfers it to the donee and accepts the position of an agent of the donee in the management of the property, the delivery as required by law is complete: *Case law discussed.* [P 94 C 1, 2]

(b) Mahomedan Law—Mushaa—Rigidity of rule has been considerably relaxed in British India.

The original rigidity of the rule of Mushaa has been considerably relaxed in its application to British India and in almost all cases, which have come up before the Courts, an effort has been made to adopt the rule to its new environments and so to interpret it as to make it consistent with the principles of justice, equity and good conscience. [P 95 C 2; P 96 C 1]

(c) Mahomedan Law — Gift — Gift of Mushaa is valid if donor has done all that law requires him to do to separate himself from property—Tests indicated.

The only test that should be applied in cases of gifts under Mahomedan law is to see whether intention on the part of the donor has been expressed in most unequivocal terms and has been attended by honest efforts on his part to complete the gift by divesting himself of the

control over the property in such a manner as would clearly imply his divestiture in the eye of the law of the land or in other words whether the donor has still reserved to himself a loop-hole of escape or not. If this is not so and if the donor has done all that the law of the land requires to be done to separate himself from the property, a gift of Mushaa will be as valid as that of property which can be physically handed over to the donee.

[P 96 C 1]

(d) Mahomedan Law—Gift — Delivery of possession of any part of property makes whole gift operative.

A gift being indivisible, the delivery of possession of any part of the property would make the whole gift operative: 1922 P C 281, *Foll.*; 1927 Pat 20 and 1927 Mad 572, *Rel. on.*

[P 96 C 2]

S. N. Bali, J. N. Khosla and Mohsin Shah—for Appellants.

Malik Barkat Ali—for Respondents.

Din Mohammad, J.—The dispute, in this case, relates to the property of one Aziz Din of Dina Nagar. He had married two wives. By one of his wives, he had a son, Feroz Din, and two daughters, Mt. Jannat Bibi and Mt. Ghulam Fatma. By his second wife, he had a son, Nasir Din and three daughters, Mt. Sughra, Aisha and Mt. Batul. Feroz Din died in 1912, leaving him surviving his three sons, Mohammad Shah, Mohammad Yusuf and Mohammad Ibrahim. Aziz Din had a brother named Mohammad Bakhsh who left a grandson, Mohammad Sharif. He had also a sister whose son is Abdul Ghani. It appears that, in 1913, which was admittedly before the birth of Nasir Din, he made a gift of a part of his property in favour of his three grandsons, mentioned above, his daughter Mt. Jannat Bibi, his sister's son Abdul Ghani, and his brother's grandson Mohammad Sharif, whose gift however, is not the subject-matter of the present suit. To Mohammad Shah, Mohammad Yusuf and Mohammad Ibrahim, he gave, among other properties, "one half share out of 576 acres of land situated at Chak 270 (Sind)," and "3/4ths share out of a house situated at Dina Nagar town." To Mt. Jannat Bibi, he gave, among other properties, "1/8th share of the Sind land" and "a vacant site at Dina Nagar town." To Abdul Ghani, he gave "1/8th share of the Sind lands" together with some other property with which we are not concerned. Aziz Din died in 1922, leaving him surviving a widow, a son, five daughters and three grandsons. The present suit was instituted, on 21st August 1922, by Nazir

Din and his two minor sisters, Mt. Aisha Begam and Mt. Batul Begam, along with their mother Mt. Taj Bibi, against Abdul Ghani and the three grandsons of Aziz Din named above, and his three married daughters Mt. Jannat Bibi, Mt. Sughra Begam and Mt. Ghulam Fatima. It was for possession of the property alleged to have been owned by Aziz Din, including the property that was the subject of gift in 1913, as well as some other property which was alleged to have been purchased by him benami in the name of his son Feroz Din in 1889. The plaintiffs based their claim on Mahomedan law and contended that the three grandsons of Aziz Din were not entitled to inherit his estate, being the sons of a predeceased son; that the gift, if any, was illegal and void, as it came within the mischief of the doctrine of Mushaa; that the property purchased in the name of Feroz Din could not be treated as an advancement to him and should, therefore, be thrown into the hotchpot; and that the married daughters were not entitled to any share in the estate of their father as they had received their share in the shape of jewellery and dowry that were presented to them at the time of their marriage.

The three grandsons resisted the suit on the ground that they were governed by customary law and hence included among the heirs of Aziz Din; and added that, even if they were not, the gift in their favour was valid and the previous purchase in the name of their father was not benami. Mt. Jannat Bibi claimed inheritance on the basis of Mahomedan law and denied having received her share on the occasion of her marriage. Mt. Ghulam Fatma challenged the gift, based her claim on Mahomedan law and put in pleas similar to those of Mt. Jannat Bibi. Abdul Ghani's share was struck off as he had parted with his share of the gifted property in favour of some of the other defendants, and Mt. Sughra Begam supported the plaintiffs' claim. On these pleadings, necessary issues were framed by the Senior Subordinate Judge who came to the conclusion that the gift was valid, that the purchase in the name of Feroz Din in 1889 was not proved to be benami, and that barring the property which was the subject of the gift and the property purchased by Feroz Din, the plaintiffs were entitled to share

the rest of the estate left by Sheikh Aziz Din, along with all the female defendants, according to the shares prescribed by the Mahomedan law. Dissatisfied with this decision, they have preferred this appeal. The learned counsel who has appeared on their behalf, has attacked the decision of the learned Subordinate Judge merely on two grounds, namely: (1) that the gift is invalid under Mahomedan law, and (2) that the purchase of the property in the name of Feroz Din in 1889 was benami. I will take up the question of the gift first. It was contended by the learned counsel that the doctrine of Mushaa was applicable to the present case and as it was not permissible under the Mahomedan law to take a gift of an undivided share in any property, the gift in suit could not be maintained. He mainly based his argument on the fact that the subject of the gift was an undivided share of lands situated at Sind and of the house at Dina Nagar, and urged that as no delivery of possession had taken place, which was a *sine qua non* for validity of a gift under the Mahomedan law, the gift could not be operative.

I consider however that the Mahomedan law neither contemplates the actual delivery of possession for the validity of gift in cases like the present, nor does it prohibit gifts of such properties as are covered by the present deed. It is no doubt true that according to strict Hanafi law, the general proposition, as laid down by some of its exponents, is to the effect that an undivided part of a thing, that is capable of division, cannot be the subject of gift. But, to my mind, it means something else than what is imported into it by the learned counsel for the appellants. The Mahomedan law of gift has been interpreted on several occasions by their Lordships of the Privy Council as well as by the High Courts in India, and the general principle deducible from those authorities is that, in case the donor and the donee are related to each other in the manner in which they are related in the present case, it is unnecessary that the donor should physically part with the possession of the property and that a mere intention on his part to treat the property as that of the donee and to divest himself of his own ownership, is enough to

constitute a valid gift. It is also clear from these authorities that an undivided share of agricultural estates can be made the subject of gift, and that in such cases, if mutations take place subsequently on the basis of the shares defined in the gift, even if no actual partition takes place between the various owners of the said property, the gift cannot be impugned on that score. So far as the delivery of possession is concerned the consensus of opinion now-a-days is that if in a registered deed, which is solemnly executed after undergoing all the formalities of law, there is a clear declaration made that the donor parts with his dominion over the property and transfers it to the donee and accepts the position of an agent of the donee in the management of the property, the delivery as required by law is complete.

The earliest judgment to which reference may with advantage be made is 11 All 460 (1). Their Lordships of the Privy Council laid down that the law relating to the invalidity of gifts of Mushaa, i. e., the prohibition of gift of an undivided part in property capable of partition, ought to be confined within the strictest rules, and the authorities on the Mahomedan law show that possession taken under a gift, even although that gift might with reference to Mushaa be invalid without it, transfers effectively the property given according to the doctrine of both the Shia and Sunni Schools. Possession once taken under a gift is not invalidated as regards its effect in supporting the gift by any subsequent change of possession.

The subject of the gift in that case also was shares in revenue-paying villages, with land, houses and moveables. At p. 475, their Lordships further observed that the doctrine relating to the invalidity of the gift of Mushaa was wholly unadapted to a progressive state of society, and considered that when the donor had declared in the deed of gift that she had made the donee possessor of all properties given by the deed, that she had abandoned all connexion with them and that the donee was to have complete control of every kind in respect thereof, sufficient possession was taken on behalf of the donee to render the gift effectual.

In 35 Cal 1 (2) their Lordships of the Privy Council followed 11 All 460 (1), and held that assuming the law of Mushaa applied to the succession of Mahomedans.

1. Mohammad Mumtaz Ahmad v. Zubeida Jan., (1889) 11 All 460=16 I A 205=5 Sar 483 (P C).
2. Ibrahim Goolam Arif v. Saiboo, (1903) 35 Cal 1=34 I A 167=4 L B R 154 (P C).

residing in Rangoon, that doctrine was not applicable to shares in companies nor to shares in free-hold property in a large commercial town. In that case, the subject of gift was certain undivided shares in property consisting of 18 parcels of free-hold land along with shares in six companies. The donor notionally divided the property to be dealt with into two thousand shares, kept to himself 1150 shares and distributed the remaining 850 among the persons to be benefited, and it was consequently contended in that case that the gift was void as being contrary to the doctrine of Mushaa. Their Lordships of the Privy Council observed that even if the duty of the Courts were to construct a prohibition of gifts of undivided shares of what was divisible, which should be applicable to the conditions of modern life, it would seem impossible in the case of the shares and extremely difficult in the case of free-hold property in a town, to carry it out, but the attitude of law towards this doctrine of Mushaa did not involve any such constructive application of the doctrine. Their Lordships further considered that it would be inconsistent with the decision in 11 All 460 (1), to apply a doctrine which in its origin applied to very different subjects of property, to shares in companies and free-hold property in a great commercial town.

In 38 Cal 518 (3), a Bench of the Calcutta High Court laid down in a case where the subject of the gift was a four-annas share in a kaimi rayati holding, that as the donor had admitted the donee to joint possession with him and recognized him as being in such possession for 14 years, he could not be allowed to say that there had been no valid gift. A similar question came up before a Bench of this Court constituted by my brother Addison, J., and Tek Chand, J., in 10 Lah 761 (4), and it was remarked therein that the rules against the gift of Mushaa laid down by Abu Hanifa were of a highly technical nature and were considerably relaxed even in the days of his disciples and also by the later doctors of the Hanafi School. In that case also the observations of their Lordships of the Privy Council in 11 All 460 (1) were

quoted and followed. Even on the question of the transfer of possession, as remarked above, the Courts in British India as well as the Privy Council have enunciated certain principles which relax the rigours of the strict Mahomedan law as sometimes construed by certain orthodox doctors, and bring the law into consonance with modern civilisation and mode of life. In 1925 Lah 501 (5), Jai Lal, J., observed as follows :

Actual transfer of physical possession is not necessary to complete a gift in cases where donor and donee live in the gifted house. The fact that the donor continued to live in the same house for about a month after the date of the gift, which he had made by means of a registered deed, does not show that possession was not given to the donee, where it is so expressly stated in the deed.

In 5 Rang 7 (6), a Mohamedan had conveyed immovable property to his wife by a registered deed and had effected mutation in her name, but had continued to manage the property himself. Their Lordships of the Privy Council held that the acts of the husband after the mutation in reference to the property, must be regarded as being on his wife's behalf and that there had been delivery of possession within the rule and consequently the gift was valid under Mohamedan law. In a recent case reported in 6 Luck 556 (7), this question again came up before their Lordships of the Privy Council. In that case a Mohamedan had executed in favour of his wife a deed of gift of immovable property, which declared that he had delivered possession over it to her as an absolute owner. The deed was handed over to and retained by her, but there was no mutation of names. She did not take actual possession until after her husband's death, but during his lifetime she frequently resided with him on the premises. It was held by their Lordships of the Privy Council that having regard to the declaration in the deed and the handing over of it to the donee, the gift was valid.

It will be manifest from the above that the original rigidity of the rule of Mushaa has been considerably relaxed in its application to British India and in almost all cases, which have come up

3. Abdul Aziz v. Fateh Mohammad, (1911) 38 Cal 518=9 I C 635.
4. Fayyazuddin v. Kutbuddin, 1929 Lah 309=116 I C 899=10 Lah 761.

5. Rahimat Ali v. Mt. Daulat Bibi, 1925 Lah 501=90 I C 640.
6. Ma Mi v. Kallander Ammal, 1927 P C 22=100 I C 32=54 I A 23=5 Rang 7 (P C).
7. Mohammad Sadik Ali v. Fakhar Jehan Begum, 1932 P C 13=136 I C 385=59 I A 1=6 Luck 556 (PC).

before the Courts here as well as before the Privy Council, an effort has been made to adapt the rule to its new environments and so to interpret it as to make it consistent with the principles of justice, equity and good conscience. The Courts in this country have given effect rather to the spirit of the rule than to its letter and have upheld gifts in all cases in which the intention to give on the part of the donor had been expressed in most unequivocal terms, and had further been attended by all honest efforts on his part to complete the gift by divesting himself of the control over the property in such a manner as would clearly imply his divestiture in the eye of the law of the land.

The *raison d'être* of this rule was the avoidance of gifts that were vague, indefinite or incomplete, and the only test that should be applied in such cases is whether the gift in question is open to any of these objections; or in other words, whether the donor has still reserved to himself a loop-hole of escape or not. If this is not so and if the donor has done all that the law of the land requires to be done to separate himself from the property, a gift of *Mushaa* will be as valid as that of property which can be physically handed over to the donee. Transfer of possession is no doubt the main thing in the whole affair, and in every case this is the only thing to be seen. But, in different countries there are different methods by which this can be effected; and what acts amount to such a transfer in our own country, have been clearly indicated in the authorities cited above.

Applying these tests therefore to the gift before us, it is abundantly clear that all the requirements of the law have been completely fulfilled. Not only was the document registered in all its solemnity, but there was further a clear indication in the deed that the donor ceased to have any control over the property on his own behalf, and undertook to manage it as an agent of the donees only so long as they were labouring under a disability. He also made it clear that he would at once sever his connexion, whenever any one of the donees was fit to take charge of the property on his own account. In addition to this, in the case of agricultural lands, he had the names of the donees entered in the record of rights in place

of his own name, and had thus given to the world a clear indication of the change of ownership; and in the case of properties other than land, he handed over physical possession to the donees and one of them, Mt. Janant Bibi, actually constructed a house on the site gifted to her. A gift being indivisible, the delivery of possession of any part of the property would make the whole gift operative. If any authority is needed for this proposition, reference may with advantage be made to 1922 P. C. 281 (8). At p. 288, their Lordships observed that the whole *zemindari* property mentioned in the deed, and not parts of it only, must be regarded as one property, the taking possession of any part of it being constructively the taking possession of the whole. The same principle was enunciated in 1927 Pat 20 (9). It was laid down in that case that where there was evidence to show that some of the properties in a gift had been delivered, delivery of possession of all properties could be inferred. In 1927 Mad 572 (10), Devadoss, J., held that where a person made a gift of certain items, some of which he could not at once deliver into the hands of the donee, it would not be right to hold that the whole gift was invalid.

I have therefore no hesitation in holding that the gift in this case was not a mere paper transaction, but a complete act in all respects and cannot now be impugned on the basis of the highly technical doctrine of *Mushaa* or on the ground of non-delivery of possession. The question of *benami* need not detain us long. There is not an iota of evidence worth consideration on the record to prove that the funds were supplied by Aziz Din when the purchase of the property was made by Feroz Din in 1889, nor is there any evidence to show that Aziz Din ever claimed that property to be his. Rather, all the documents executed by Aziz Din subsequent to 1889 clearly prove the contrary. He gave an inventory of his property in the deed of gift in dispute and also in the alleged will executed by him immediately before

8. Mohammad Abdul Ghani Khan v. Fakhar Jehan Begum, 1922 P O 281=68 I C 254=49 I A 195=44 All 301 (PC).

9. Abdul Haq v. Mt. Tamizan, 1927 Pat 20=97 I C 154.

10. Ajagar Hazar Sahab v. Annammah, 1927 Mad 572=100 I C 62.

his death, and in neither of these did he ever lay claim to the property that had been in possession of Feroz Din since 1889. In these circumstances, I am quite satisfied that this point was also rightly decided against the plaintiffs. For the reasons given above, I would dismiss this appeal with costs.

Addison, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1936 Lahore 97

TEK CHAND AND ABDUL RASHID, JJ.

Ismail and others — Defendants—Appellants.

v.

Fazla and others—Plaintiffs—Respondents.

Second Appeal No. 1066 of 1929, Decided on 12th June 1934, from decree of Addl. Dist. Judge, Ludhiana, D/- 23rd January 1929.

(a) Punjab Tenancy Act (16 of 1887), S. 77—Suit for possession of occupancy land and house in abadi is cognizable by civil Court.

A suit for possession of occupancy land and also of a house in the abadi is not excluded from the jurisdiction of civil Courts by S. 77, or any other provision of the law: 1931 Lah 362, *Foll.* [P 97 C 2]

(b) Punjab Tenancy Act (16 of 1887), S. 59—Occupancy tenant dying without male lineal descendant or widow—Collaterals claiming descent through female are not entitled to succeed, even though such female, as daughter, has been allowed to be in possession till her death.

On an occupancy tenant dying without leaving any male lineal descendants or a widow, the tenancy is extinguished, unless there are in existence any male collateral relatives in the male line of descent from the common ancestor of the deceased tenant and these 'relatives' and such ancestor had occupied the land. Where the collaterals claim descent from the common ancestor through a female, they are not entitled to succeed, even though it is found that such female, as a daughter, has been allowed to be in possession of the property till her death: 118 P R 1918, *Approved.*

[P 97 C 2; P 98 C 1]

(c) Custom (Punjab)—Succession to house in village abadi—House in abadi devolving on deceased from his father's maternal grandfather—Collaterals of latter are entitled to it and not proprietors.

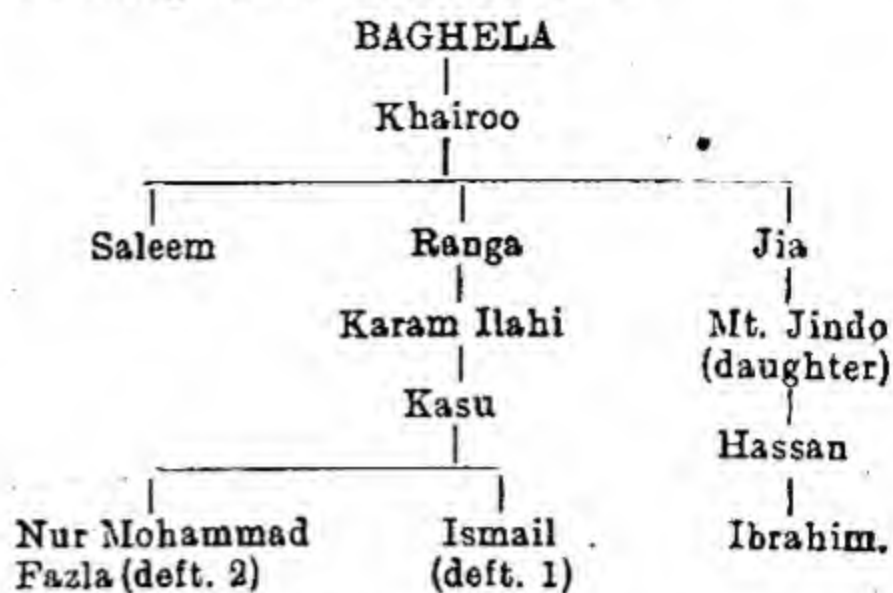
Where a person who has succeeded to a house in the village abadi after his father who had obtained it from his maternal grandfather dies, the collaterals of his father's maternal grandfather are entitled to it as against the proprietors of the village. [P 98 C 1]

S. N. Bali for *Bhagat Gobind Das*—for Appellants.

Dev Raj Sawhney—for Respondents.

1936 L/13 & 14

Tek Chand, J. — The following pedigree-table will be helpful in understanding the facts of this case :



Ibrahim was the last occupancy tenant of the agricultural land in dispute. He died without leaving any male lineal descendant or widow, and on his death the occupancy holding was taken possession of by Ismail and Fazla, defendants 1 and 2. The plaintiffs, who are the proprietors of the land, brought a suit for possession of the land also of a house in the abadi. The suit was decreed by the trial Court and the decree has been affirmed by the District Judge. On second appeal, the first contention raised by Mr. Bali on behalf of the defendants is that the suit was triable by a Revenue Court only under the provisions of S. 77 (3) (d), read with the proviso to sub-S. (3) of that section. The point however is concluded by authority, the latest decision of this Court being 12 Lah 111 (1), in which after a review of previous rulings it was held that such a suit is not excluded from the jurisdiction of civil Courts by S. 77, Punjab Tenancy Act, or any other provision of the law. After hearing Mr. Bali at length I see no reason to dissent from the view taken in the ruling above-mentioned.

On the merits, it will be convenient to deal separately with the case relating to the occupancy land and the house. So far as the land is concerned, it is not denied that succession to the tenancy is governed by S. 59, Punjab Tenancy Act, under which on an occupancy tenant dying without leaving any male lineal descendants or a widow, the tenancy is extinguished, unless there are in existence any male collateral relatives in the male line of descent from the common ancestor of the deceased tenant and those

1. Sham Singh v. Amarjit Singh, 1931 Lah 362 = 192 I C 15 = 12 Lah 111.

relatives, and such ancestor had occupied the land. Obviously the appellants are not such collaterals for they claim descent from Khairoo through a female Mt. Jindo. Mr. Bali contends that in this case Mt. Jindo should be treated as a "son" of Jia, as succeeded Jia because her doli had not left the house of Jia at the time of her marriage, and she had succeeded in accordance with the rule of custom mentioned in Answer to Question 43 of Dunnett's Riwaji-i-am of the Ludhiana district. There is no clear finding that Mt. Jindo's doli did not leave Jia's house on her marriage, but assuming that this was so and it was for this reason that the landlords allowed Mt. Jindo to continue in possession of the occupancy tenancy after Jia's death, the defendants cannot be treated to be the male collateral relatives of Ibrahim in the male line of descent from Khairoo for the purposes of S. 59, Tenancy Act [cf. 113 P R 1913 (2).] I have no doubt that the appellants have no right to succeed to this land and that on Ibrahim's death the occupancy tenancy was extinguished, and that the land reverted to the plaintiffs-proprietors.

The case relating to the house however stands on a different footing. The house is situate in the village abadi and not in the occupancy holding. The finding is that Baghela, father of Khairoo, the common ancestor of Jia and the defendants had settled in this village with the original founders and had the status of a malik qabza. In 1852 both Jia and Ranga owned two houses in the abadi, adjacent to each other. On Jia dying sonless the house was taken possession of by his daughter Mt. Jindo, and on her death it devolved on her son, Hassan and then on Ibrahim. On Ibrahim's death his daughter Mt. Saidi, who is married to Umra, son of Ismail (defendant 1) entered into possession. The house has nothing to do with the occupancy holding in the agricultural land, and I do not see how the plaintiffs (proprietors) can lay claim to it. On Ibrahim's death, either his daughter and her issue, or the collaterals of his father's maternal grandfather Jia, from whom the house had devolved on him, would be entitled to succeed. The learned District Judge has relied on an entry in the

Wazib-ul-arz of 1882 but that entry, assuming that it is still in force, has no application to the facts as found to exist in connexion with the house in question. I hold that the plaintiffs' suit for possession of the house was wrongly decreed. I would accordingly accept this appeal partially, and in modification of the decree of the learned District Judge dismiss the suit in respect of the house but affirm the decree in favour of the plaintiffs for possession of the agricultural land. Having regard to all the circumstances of the case, I would leave the parties to bear their own costs throughout.

Abdul Rashid, J.—I agree.

K.S./R.K. *Appeal partly accepted.*

A. I. R. 1936 Lahore 98

RANGI LAL, J.

Official Receiver, Delhi—Appellant.

v.

Kishen Lal and another—Objectors—Respondents.

Misc. Second Appeal No. 720 of 1935, Decided on 15th July 1935, from order of Dist. Judge, Delhi, D/- 8th January 1935.

(a) **Hindu Law — Alienation — Widow — Alienation to meet expenses of litigation — Necessity is not established unless widow has no sufficient funds to carry on litigation — Onus is on alienee to show that alienor's income was insufficient.**

Where a widow purports to alienate a portion of her husband's property in order to meet the expenses of litigation incurred for the protection of the estate, necessity is not established unless it is proved by the alienee that at the time the money was actually advanced, there was no money in the hands of the widow sufficient for the protection of the estate: 60 I C 486; 38 Cal 721 and 1918 Pat 548, *Foll.*

[P 99 C 1]

(b) **Practice — Second appeal — Finding of fact—Suit for setting aside alienation by widow to raise money for litigation — No clear finding as to whether funds with widow were insufficient to meet expenses of litigation—Finding is not one of fact.**

Where the Court in a suit for setting aside an alienation made by a widow to raise money for certain litigation, does not give a clear finding that the funds left with the widow when the litigation started were insufficient to meet the necessary expenses incurred in it, the finding cannot be said to be one of fact and can be attacked in a second appeal. [P 99 C 2]

Kishan Dayal—for Appellant.

Rang Bihari Lal and Shamsher Bahadur—for Respondents.

2. *Dewan Singh v. Kishen Singh*, (1913) 113 P R 1913=201 O 771.

Judgment.—The only question for decision in this case is whether a mortgage and sale by a widow were justified under the Hindu law. The trial Judge held that consideration was proved only to the extent of Rs. 1,300 and that no legal necessity was established. The alienations were therefore set aside. On appeal the learned District Judge was satisfied that the alienations were made in order to raise money for certain litigation in which the widow was engaged. He therefore accepted the appeal and upheld the alienations. A further appeal has been filed to this Court by the Official Receiver of the estate of one Bhagwan Chand a reversioner of the widow.

The learned District Judge has not dealt with the evidence on the record and has not come to any clear findings that the whole sum raised by the widow was required for the expenses of litigation and that the income from her husband's estate in her hands was insufficient for that purpose. It appears that the learned Judge was of opinion that it was for those objecting to the alienations to show that the widow had no ready money with her at the time when the litigation commenced. It has been held in 38 Cal 721 (1), that in a case of this kind it is not sufficient to establish that there was litigation and expenses must have been incurred on it but it must be shown that the expenses could not have been met from the income of the estate, that they were reasonable and what they were. In 60 IC 486 (2) it was held that where a widow purports to alienate a portion of her husband's property in order to meet the expenses of litigation incurred for the protection of the estate necessity is not established unless it is proved by the alienee that at the time the money was actually advanced there was no money in the hands of the widow sufficient for the protection of the estate.

In the case of an alienation by a widow the onus is always on the alienee to show that the alienor's income was insufficient to provide money required for the purpose for which the alienation was said to have been made. In 46 IC 627 (3)

1. Ravaneswar Prasad Singh v. Chandi Prasad Singh, (1911) 38 Cal 721=12 IC 931.
2. Narain Singh v. Sarjung Singh, (1921) 60 IC 486.
3. Radha Kishan v. Nauratan Lal, 1918 Pat 548=46 IC 627=8 Pat LJ 522.

it was held that an alienee from a limited owner must show not merely that the object for which the money was required was a legitimate one but also that the funds available to the limited owner were insufficient to meet the necessary requirements. It was further held that costs of litigation are a recognised head of necessity but the power to borrow for that purpose is not unlimited. In the present case there is nothing to show when the litigation which is said to have necessitated the alienations began and what expenses were incurred on it. There is some evidence on the record to show what the funds in the hands of the widow were when her husband died but the learned District Judge has not given a clear finding that the funds left with her when the litigation started were insufficient to meet the necessary expenses to be incurred on it. It cannot therefore be said that the finding is one of fact and cannot be attacked in second appeal. I also find that no finding has been given as to the passing of the consideration for the alienations. The first alienation was a mortgage dated 6th October 1926 for a sum of Rs. 2,500. According to the mortgage deed a sum of Rs. 150 had been received previously and the remaining sum of Rupees 2,350 was to be received before the Sub-Registrar. The Sub-Registrar's endorsement however shows that a sum of Rs. 350 only was paid in his presence. No necessity for the loan is mentioned in the deed at all. The second alienation was a sale dated 7th May 1927. According to the sale deed the consideration was Rs. 7,000 and was made up thus:

1. Due to the vendee on account of the previous mortgage ... Rs. 2,500.
2. Due on account of a promissory note dated 12th December 1926... Rs. 1,200.
3. Due on account of a promissory note dated 17th February 1926... Rs. 800.
4. Due on account of a promissory note dated 20th April 1927 ... Rs. 500.
5. Paid in cash on account of expenses of stamp and registration Rs. 300.
6. Due to the vendee on account of a book debt... Rs. 400.
7. Paid before the Sub-Registrar ... Rs. 1,300.

The sale deed does not mention any necessity for the sale. The Sub-Registrar's endorsement shows that a sum of Rs. 1,300 was paid in his presence. The promissory notes and the book account referred to above were not produced. The mortgage deed as well as the sale

deed were executed on behalf of the widow by her son-in-law Shankar Lal. He stated that she had borrowed Rupees 1,000 from one Raj Narain and the latter's debt was paid off out of the mortgage money mentioned above. There is no evidence on the record to show what the nature of the debt said to have been due to Raj Narain was and when it was borrowed. Shankar Lal made a vague statement to the effect that when the widow was in need of money for the purpose of litigation she sold her property. He admitted that he had no account of the expenses of litigation and no account of the income of her property. He also admitted that her husband who died in 1920 or thereabout left moveable property worth Rs. 5,000 or 6,000 and also shop goods worth Rs. 5,000 or 10,000. This evidence does not seem to establish that the widow received full consideration for the alienations, that the full amount was required for the expenses of litigation and that she had no other source for meeting those expenses. I therefore accept the appeal, set aside the order of the learned District Judge and remand the case to him for a fresh decision in the light of the above remarks. The parties have been directed to appear before him on 1st August 1935. Costs to follow the event.

R.M./R.K.

*Appeal accepted.***A. I. R. 1936 Lahore 100**

ABDUL RASHID, J.

Raghunath Singh and others—Defendants—Appellants.

v.

Dhumi Mal and another—Plaintiffs—Respondents.

Misc. Appeal No. 479 of 1935, Decided on 25th June 1935, from order of Senior Sub-Judge, Gurgaon, D/- 17th December 1934.

(a) Jurisdiction—Small Cause—Hissedars of village common entitled to share offerings in temple—Offerings at temple with many claimants farmed to highest bidder by Government—Thekedar was to give surety—Mortgage by co-sharer of his share—Thekedar refusing to pay amount of share to mortgagee—Suit by mortgagee against thekedar held cognizable by Small Cause Court—Art. 13 or Art. 11, Sch. 2, Provincial Small Cause Courts Act, held did not apply.

The hissedars of a village common were entitled to a share in the offerings of a temple. The Government in order to avoid disputes among them had been farming the offerings to

the highest bidder each year, with the consent of the co-sharers. The thekedar had to provide a surety. One of the co-sharers mortgaged his share. On refusal by the thekedar to pay the mortgagee the amount of the share mortgaged, the mortgagee brought a suit claiming a decree against the thekedar and his surety for the amount of the share:

Held: that the real contest was between the mortgagor and the mortgagee and the thekedar would get a valid discharge by making the payment to whichever person (whether mortgagor or mortgagee) was held by the Courts to be entitled to receive the offerings and that the suit was cognizable by a Court of Small Causes and did not fall within the purview of Art. 13 of Sch. 2 and therefore no second appeal lay: 1922 Lah 451; 84 P R 1892; 81 P R 1889 and 20 P R 1911, *Rel. on*; 74 P R 1886 and 28 Mad 202, *Disting.* [P 100 C 2; P 101 C 2]

(b) Revision—Error of law—No revision lies.

By deciding a question of res judicata wrongly, a Court cannot be said to have exercised its jurisdiction illegally or with material irregularity: 11 Cal 6 (P C), *Rel. on.* [P 102 C 1]

Kishen Dayal and Bhagwat Dayal—for Appellants.

Bishen Narain—for Respondents.

Judgment.—This appeal arises out of an action brought by Dhumi Mal and Zaharia Mal against Ganga Sahai, Jawahar Lal and Rughnath for recovery of Rs. 55 on account of the share of the plaintiffs in the offerings made to the Hindu temple of Mata Sitla. The material facts of the case for the purposes of this appeal may be shortly stated. There is a Hindu temple in village Gurgaon. The temple is situated on shamilat deh, and all hissedars of the village common are entitled to a share in the offerings. As there are a very large number of claimants to the offerings, the Government, in order to avoid disputes, has been farming the offerings to the highest bidder in each year with the consent of the co-sharers. The thekedar has to provide a surety. The allegations of the plaintiffs are that they as mortgagees of the share of Rughnath, defendant 3 are entitled to receive his share, that Ganga Sahai thekedar defendant 1 refuses to pay them this share and that, therefore, they are entitled to a decree against Ganga Sahai and his surety Jawahar Lal, defendant 2, for a sum of Rs. 55. The defendants pleaded that the plaintiffs had no right to receive the share of the mortgagor Rughnath, that in any case, their claim to receive the share of the mortgagor has been previously disallowed by a competent Court and that this decision operated as

res judicata. The trial Court held that the finding in the previous suit was binding on both the parties and that this finding operated as res judicata, and on that basis dismissed the suit. The plaintiffs preferred an appeal to the learned District Judge, who held that neither S. 11, Civil P. C., nor the principle of res judicata applied to the present case, and that the plaintiffs were entitled to maintain the present suit. He accepted the appeal and remanded the case to the trial Court for decision of the other issues. Against this order of remand, the defendants have preferred a second appeal to this Court. A preliminary objection has been raised on behalf of the respondents that no second appeal is competent in the present case. S. 102, Civil P. C., lays down that no second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject matter of the original suit does not exceed Rs. 500. Under S. 15 (2), Small Cause Courts Act, all suits of a civil nature of which the value does not exceed Rs. 500 are cognizable by a Court of Small Causes subject to the exceptions specified in Sch. 2, to that Act. We have therefore to see whether the present suit falls within any of the exceptions contained in Sch. 2, Provincial Small Cause Courts Act. The learned counsel for the appellants submits that his case falls within Arts. 11 and 13 of Sch. 2, and that the present suit is a suit to enforce payment of

other dues payable to a person by reason of his interest in immovable property or in a shrine or other religious institution.

Reliance is placed in this connexion on 74 P R 1886 (1) and 28 Mad 202 (2). These cases however appear to me to be distinguishable. In 74 P R 1886 (1), some of the co-sharers sued for their share of the profits on the ground that they were proprietors of certain land in the village and that the offerings of the temple were divisible amongst all the proprietors. That was a case between persons who were primarily entitled to a share in the offerings against a person who was primarily responsible to pay the cesses or dues. In 28 Mad 202 (2) the suit was brought by a member of a religious association to recover his share of the voluntary payments made to the association and it was held

1. Ude Ram v. Sanda, (1886) 74 P R 1886.

2. Bavadasan v. Narayana, (1905) 28 Mad 202.

that the suit fell within the purview of Art. 13, Sch. II, Provincial Small Cause Courts Act. In neither of these cases was there a dispute between a mortgagor and a mortgagee. In the present suit it is admitted by defendants 1 and 2 that the mortgagor, Rughnath, defendant 3 is entitled to a share in the offerings, and they merely contest the position taken up by the plaintiffs to the effect that they as mortgagees are entitled to receive the share, and not the mortgagor. The real contest in the present case is therefore between a mortgagor and a mortgagee, and defendants 1 and 2 would get a valid discharge by making the payment to whichever person (whether the mortgagor or the mortgagee) is held by the Courts to be entitled to receive the offerings. As mentioned above therefore the real contest is between the mortgagor on one side and the mortgagee on the other. The present suit, in my opinion, does not fall within the purview of Art. 13, Sch. II, Provincial Small Cause Courts Act. Reference may be made in this connexion to a Division Bench ruling of this Court reported as 3 Lah 369 (3). Where it was held that a suit by a person as manager of a temple for a share of the offerings and the produce of the temple land and for the price of a mare presented to the temple in the absence of any allegation in the plaint that the defendant acted dishonestly is cognizable by a Court of Small Causes and does not fall under either Art. 13 or Art. 32, Sch. II, Provincial Small Cause Courts Act, 1887. Art. 13 of the Act only relates to plaints made against a person who is primarily liable to pay cesses or dues. To the same effect are 81 P R 1889 (4), 84 P R 1892 (5) and 20 P R 1911 (6). Art. 11, Sch. II of the Act was also referred to by the learned counsel for the appellants but that article has no applicability to the facts of the present case. I therefore hold that no second appeal lay in the present case.

It was next contended by the learned counsel for the appellants that this appeal may be treated as petition for revision. It was held by their Lordships of

3. Shiv Gir v. Khazan Gir, 1922 Lah 451=77 I O 561=3 Lah 369.

4. Harnam v. Gandu, (1889) 81 P R 1889.

5. Jawahir Singh v. Man Singh, (1892) 84 P R 1892.

6. Arur Singh v. Dayal Singh, (1911) 20 P R 1911=9 I O 579.

the Privy Council in 11 Cal 6 (7), that by deciding the question of res judicata wrongly a Court cannot be said to have exercised its jurisdiction illegally or with material irregularity. For the reasons given above, I dismiss this appeal with costs.

R.W./V.V

Appeal dismissed.

7. Amir Hasan Khan v. Shiv Bakhsh Singh, (1885) 11 Cal 6 (P C).

A. I. R. 1936 Lahore 102

HILTON, J.

Harikishan Lal & Sons—Defendants
—Appellants.

v.

Peoples Bank of Northern India, Ltd.
—Plaintiff—Respondent.

Misc. First Appeal No. 1180 of 1934,
Decided on 19th July 1934, from orders
of Senior Sub-Judge, Lahore, D/- 4th
April 1934.

(a) Appeal—Competency — Order appointing receiver ad interim is appealable.

The mere fact that an appointment of a receiver is made ad interim does not mean that the order is not an order under O. 40, R. 1, Civil P.C., and an appeal lies from it under O. 43, R. 1 (a) in the same manner as if the appointment had not been ad interim but final. [P 103 C 1]

(b) Receiver—Appointment of — Mere apprehension that defendant would wrongfully dispose of property does not justify order without further inquiry.

Mere existence of apprehension in the mind of the plaintiff that the defendant would wrongfully dispose of his property is not alone sufficient to justify an order for receivership without further inquiry as to the basis of these apprehensions and the appointment of a receiver merely by reason of such apprehension cannot be rendered just and convenient. [P 103 C 2]

(c) Receiver — Appointment of — Creditor having right against specific fund or estate is entitled to receiver on ground that he has special charge on debtor's property.

There is a distinction between the practice of appointing a receiver in the case of a general creditor and in the case of a creditor who has a right against a specific fund or estate. The latter class of creditors is entitled to a receiver on the ground that they have a special or equitable charge or lien upon the debtor's property, unless other circumstances exist which make the appointment unjust or inconvenient: 1922 Pat 318, Rel. on. [P 104 C 1]

(d) Receiver—Appointment of—Application for appointment of receiver—Suit not so patently framed in wrong manner as to make its success so problematical as to justify refusal to appoint receiver—Court should not refuse to make appointment.

Where the plaint itself shows that the suit is not likely to succeed or even the plaintiff has not excellent chance to succeed, it is a circum-

stance which would render it unjust and inconvenient to appoint a receiver. It is however one thing to argue that a suit is wrongly framed and quite another to say that it is wrongly valued. A wrong valuation is not so vital that it can never be remedied. Where therefore the suit is not so patently framed in a wrong manner as to make its success so problematical as to justify refusing a receivership order to a creditor whose case is that he is secured, the Court should not refuse to pass such an order. [P 104 C 1, 2]

Nawal Kishore and Ajit Ram—for Appellants.

Kishen Dial and Badri Das (for *Bharat Insurance Co.*)—Respondent.

Judgment. — The Peoples Bank of Northern India Limited, has instituted a suit against Messrs. Harikishan Lal and Sons, Timber Merchants in the Court of the Senior Subordinate Judge at Lahore on 3rd April 1934. The suit was based upon an agreement alleged to have been made between the parties on 16th March 1931. This agreement sets forth that in consideration for advance made by the Bank to the defendant company, the latter pledged with the Bank the timber mentioned in certain lists annexed to the agreement as security and undertook to act as trustees for the Bank in respect of the said timber and that they are liable to account for it to the Bank: the document also recites that the borrowers undertook responsibility for the safety of the timber against theft, loss and destruction. Further, Cl. 8 of the document relied upon was as follows:

That at the end of 16th March 1934 the borrowers shall pay forthwith to the Bank the balance then outstanding and owing to the Bank on their account inclusive of interest , and in case of default the Bank shall have the right to take possession of the security after notice to the borrowers or demand the repayment of the loan. In case of taking possession the Bank shall be entitled to sell the security , and to apply the proceeds in the realization of loan, interest, costs etc. . . .

Suing on the basis of this document the Bank alleged that default had occurred after notice was given, and that they were entitled to pursue the remedy provided for in the foregoing clause. They asked by way of relief for (a), a decree for rendition of accounts in respect of the timber pledged with the Bank (b) a decree for the delivery of the timber and for the money for which the defendant firm may be held liable as a result of accounting and (c) in case possession of the timber be not delivered, a decree for the value thereof. On the same date on which the

plaint was presented the plaintiff Bank moved the Court by application to appoint a receiver of the timber that was alleged to have been pledged to them and also for temporary injunction forbidding the defendant firm to alienate or intermeddle with the timber.

The Senior Subordinate Judge has passed an order on 4th April 1934 without issuing any notice to the defendant firm making an appointment of an ad interim receiver to take possession of the timber and nominating Lala Prakash Chander Mahajan as one receiver. A temporary injunction as prayed for was also issued. At the same time it was ordered that a notice should issue to the defendant firm on the question of a final decision of the matter. Against this order appointing an ad interim receiver the defendant firm has appealed to this Court. The appeal also complains against the appointment as receiver of Lala Guranditta Mal, which appointment was made by a subsequent order of the Senior Subordinate Judge dated 5th April 1924 in place of Lala Prakash Chander Mahajan, who had not consented to act.

For the plaintiff Bank Mr. Kishen Dyal urged here that an appeal does not lie, but I am of opinion that the mere fact that the appointment was made ad interim does not mean that the order was not an order under O. 40, R. 1 and an appeal will therefore lie under O. 43, R. 1 (s) in the same manner as if the appointment had been not ad interim, but final. The first ground upon which Mr. Nawal Kishore for the appellant firm has attacked the order under appeal is that the timber in question or at any rate a considerable quantity of it is and was at the time of the order in the possession of the Bharat Insurance Company and that the defendant firm has no present right to remove the Bharat Insurance Company from the possession or custody of the timber: see O. 40, R. 1, sub-R. (2). It is argued that before appointing a receiver further inquiry was necessary, as stringent action of this character is to be adopted with caution. Now the order under appeal does not purport to remove the Bharat Insurance Company from possession or custody of the timber and I understand that no such distinct order has been passed. I am of opinion that the order under appeal would not justify the removal of the Bharat Insurance Com-

pany from the possession of the timber, not because the said Company is a person whom the defendant firm has no present right to remove (this may or may not be the case and is a matter to be inquired into if the question arises) but because the Company can only be removed by a definite order of the Court made under O. 40, R. 1, sub-R. (b) and no such order is included in the order under appeal, nor, so I was informed at the Bar, has any such order been subsequently made. The question of the Bharat Insurance Company's right to possession or their removal from possession has not yet therefore been decided and the question whether an ad interim receiver should have been appointed must be decided without reference to the Bharat Insurance Company's alleged possession of some of the timber. If the receiver's appointment is confirmed, he will still have to get another order from the Court before he can remove the Bharat Insurance Company from possession.

It was next alleged that the plaintiff Bank were not justified in obtaining an order for receivership by stating that they apprehended a wrongful disposal of the timber on the part of the defendant firm. In dealing with this point I think that I should exclude from consideration events which are said to have occurred subsequent to the order under appeal and that I should merely pay regard to the material which the Judge had before him when he passed that order. On this point I think that the mere existence of such apprehensions in the minds of the Bank's representatives was not alone sufficient to justify the order for a receivership without further inquiry as to the basis of these apprehensions and if there were no other considerations in the case I would be disinclined to hold that the appointment of a receiver was rendered just and convenient merely by the existence of such apprehensions.

There was however before the Senior Subordinate Judge when he passed the order under appeal the agreement on which the plaintiff Bank was suing and prima facie this agreement read together with the averments in the plaint, supported the contention that the plaintiff Bank was not merely a general creditor of the defendant firm, but a creditor having a right against a specific security consisting of timber. The distinction

between the practice of appointing a receiver in the case of a general creditor and in the case of a creditor who has a right against a specific fund or estate is well understood (see Woodroffe's Law Relating to Receivers, Edn. 4, pp. 138 to 140 and 61 I C 849 (1)). The latter class of creditor is entitled to a receiver on the ground that he has a special or equitable charge or lien upon the debtor's property.

Clause 8 of the agreement (quoted in extenso earlier in this judgment) was *prima facie* a good ground therefore upon which the Senior Subordinate Judge could order the appointment of a receiver and unless there were other circumstances before him which pointed to such a Court being unjust or inconvenient, I think that his discretion was rightly exercised.

It is contended that such a circumstance exists in the plaint itself and that the suit as framed is not likely to succeed owing to the character of the reliefs sought and the manner in which they have been valued for Court-fee. No doubt if the plaint itself were to show that the suit is not likely to succeed, or even that the plaintiff Bank had not an excellent chance to succeed, this would be a circumstance which would render it unjust and inconvenient to appoint a receiver. It is suggested that the plaintiff Bank cannot succeed on a suit for rendition of accounts, and that they have not sued or paid Court-fee upon a suit for recovery of the money alleged to have been loaned by them to the defendant firm. I do not want to prejudge any matter which may be disputed in the suit itself, but it seems an open question at least whether the plaintiff Bank could not refrain from suing for recovery of the money loaned and sue merely for delivery of the timber alleged to have been pledged to them, which they have certainly done. How far they can sue for rendition of accounts of the timber I will not decide, but one relief which they have sought is the delivery of the timber and if they should succeed in obtaining that relief the receivership would not have been in vain. It is of course one thing to argue that a suit is wrongly framed and quite another to say that it is wrongly valued. A wrong valuation is

not so vital that it can never be remedied, and I do not think it can be said that the suit is so patently framed in a wrong manner that its success must be so problematical as to justify refusing a receivership order to a creditor whose case is that he is secured.

Similar considerations apply to the injunction order as to the order appointing a receiver and it is not necessary to cover the same ground twice.

The grievance of the defendant firm against the appointment of Lala Guranditta Mal is based *inter-alia* on the allegation that he is inimical to the defendant firm and that he carries on a rival timber business at Jhelum. A representation to this effect has also been made to the senior Subordinate Judge and is still awaiting decision. This matter calls for an early decision, but it is better that it should be decided by the senior Subordinate Judge, as the receiver is an officer of that Court and the matter is properly before that Court.

To sum up, my decisions are: (1) The order under appeal does not direct the removal of the Bharat Insurance Company from the possession or the custody of the timber, and unless or until a distinct order to that effect is made by the lower Court such removal is unjustified. (2) The appointment of a receiver was in the circumstances *prima facie* just and convenient and the order is upheld. This is without prejudice to the decision regarding a permanent appointment which decision must be expedited. (3) The question whether Lala Guranditta Mal should be replaced by another person as receiver is under the consideration of the lower Court, and it is directed that the decision on this matter be taken up without delay.

The costs of the hearing in this Court should be borne by the parties incurring them.

R.M./R.K. *Order accordingly.*

A. I. R. 1936 Lahore 104

JAI LAL AND SALE, JJ.

Parmodh Chand—Appellant.

v.

Narain Singh & others—Respondents.

Second Appeal No. 1570 of 1932, Decided on 25th June 1935 from decree of Dist. Judge, Hoshiarpur, D/- 11th July 1932.

1. *Pirthi Chand Lal v. Kalikanand Singh*, 1922 Pat 318=61 I C 849=6 Pat L J 366.

(a) Civil P. C. (1908), S. 100—Legal effect of proved or admitted facts is question of law.

Where the lower appellate Court has failed to properly appreciate the legal effect of certain proved or admitted facts, the question is one of law and therefore it is a good ground for a second appeal: 1930 P C 91, *Foll.* [P 106 C 1]

(b) Evidence Act (1872), S. 90—Entry in school register—Register over 30 years old produced from proper custody—Genuineness is presumed—Person making entries not produced as witness is immaterial.

A school register was produced in evidence and reliance was placed on certain entries in the register. The person making the entries

could not however be produced as a witness. The register was over 30 years old and was produced from proper custody:

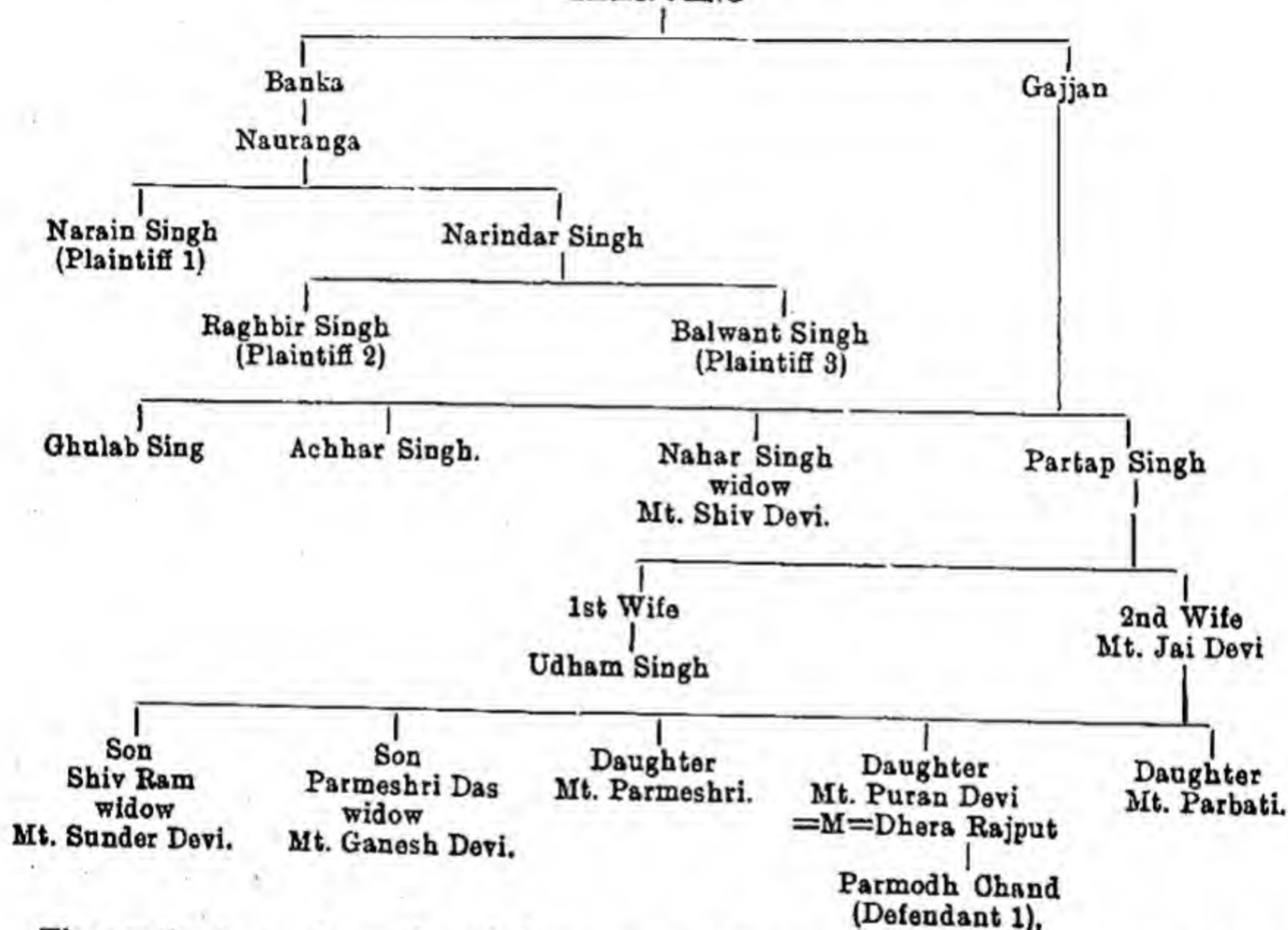
Held: that a presumption of genuineness attaches to the register and the fact that the person responsible for the entries was not produced as a witness was immaterial. [P 107 C 1]

Achhru Ram—for Appellant.

Yashpal Gandhi and Iqbal Singh for *Faqir Chand*—for Respondents.

Sale, J.—The following pedigree-table will illustrate the facts in dispute in this second appeal.

SHER JANG



The parties in so far as they belong to the line of Sher Jang, the common ancestor, are Narial Rajputs of Amb in the Hoshiarpur district, but it is denied by the defendant-appellant that Shiv Ram and Parmeshari Das are the legitimate sons of Partap Singh. The suit was brought to challenge two alienations of landed property, both to Parmodh Chand, defendant 1. The first alienation was a bequest by Mt. Ganesh Devi widow of Parmeshri Das, the property in question being mutated in favour of Parmodh Chand in 1925 after Mt. Ganesh Devi's death. The second alienation is a gift by Mt. Sunder Devi, widow of Shiv Ram, in 1928. The plaintiffs claimed to be the collaterals of Shiv Ram and Parmeshri Das, their case being that these two persons were the

legitimate sons of Partap Singh by a second wife Mt. Jai Devi. The suit was contested by the alienee mainly on the ground that Shiv Ram and Parmeshri Das are not Rajputs, but the sons of Mt. Jai Devi, (admittedly a Sud woman) by her real husband Genda Sud, and thus not the legitimate sons of Partap Singh.

The trial Court found for the collaterals and decreed the claim and this decree was confirmed in appeal by the District Judge, Hoshiarpur. The sole question for determination is whether Shiv Ram and Parmeshri Das are, as found by the lower Courts, the legitimate sons of Partap Singh. The evidence in this case is the same as that recited and discussed in the judgment by this Bench in Civil First Appeal No. 968 of 1933 of to-day's date, in

which we have held, reversing the decision of the Senior Subordinate Judge, that Shiv Ram and Parmeshri Das are not the legitimate sons of Partap Singh. The parties to this second appeal are different, but it is unnecessary to deal with the evidence discussed in the other judgment except in so far as it is material for the decision of this second appeal. On behalf of the respondent, it is urged that the finding of the lower appellate Court, viz., that Shiv Ram and Parmeshri Das are the legitimate sons of Partap Singh, is a question of fact binding on this Court and that this second appeal is not therefore competent.

Briefly Mr. Achhru Ram for the appellant contends that a second appeal lies for three reasons: (1) that the District Judge has misconceived the legal effect of the entries in the School register dated 2nd January 1873, (2) that the District Judge has omitted to consider the oral evidence relating to the alleged death of Genda in 1879 and (3) that the District Judge has misunderstood and drawn wrong inference from the admission of Narain Singh plaintiff No. 1 and of Narindar Singh, father of plaintiffs Nos. 2 and 3, in the plaint of the suit which they brought in 1893. There is in my opinion force in Mr. Achhru Ram's contention. I would hold that as will appear from a discussion of the material evidence a second appeal lies on the ground that the District Judge has not properly appreciated the legal effect of certain proved or admitted facts. This, as was pointed out in 11 Lah 199 (1), is a question of law and therefore a good ground for a second appeal.

In considering the evidence, the District Judge was largely influenced by two admissions stated to have been made before him in the course of arguments: (1) that there was no obstacle to the marriage of a Sud woman (Mt. Jai Devi) to a Rajput (Partap Singh) and (2) that a marriage between them must be presumed from long cohabitation. No such admissions have been made before us. Indeed Mr. Achhru Ram for the appellant has repudiated these admissions and no attempt has been made to rely on them in this Court. It may be, (though the point is not before us) that there is no obstacle

to the marriage of a Sud woman to a Rajput in these enlightened days, but the marriage in question, if it occurred at all, must have occurred about the year 1860, and there can be little doubt that in those days such a marriage would not have been approved. Indeed, the District Judge in another place in this judgment has observed that:

It is not surprising that Mt. Ganesh Devi (widow of Parmeshri Das) and Mt. Jai Devi (the Sud companion of Partap Singh) were both cremated in the cremation ground intended for Suds (instead of in the place where Rajputs would be cremated) in view of the well-known orthodoxy of Rajputs.

Again, he has observed that:

Orthodox Rajputs would not wish to recognize as full Rajputs the status of Parmeshri Das and Shiv Ram, because they were borne of a Sud woman.

It is apparent therefore that the District Judge himself felt doubts on the point whether the Rajput brotherhood in 1860 would have approved of the marriage of Pratap Singh to a Sud woman.

The question of the alleged presumption of marriage said to arise from admitted cohabitation between Pratap Singh and Mt. Jai Devi has been fully discussed in our judgment in Civil Appeal No. 968 of 1933 in which it has been pointed out that in the circumstances of the present case, no such presumption can arise. It is common ground that Mt. Jai Devi, the mother of Shiv Ram and Parmeshri Das was a Sud woman. Pratap Singh had an admitted Rajput wife, who was the mother of Udham Singh. There is un rebutted evidence on the record which has been accepted by the District Judge himself that Shiv Ram was born in 1861 and Parmeshri Das in 1863. There is also un rebutted evidence that Genda, said by the respondents to be the Sud husband of Mt. Jai Devi, died in 1879. Consequently, any marriage between Partap Singh and Mt. Jai Devi before 1879 would be out of the question. There seems no reason to reject the oral evidence that Genda died in 1879, corroborated as it is by the evidence of the Pandas from Hardwar, which shows that up to 1879 Partap Singh had only one recognized son Udham Singh and that it was only after Genda's death in 1879 that Shiv Ram and Parmeshri Das were recognized as his sons. There is similar evidence that prior to this date, Parmeshri Das and Shiv Ram were reported as the sons of Genda Sud.

1. Wali Mahomed v. Mahomed Bakhsh, 1930 P C 91=122 I C 316=11 Lah 199=57 I A 86 (P O).

But the conclusive evidence, in my opinion, which the District Judge has failed to appreciate, is provided by the school register of 1873 and the family agreements of 1878 and 1880. The District Judge has rejected entries in the school register on the ground that the person responsible for these entries was not produced as a witness. It was however obviously impossible to produce the person responsible for these entries. The document is more than 30 years old and was produced from proper custody by D. W. 9, a teacher in the Government College at Hoshiarpur, the successor of the old Municipal Board School, which has as such, ceased to exist. A presumption of genuineness attaches to this register and the fact, that the District Judge has accepted as an undisputed fact that Shiv Ram was born in 1861 and Parmeshri Das was born in 1863, itself indicates that the entries in the register are genuine. These entries describe Shiv Ram and Parmeshri Das as the sons of Genda Mal Sud and are therefore good contemporary evidence that they were not the sons of Partap Singh. Again, the District Judge has failed to appreciate the proper effect of the agreements of 1878 and 1880 which recite that though Parmeshri Das and Shiv Ram were the sons of a Sud woman, they were to be held entitled to succeed as if they were the sons of Partap Singh's legitimate wife. The District Judge has rejected these documents "as of no help" to the defendant on the ground of the presumption (accepted throughout his judgment) of a marriage between Partap Singh and Mt. Jai Devi. I have shown however that no such presumption of marriage exists. Further, the District Judge says in his judgment that Shiv Ram and Parmeshri Das were admitted in these agreements to be the sons of Partap Singh. This is a misdescription. They were described as the sons of Mt. Jai Devi, who is the keep of Partap Singh, but in order to enable them to succeed to the family property on the death of Partap Singh, their mother was to be deemed to be the wife of Partap Singh, so that Shiv Ram and Parmeshri Das should succeed equally with Udham Singh. This is very different from admission that Shiv Ram and Parmeshri Das were the sons of Partap Singh.

Again the District Judge has failed, in my opinion, to draw proper inferences

from the plaint of the suit instituted by Narain Singh plaintiff in 1893. This suit was brought by Narain Singh plaintiff 1 and Narindar Singh, father of plaintiffs 2 and 3, to challenge the act of Udham Singh in allowing one-half of the property of Partap Singh to be mutated in favour of Shiv Ram and on his death, in the name of his widow. The mutation was obviously the result of the agreements of 1878 and 1880 to which reference has already been made. The District Judge comes to the conclusion that because the suit was dropped and because it was not clearly alleged in the plaint that Shiv Ram was not the son of Partap Singh, Shiv Ram was by implication admitted to be the son of Partap Singh. Actually however it is specifically stated that Partap Singh left only one son Udham Singh and though it is not definitely alleged that Shiv Ram was not the son of Partap Singh, the allegations made in the plaint are consistent only with the hypothesis that the plaintiffs then considered that Shiv Ram was not the son of Partap Singh. The reason why the suit was dropped was because the suspected pregnancy of Shiv Ram's widow did not materialize with the result that there would be no issue and the suit would have been infructuous. This plaint, in my opinion, fully confirms the other contemporary documentary evidence in showing that whatever may be the view of Narain Singh and the other plaintiffs now, they did not regard Shiv Ram and Parmeshri Das as the sons of Partap Singh 30 years ago.

For these reasons, I would hold that it is not proved that Shiv Ram and Parmeshri Das were the sons of Partap Singh. It follows therefore that the plaintiffs are not the collaterals of Shiv Ram and Parmeshri Das and have therefore no right to impugn the alienations made by their widows. I would therefore accept the appeal, set aside the decree of the lower Courts and dismiss the suit with costs throughout.

Jai Lal, J.—I agree.

S.R./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 108

ADDISON, AG. C. J. AND DIN MUHAMMAD, J.

Mt. Harnam Kaur and another—Defendants—Appellants.

v.

Jagat Singh and others—Plaintiffs and another—Defendant—Respondents.

Second Appeal No. 1288 of 1932, Decided on 23rd July 1935, from decree of Dist. Judge, Ludhiana, D/- 5th July 1932.

(a) Custom (Punjab)—Ancestral Property—Historical note showing village founded by P—P's sons dividing village—People leaving village because of famine—Returning years afterwards—Dividing lands into hals, one being land in suit—Inference that original proprietors returned and not descendants held not legitimate—Hence land not established as ancestral.

A historical note indicated that the village in which the disputed land was situate was founded by B. After him his sons divided the village. The proprietors and the people of the village were, however, forced to leave it on account of famine but some of them returned to the village many years afterwards. They divided the land in the village into hals and one of the divisions was the land in dispute:

Held: that it could not be legitimately inferred that it was the original proprietors who returned, and not their descendants. Hence it had not been established that the land was ancestral: 1930 Lah 633, Ref. [P 108 C 2]**(b) Custom (Punjab)—Ludhiana District—Hindu Jats—Gift to daughters—Collaterals beyond 4th degree cannot challenge gift.**

Among the Hindu Jats of Ludhiana District a gift by the father, of any part of his property, to his daughters cannot be challenged by collaterals beyond the 4th degree. [P 109 C 1]

Jhanda Singh—for Appellants.**Addison, J.**—The plaintiffs sued for a declaration that the gift by defendant 1, Naraina, to his daughters, defendants 2 and 3, was null and void as against them and should not affect their reversionary rights after the donor's death. The trial Court held the land not to be ancestral and dismissed the suit. On appeal the District Judge held the land to be ancestral and found that the plaintiffs, who were reversioners within five degrees, could contest the alienation. He accordingly accepted the appeal and decreed the suit. He however granted the defendants a certificate under S. 41 (3), Punjab Courts Act, to the effect that a question of custom was involved as to whether a gift of ancestral property by a sonless proprietor to his married daughters in the presence of collaterals of the 5th

degree was valid or not; and the defendants on this certificate have preferred this second appeal.

It was first argued that the finding, that the land was ancestral was not supported by evidence and that the conclusion was merely a conjecture of the District Judge and not a proper inference from the facts established. The District Judge has relied upon the historical note at the bottom of the pedigree table of the village. According to it, the village was founded three hundred years before the first settlement by Phirna in the time of the Moghals when the Rajputs of Raikot ruled over that territory. Phirna came to graze cattle in these parts and settled there. His two sons, Sawla and Rukkan, divided the land into two villages. Maharaja Ranjit Singh granted a Jagir of the land to Bhai Kaithalwala, but many people were famine-stricken and left the village. The few, who remained, cultivated what they could. This was before Bhai Kaithalwala got the jagir. In his time many of the proprietors returned and divided the land into fifteen hals irrespective of ancestral shares, five patties being formed, one of them being patti Bhola. On this the District Judge held that it was established that the original proprietors returned and on the authority of 1930 Lah 633 (1) found that the land did not lose its ancestral character when the original proprietors returned and re-occupied it. On this historical note, however, it cannot be legitimately inferred that it was the original proprietors who returned, and not their descendants. The finding of the District Judge on this question, therefore, is not, in our opinion, based on evidence but on conjecture, and we hold that it has not been established that the land is ancestral. We might add that the land at the first settlement was held by Arjan, who was three degrees removed from the common ancestor of the parties. This is sufficient to dispose of the appeal, but we shall also proceed to dispose of the question of custom.

According to question 87 of Mr. Dunnett's Customary Law prepared in 1911, all Hindu Jats said that to enable a father to make a gift of any part of his property to his daughters, he must obtain the consent of the heirs, but only

1. *Sadda Singh v. Lehna Singh*, 1930 Lah 633—121 I C 733.

collaterals related through the great-grand-father could object to such a gift. In the present case, the plaintiffs are related through the great-great-grand-father, that is, in the 5th degree instead of the 4th degree. They are not, therefore, entitled, according to this reply, to object to the gift.

A similar reply was given in Mr. Gordon Walker's Customary Law of the District published in 1885. The question number is the same, namely, 87. It is there stated that as to immovable property (or rather land), most tribes say that to enable the proprietor to make a gift of any part of it to the relations mentioned in the question, he must obtain the consent of the heirs—the lineal male descendants, or, in default of them the collaterals related through the great-grandfather.

The two Customary Laws of the District, therefore, are against the plaintiffs. But the District Judge has relied upon a *riwaj-i-am* prepared for pargana Ghungrana in Mr. Gordon Walker's settlement operations. This village is in that pargana. A pargana was in those days a sub-division of a *tahsil*. According to the reply to question 87 in it, the consent of all collaterals was said to be necessary in the case of such a gift. There is no other evidence of importance except that there is a judicial decision against the plaintiffs, but it was not in this locality though the land was situated in the same district. The District Judge has been impressed by the fact that married daughters have no right of succession, and he argues from this that collaterals being heirs, however distant, should logically have the right to contest a gift to married daughters. Custom is, however, not logical, and as the two Customary Laws of the district are against the plaintiffs and there is no instance in favour of the plaintiffs, we must hold that the plaintiffs have failed to establish that they have the right to challenge the gift as they are only related in the fifth and not the fourth degree.

For both the reasons given, we accept the appeal and dismiss the suit with costs throughout.

S.R./R.K.

Appeal allowed,

A. I. R. 1936 Lahore 109

AGHA HAIDAR, J.

Mt. Mahbub Begum—Plaintiff—Appellant.

v.

Sher Mohammad and another—Defendants—Respondents.

Second Appeal No. 1035 of 1935, Decided on 18th October 1935, from decree of Addl. Dist Judge, Lahore, D/- 22nd March 1935.

(a) Release—Admissibility—Property relinquished valued at more than Rs. 100—Deed unless properly stamped and registered is inadmissible in evidence.

Where a document is produced not for any collateral purpose but for the purpose of proving the actual transfer or relinquishment of certain rights, and the property which is the subject-matter of relinquishment is valued at more than Rs. 100 the document ought to be properly stamped and registered, otherwise it is inadmissible in evidence : 1919 P C 44, *Disting.*

[P 111 C 2]

(b) Easement—One party executing deed of relinquishment of certain rights over property—Parties not concerned with any right of easement that may accrue in future.

In a partition between G and N, N executed a document which allowed G to build his house in any way he liked. Many years later, successor of N claimed a right of easement against G. It was contended that the deed executed by N was a bar to such claim :

Held : that the document merely empowers G to build his house in any manner he thought fit. It certainly did not amount to a relinquishment of the right of easement which would accrue to N or his successors-in-title after the prescribed period of 20 years had expired. The parties were not dealing with hypothetical rights which were to materialise in future, if at all, and the document executed by N was no bar to a right acquired later.

[P 111 C 2]

Barkat Ali—for Appellant.

L. M. Datta—for Respondents.

Judgment.—This is a plaintiff's appeal which arises out of a suit for a permanent injunction asking the Court to restrain the defendants from obstructing the plaintiff's door A and the windows B and C in the southern wall of her house and also for a mandatory injunction directing the defendants to remove such structures as they have already put up and which have closed the plaintiff's door and windows. Both the Courts below have dismissed the plaintiff's claim.

Rahim Bakhsh was the common ancestor of the parties. He died some time in May 1906 leaving him surviving three sons, Sher Mohammad (defendant 1), Ghulam Mohammad (defendant 2) and

Nazar Mohammad, the husband of Mt. Mahbub Begum, plaintiff. On the death of Rahim Bakhsh a partition was effected between his three sons. As a result of the partition Nazar Mohammad got a certain share towards the north of the house in question. The rest of the house fell to the shares of his two brothers, Ghulam Mohammad and Sher Mohammad, in this way that Ghulam Mohammad received an open site to the south of the plaintiff's share and Sher Mohammad got the rest of the house. Nazar Mohammad died some time in 1921. The relations between Ghulam Mohammad, Sher Mohammad and Mt. Mahbub Begum, the widow of Nazar Mohammad, who had died childless, remained cordial for some time after the death of Nazar Mohammad and in fact on 20th January 1922 Sher Mohammad and Ghulam Mohammad combined in releasing their share under the Mahomedan law in the property of their deceased brother, Nazar Mohammad, in favour of Mt. Mahbub Begum. These relations somehow became strained afterwards and in 1927 a suit was brought by Mt. Hayat Bibi, the widow of Rahim Bakhsh, and the mother of Sher Mohammad, Ghulam Mohammad and Nazar Mohammad against Mt. Mahbub Begum in which Mt. Hayat Bibi claimed her share under the Mahomedan law in the property of her deceased husband Rahim Bakhsh. This suit was dismissed. This suit has no direct bearing upon the present controversy. I have mentioned it merely to show that the relations about this time between Mt. Mahbub Begum and the rest of the family were not friendly and the suit brought by Mt. Hayat Bibi was the outcome of the differences which arose between the parties.

In the northern wall of the portion of the house which fell to the share of the plaintiff, there are two windows and a door. Ghulam Mohammad and Sher Mohammad put up wooden planks on the open space which had been allotted to Ghulam Mohammad in the partition of 1907 with the result that the light and air which the plaintiff had been receiving through the door and the two windows were obstructed. The plaintiff then brought the present suit claiming a right of easement of light and air through the two windows and the door and asking for the injunction already mentioned. A

number of defences were raised, but substantially the plea was taken that the partition took place in 1919 between the parties and therefore the period of 20 years had not yet been completed, and therefore no prescriptive right of easement had been acquired by the plaintiff. It was also pleaded that the door and windows always remained closed and, therefore, the plaintiff never enjoyed any light and air through them. The right of privacy was also asserted and it was also said that the plaintiff had sufficient light and air in spite of the alleged obstruction. Both the Courts below held unanimously that there was a partition, as alleged by the plaintiff, in the year 1907, and that the door and windows did not remain closed as pleaded by the defendants, but had been in use, and light and air had been passing into the plaintiff's house through them. The trial Court, however, dismissed the plaintiff's suit on the finding that, although the passage of light and air was interfered with, the comfort of the house had not materially diminished and that the door and windows in the plaintiff's house interfered with the defendants' right of privacy. The plaintiff went up in appeal. The lower appellate Court has held that obstruction had been caused by the defendants recently and that, if it were to continue the house would be rendered uninhabitable. After recording these findings the lower appellate Court, however, dismissed the plaintiff's suit on the ground that, in view of the stipulations contained in Ex. D-1, which was accepted by Nazar Mohammed, the husband and predecessor-in-title of Mt. Mahbub Begum, Ghulam Mohammad was entitled to build a house in any way he liked and no one had any concern with it.

The plaintiff has come up to this Court in second appeal and the decision of the lower appellate Court being in favour of the plaintiff on the major questions of the obstructions being recent and the house of the plaintiff having been rendered unfit for habitancy on account of these obstructions, the only points which were pressed in argument by the counsel for the plaintiff-appellant were that Ex. D-1 was not admissible in evidence for the want of registration and that, on a proper interpretation of this document, the plea raised by the defendants on the strength of Ex. D-1 was not entertain-

able and the plaintiff was entitled to succeed. The deed of partition (Ex. D-1) is engrossed on a one rupee stamp paper and is not registered. The executant of this document is Nazar Mohammad only and it does not purport to have been executed by the other two brothers. Nazar Mohammad, however, acknowledges the shares which had been allotted to himself and his two brothers and refers to certain money compensation, etc. which had to be paid by some of the parties for the purpose of equalizing their shares. This part of the document was executed on 27th January 1907 and bears the signatures of Nazar Mohammad. The document is a very crude one on the face of it. A further writing appears on this very document which bears date 10th March 1907. After referring to the shares which had been allotted to Ghulam Mohammad in the house in question and to certain other matters, with which we are not concerned, the writing concludes with the words: "*Ghulam Mohammad jis tareh se chahe apna makan bana le ve. Is se kisi ka taalug nahin hoga*". (Ghulam Mohammad may build his house in any way he likes. No one will have any concern with it).

In the prolix and rambling written statement, which was filed in the trial Court by the defendants, there is a reference to the admissions made by Nazar Mohammad and reliance is placed upon them in order to meet the case set up by the plaintiff for an injunction. No issue however was framed and the Judge of the trial Court does not seem to have looked at this aspect of the case. The learned District Judge however for the first time referred to this document, and relying upon it decided the case against the plaintiff. Counsel for the respondents has admitted that the value of the property covered by this deed of relinquishment is more than Rs. 100. Mr. Barkat Ali, counsel for the appellant, has argued that the document was inadmissible in evidence for want of registration and that, in any event, the language of the document, as it stands, does not help the plaintiff-appellant. The learned Judge, with 43 Mad 244 (1) apparently in his mind, has tried to get over the difficulty as regards stamp and registration by observing that Ex. D-1 is admissible to

show that the plaintiff's husband gave up all his rights in the house, vacant space, passage etc., and also stipulated that Ghulam Mohammad could build the house in three-fourths of the sehn which fell to his share in any way he desired. Reliance is thus placed upon the addendum dated 10th March 1907, to the document in order to show that Nazar Mohammad had relinquished all his claim.

This line of reasoning does not appeal to me. In 43 Mad 244 (1) it was held that though a gift was invalid for want of registration and the recitals in certain petitions could not be used as evidence of gift, such recitals may be referred to as explaining the nature and character of possession of the alleged donee, the owner of the land. The ruling therefore does not help the defendants. In the present case reliance is not placed on the addendum, dated 10th March 1907 for any collateral purpose, but for the purpose of proving the actual transfer or relinquishment of certain rights on the part of Nazar Mohammad. In my opinion therefore, in view of the admission of the respondents' counsel that the property which was the subject-matter of relinquishment was valued at more than Rs. 100, the document ought to have been properly stamped and registered and, as it stands, it is inadmissible in evidence.

But assuming for the sake of argument that the document did not require the requisite fee of a deed of relinquishment and registration, the language of the document does not lend support to the defendants' contention. At that time the partition had very recently taken place. No right of easement had been acquired by anybody. Therefore the parties could not possibly have been thinking of any such right. It merely empowers Ghulam Mohammad to build his house in any manner he thought fit. It certainly did not amount to a relinquishment of the right of easement which would accrue to Nazar Mohammad or his successors-in-title after the prescribed period of twenty years had expired. The parties were not dealing with hypothetical rights which were to materialize in future, if at all. If certain rights of future easement were intended to be restricted or cancelled by the parties nothing would have been easier than to make it clear by a specific reference to them. The construction that the Court below has put on this docu-

1. Varada Pillai v. Jeevarathnammal, 1919 P O 44=58 I O 901=46 I A 285=48 Mad 244 (P O).

ment is, in my judgment, too far-fetched and is not borne out by the plain meaning of the text. I therefore allow the appeal, set aside the decree of the two Courts below and grant the plaintiff a mandatory injunction in the terms laid down at the conclusion of the judgment delivered by Tek Chand, J., in 13 Lah 806 (2) at p. (816), namely that the defendants are directed to so construct their building as to leave forty-five degrees of unobstructed light to enter through the door and the two windows on the ground floor in the plaintiff's house. Mr. Barkat Ali who himself cited this case in support of his contention has agreed to this form of the injunction.

Some cross-objections were filed by the respondents. They have not been pressed and are therefore dismissed. The plaintiff shall have her costs throughout.

B.D./R.K. *Order accordingly.*

2. Mt. Jas Kaur v. Mt. Bhag Devi, 1933 Lah 29 =140 I C 238=13 Lah 806

A. I. R. 1936 Lahore 112

JAI LAL AND SKEMP, JJ.

Pritam Singh—Defendant—Appellant.

v.

Sarjit Singh—Plaintiff—Respondent.

Second Appeal No. 1517 of 1931, Decided on 7th November 1934.

(a) Custom (Punjab)—Alienation of ancestral property to pay off mortgage effected to pay previous old creditors is for necessity.

An alienation of ancestral property effected to pay a mortgage effected to pay off a previous old creditor is one for necessity. [P 113 C 1]

(b) Custom (Punjab)—Alienation—Small sum of Rs. 50 raised to purchase cow held for necessity and no enquiry by alienee held needed.

Where a small sum of Rs. 50 was raised by mortgage for the purpose of purchasing a cow and the alienor was not in good health and required milk:

Held: that the sum raised was so small and the purpose for which it was acquired was so ordinary that no enquiry was required by the alienee and hence it was for necessity.

[P 113 C 1]

(c) Custom (Punjab)—Alienation for discharging decretal debt—Outsider alienee is not bound to make further enquiry, unless his suspicions are likely to be aroused or he has actual knowledge of bad faith of decretal transaction.

Where an alienee, who is an outsider, finds that the alienor's debt is a decretal debt, he need not make any further enquiry, and the reversioners will not be allowed to go behind the decree. This rule, is not applicable where it is clear that the alienee's suspicions should have been aroused by the surrounding circumstances,

or where it is proved that he actually had knowledge of the bad faith of the decretal transaction.

[P 113 C 2; P 114 C 1]

(d) Custom (Punjab)—Alienation—Suit filed by alienor dismissed with costs—Alienation to pay such costs is one for necessity.

Where a suit by the alienor is dismissed with costs, he is legally liable to pay the costs and as such an alienation to pay such costs is one for necessity.

[P 114 C 1]

(e) Custom (Punjab)—Alienation—Antecedent debts—Alienor man of loose character—Initial onus lies on alienee to show that debts are due—If he discharges this, onus shifts to opposite party to show that alienee made no proper enquiries—Enquiry should be with regard to existence of debt and also as to their nature.

If the alienor is a man of loose character, the initial onus lies on the outsider alienee to show that the debts were due, and when he has discharged that onus, the turn of the opposite parties then comes to show that the alienee made no proper enquiry or that if he made one, he must have learnt of the real nature of the debts. The enquiry which should be made by alienee should refer not only to the existence of the debts but include also an enquiry as to their nature if those who challenge the alienation can show that the result of the first enquiry should have raised doubts in the mind of an ordinarily prudent man as to the morality of reasonableness of the debts: 1920 Lah 279, *Poll.*

[P 114 C 1, 2]

(f) Custom (Punjab)—Alienation—Alienor merely keeping mistress but not guilty of reckless extravagance or wanton waste—If alienee pays off debts which are due to third parties, persons challenging alienation should prove that those debts are tainted with immorality.

Where the alienor is living with a mistress, and careless of his own and other people's money but is not guilty of reckless extravagance or wanton waste or trying to injure the estate out of spite, it is not enough for the person challenging the alienation in such a case to show that the alienor is generally a man of bad character. If the alienee pays off debts which are really due to third parties it is for such person to prove that those debts are in each case tainted with immorality.

[P 114 C 2]

Asa Ram for J. N. Aggarwal and J. N. Aggarwal—for Appellant.

Tek Chand—for Respondent.

Skemp, J.—One Sarjit Singh, a minor, sued through his mother for possession of land which had been alienated by his deceased uncle Nathu on the ground that the alienations were made without consideration and necessity. There were eight alienations in all and the Senior Subordinate Judge disposed of the suit as far as concerned four of the alienations on a finding that the land alienated was not ancestral. He found that three other alienations were for necessity and that

the last and most important in favour of Sodhi Pritam Singh was mainly for necessity. One-seventh of the purchase price was not for necessity, but he upheld this sale also on the ground that it was only a small fraction of the whole. He therefore dismissed the suit. On appeal the learned District Judge concurred with the findings as to the non-ancestral character of the land alienated in four cases. He also dismissed the appeal qua the other three minor alienations finding that they were for necessity. As to the alienation in favour of Pritam Singh he found that only two items of the consideration for Rs. 500 and Rs. 120 respectively were for consideration and granted the plaintiff a decree for possession of the land sold to Pritam Singh on payment of Rs. 620. Both parties lodged second appeals in this Court. The plaintiff sought an unqualified declaration that the eight alienations were void; Pritam Singh desires that his sale be upheld in toto.

The plaintiff's appeal is entirely devoid of force or merits. It was given up in respect of the four alienations of land held to be non-ancestral. As to the other three items the first is a mortgage for Rs. 610 effected in 1923 to pay off a previous old creditor whose bonds for debts reciting necessary purposes were taken in the year 1919 and 1920. These were old debts in favour of previous creditors and I agree with the learned District Judge that they must be held to be for necessity.

The next alienation impeached is a mortgage for Rs. 760 effected in 1927. Rs. 436 were utilised to pay off previous mortgages of 1922 and 1923 which had been effected in favour of outsiders. The balance of Rs. 288-3-0 was required to meet the claims of Jagirdars. Nathu was lambardar of his village and he had spent land revenue including the Jagir money due to these persons. It was clearly a necessity that he should pay them off otherwise he would have been liable to imprisonment. Item 3 is a mortgage of Rs. 50 to buy a cow in 1927. I agree with both the lower Courts, who held that the sum raised was so small and the purpose for which it was acquired was so ordinary that no enquiry was required especially as Nathu was not in good health and required milk. The plaintiff Sarjit Singh also attacked the two items found for necessity in the principal transaction.

1936 L/15 & 16

These are Rs. 500 for payment to the present plaintiff himself and Rs. 120 due on a bond for money raised for the present plaintiff's marriage. Both these items have been rightly held to be for necessity. The plaintiff's appeal is dismissed with costs. I turn now to the appeal of the vendee Pritam Singh. The consideration for the sale in his favour, which is dated 25th August 1927, consisted of the following items:

1. Rs. 600 left with the vendee for payment to Sarwan Singh, mortgagee on a mortgage of 1920.
2. „ 500 left with the vendee for payment to Sarjit Singh, plaintiff, nephew of Nathu deceased.
3. „ 820 left with the vendee for payment to Maghi.
4. „ 1,000 paid by vendee to Munshi Ram creditor on account of two bonds, dated 24th March 1925 and 18th February 1925.
5. „ 120 set off against a bond, dated 17th June 1926 executed by Nathu in favour of the vendee.
6. „ 460 to be received before Sub-Registrar for payment to creditors.
7. „ 200 left with the vendee for payment to Baggu, a decree-holder.

Rs. 3,700

I have already dealt with items 2 and 5. Pritam Singh's counsel gave up the appeal about item 6, concerning which there is only oral evidence. As to item 7, the learned District Judge wrote:

The last item is one of Rs. 157 paid to one Baggu, who held a decree for the costs of a suit brought against him by Nathu, which was dismissed. The general rule that ancestral land may be charged in order to discharge an outstanding decree must be read subject to the proviso that the decree was for a necessary or at least unobjectionable debt (see the explanation to para. 63 (e), of Rattigan's Digest). In this case it appears that Nathu brought a suit against Baggu for defamation which was dismissed. The costs which he was required to pay in consequence of having brought this suit can hardly be called a necessary or unobjectionable debt.

This view of the law is erroneous. Rattigan's Digest, para. 63 (e) lays down the discharge of outstanding decrees as a necessary purpose. The Explanation states:

Decrees obtained on razinamas are not prima facie proof that they were obtained for money advanced for family purposes. This must be read subject to the proviso that the decrees were for necessary or unobjectionable debts. Where an alienee, who is an outsider, finds that the alienor's debt is a decretal debt, he need not make any further enquiry, and the reversioners will not be allowed to go behind the decree. This rule is however not applicable where it is clear that the alienee's suspicions should have

been aroused by the surrounding circumstances, or where it is proved that he actually had knowledge of the bad faith of the decretal transaction.

This is a correct statement of the law. The suit, as documents on the record show, was actually brought by Nathu against Baggu for one thousand rupees as damages for breach of agreement. It was dismissed with costs in both Courts, the cost amounting to Rs. 157-8-0. Assuming that the District Judge made a finding of fact that it was a suit for defamation, by which finding we are bound, even so, the costs were not incurred by Nathu as an act of wanton waste or reckless extravagance or to injure the interests of the reversioners. He was legally liable to pay the costs or he might have been sent to prison or his land attached in execution of the decree. This item is for necessity to the extent of Rs. 157-8-0. As to the other three items the District Judge found that Nathu was a man of loose and extravagant character whose creditors should have been on guard in dealing with him. He based his finding on the following facts: that he was keeping a jogi woman, who was connected with his extravagance, that he misappropriated land revenue and Jagir money in his charge as lambardar and also that he effected alienations amounting to nearly Rs. 6,000 in a period of seven years. Sarjit Singh's counsel said that he was given to drink and drugs, but the learned District Judge has said nothing about this. (After dealing with the items of advances made to Ram Kishen, brother of his mistress, and Rs. 820 due to Maghi, mortgage, the judgment proceeded.) The item of a thousand rupees in favour of Munshi Ram consists of two bonds: D. 21 for Rs. 500, dated 24th March 1925, and the D. 22 for Rs. 200, dated 18th February 1925, together with interest. D. 21 is the bond for Rs. 500 already excluded; the other bond was in favour of a third party and, it should be allowed. The amount due on this bond together with interest comes to Rs. 286. The leading case on debts due to previous creditors by an alienor whose character has been attacked is 1 Lah 472 (1). If the alienor is a man of loose character,

has discharged that onus, the turn of the opposite party then comes to show that the alienee made no proper enquiry or that if he made one, he must have learnt of the real nature of the debts. (LeRossignol, J., p. 479).

The enquiry which should be made by the alienee should refer not only to the existence of the debts :

But include also an enquiry as to their nature if those who challenge the alienation can show that the result of the first enquiry should have raised doubts in the mind of an ordinarily prudent man as to the morality or reasonableness of the debts. (p. 480).

In the present case Nathu was living with a mistress, and careless of his own and other people's money. On the other hand, it has not been shown that he was guilty of reckless extravagance or wanton waste or was trying to injure the estate out of spite for his nephew. It is not enough for the plaintiff in such a case to show that the alienor is generally a man of bad character. If the alienee pays off debts which are really due to third parties it is for the plaintiff to prove that those debts were in each case tainted with immorality. I think the plaintiff has shown that the two advances of Rs. 500 to Ram Kishan were tainted with immorality, but he has not shown that any of the other previous debts were so tainted. That is the principle on which these cases ought to be decided. The net result is that I would find Rs. 1,863-8-0 out of the total consideration of Rs. 3,700 out of Sodhi Pritam Singh's sale to be for necessary purposes. I would modify the decree granted by the learned District Judge accordingly. The plaintiff is to get a decree in this Court that he is entitled to possession of the property alienated to Sodhi Pritam Singh on payment of Rs. 1,863-8-0. The parties are left to bear their own costs in this appeal.

Jai Lal, J.—I agree.

K.S.

Order accordingly.

A. I. R. 1936 Lahore 114

RANGI LAL, J.

Nanak Chand—Defendant—Appellant.
v.

Mian Mohammad Shahbaz Khan and others—Plaintiffs—Respondents.

Second Appeal No. 1147 of 1933, Decided on 8th June 1934, from decree of Senior Sub-Judge, Hoshiarpur, D/- 15th May 1933.

(a) Evidence — Recitals—Recital in document between third parties is altogether irrelevant.

1. *Jhandu v. Niamat Khan*, 1920 Lah 279=54 I C 842=1 Lah 472.

A document between strangers to the suit in which mention is made of one of the parties or their predecessors as holding the land in dispute lying on the boundaries of lands belonging to the executant of the document is not relevant to prove title to the land in dispute: 1925 Cal 1034; 1926 Cal 479 and 224 P L R 1913, *Foll.* [P 115 C 1, 2]

(b) Evidence—Relevancy — Omission to object to admission of irrelevant evidence does not make it relevant.

There is a distinction between the relevancy and admissibility of a document. Evidence which is not relevant under provisions of the Evidence Act cannot be made relevant because it is led without objection. If a document is inadmissible on account of a defect which could be cured by the person relying on it if an objection had been taken at the proper time, no objection as to its admissibility can be allowed at a later stage. But the omission to object to the admission of irrelevant evidence cannot possibly make it relevant: 19 All 76, *Rel. on.*

[P 115 C 2]

Achhru Ram—for Appellant.

Shuja-ud-Din—for Respondents.

Judgment.—The plaintiffs, who are the proprietors of the abadi of Mauza Urmur in the Hoshiarpur district, sued for possession of a house which was then occupied by one Nanak Chand, on the allegation that it had really reverted to them on the death of the last occupant Bhana without leaving any heirs. The defendant contended that Bhana never occupied the house. In the alternative, he relied on a will by Bhana in his favour. The lower appellate Court held that Bhana did occupy the house and that the execution of the will relied on by the defendant was not satisfactorily proved. On these findings, the plaintiffs' claim was decreed. The question of the competency of Bhana to make a will was not gone into. Nanak Chand has filed a further appeal to this Court. The finding that Bhana did occupy the house in suit is mainly based on a recital in a mortgage deed executed by him in favour of one Munshi in respect of a contiguous house showing the house in question to be the northern boundary thereof and to be the property of the mortgagor. It is well established that a recital in a document between third parties is altogether irrelevant. Bhana was admittedly dead at the time of the suit and his admission in the mortgage deed above could not be proved under S. 32, Evidence Act. In 86 I C 734 (1) it was held that a document between strangers to the suit in which

mention is made of one of the parties or their predecessors as holding the land in dispute lying on the boundaries of lands belonging to the executant of the document is not relevant to prove title to the land in dispute. The same view was taken in 91 I C 688 (2) and 224 P L R 1913 (3). The learned counsel for the respondents urged that the objection to the admissibility of the document not having been taken in the trial Court could not be taken at this stage. This argument overlooks the distinction between relevancy and admissibility. Evidence which is not relevant under the provisions of the Indian Evidence Act cannot be made relevant because it has been led without objection. If a document is inadmissible on account of a defect which could be cured by the person relying on it if an objection had been taken at the proper time, it is obvious that no objection as to its admissibility should be allowed at a later stage. The omission to object to the admission of irrelevant evidence cannot possibly make it relevant. In 19 All 76 (4), their Lordships of the Privy Council held that an admission by a party could not be used as evidence in the plaintiff's favour and that an erroneous omission to object to the admission of such testimony did not make it available as a ground of judgment. I am therefore of opinion that the finding of the lower appellate Court that Bhana occupied the house in suit is vitiated because it is mainly based on irrelevant evidence.

The finding in regard to the execution of the will is also vitiated by the failure of the lower appellate Court to consider that it was a registered document and that one of the plaintiff's own witnesses had deposed that Bhana admitted its execution at the time of registration. If the execution of the will is proved, it will be necessary to give a finding as to whether Bhana was competent to make the will or not. I, therefore, accept the appeal, set aside the decree of the lower appellate Court and remand the case to it for a fresh decision in the light of the above remarks. Costs to follow the event.

R.M./R.K.

Appeal allowed.

2. Abdul Karim v. Chale Ahmed, 1926 Cal 479 = 91 I O 688.
3. Mahidattarmal v. Mrs. Nicholson, (1913) 224 P L R 1913 = 19 I O 717.
4. A. B. Miller v. Madho Das, (1897) 19 All 76 = 23 I A 106 (P O).

1. Chooni Lal v. Nil Madhab, 1925 Cal 1034 = 88 I O 784 = 41 O L J 874.

A. I. R. 1936 Lahore 116

JAI LAL AND SALE, JJ.

Sundar Das—Defendant—Judgment-debtor—Appellant.

v.

Bishan Das and others—Respondents.

Misc. First Appeal No. 261 of 1935, Decided on 4th July 1935, from order of Senior Sub-Judge, Rawalpindi, D/- 6th October 1934.

(a) Civil P. C. (1908), S. 47 (3)—Sub-S. 3 is ancillary to sub-S. 1.

Sub-S. 3 of S. 47 is ancillary to sub-S. 1 and cannot be invoked unless the case is governed by sub-S. 1. [P 119 C 1]

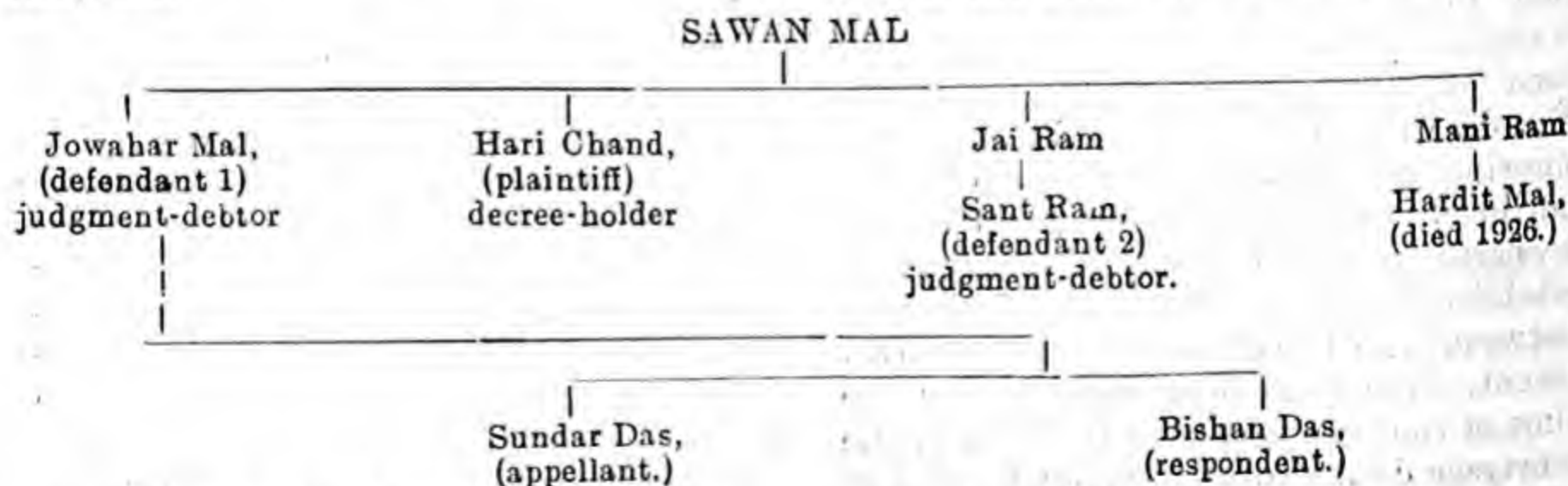
(b) Civil P. C. (1908), S. 47—'Parties to suit' is not restricted to parties on opposite sides.

The expression 'parties to the suit' contemplated by sub-S. 1 of S. 47 should not be restricted to parties ranged against each other on opposite sides: 1927 Rang 45, Rel. on. [P 119 C 1]

(c) Civil P. C. (1908), S. 47—Applicability—Dispute between representatives of one party—Other parties having no interest—Decree satisfied—S. 47 is not applicable.

Section 47 is not applicable to a dispute confined to the representatives of one party to an application in execution, when the other parties have no further interest, and the decree-holder has obtained satisfaction of his decree: *Case law discussed*. [P 120 C 1]*S. N. Bali*—for Appellant.*Kanwar Sain*—for Respondents.

Sale, J.—This first appeal arises out of a dispute between the two brothers Sundar Das and Bishan Das in their capacity as representatives of their deceased father Jowahar Mal, a judgment-debtor, against whom Hari Chand had applied as decree-holder to execute a decree in a suit for possession by partition of certain property. The following pedigree table will illustrate the material facts of this case:



On 9th July 1932 Hari Chand sued for possession by partition of certain property left by Hardit Mal deceased impleading as defendants Jowahar Mal and Sant Ram. On 19th October 1932, Sundar

Das and Bishan Das, the sons of Jowahar Mal, purporting to act as agents of Jowahar Mal admitted the claim, but Sant Ram, the other defendant, objected to this plea on the ground that Jowahar Mal was of unsound mind. Thereupon Hari Chand, the plaintiff, applied for the appointment of a guardian ad litem for Jowahar Mal. Sundar Das, son of Jowahar mal, was at first appointed, but was removed; and later the other son Bishan Das was appointed by the Court on 20th November 1932 guardian ad litem for Jowahar Mal. On 8th January 1934 a preliminary decree for partition was passed on a compromise between the parties, followed by a final decree on 26th February 1934. A condition of the final decree was that Hari Chand was allowed possession of certain property subject to his paying Rs. 2,333-5-4 to Jowahar Mal, defendant; and on 1st March 1934 Hari Chand deposited this money in Court for payment to Jowahar Mal. On 15th March 1934, Jowahar Mal died. On 23rd March 1934 Hari Chand applied in execution to bring on the record the names of Sundar Das and Bishan Das as the legal representatives of Jowahar Mal. Notice was then issued by the Court, in reply to which it became apparent that there was a controversy between Sundar Das and Bishan Das not as to the rights of Hari Chand in the matter of the execution of the decree but as to their respective shares of the money deposited by Hari Chand in the name of Jowahar Mal, their deceased father. No order was passed by the lower Court on the question of bringing the names of Sundar Das and Bishan Das on the record as the legal representatives of the deceased Jowahar Mal. But

on 1st June 1934 the Court ordered that Hari Chand be allowed the amount of costs due to him out of the amount deposited in Court, confirmed Hari Chand in possession and ordered the execution appli-

cation to be consigned to the record room as fully satisfied. It is true that in this order the Senior Subordinate Judge mentions that Bishun Das and Sundar Das "have been brought upon the record as legal representatives of Jowahar Mal, deceased," but there is no trace in the record of any such order having been passed and before us Counsel agree that this observation was made under a misconception, the real facts being that no order had been actually passed bringing on record the names of any persons as legal representatives of Jowahar Mal.

By the same order the Senior Subordinate Judge, referring to the dispute between Sundar Das and Bishun Das, sons of Jowahar Mal, regarding the money deposited in Court for Jowahar Mal, held that it was not necessary for him in the present execution application to give any decision on their respective claims. He, therefore, refused to decide the question leaving the disputants to pursue their remedy by separate suit. No appeal was filed against this order, but later, on an application by Bishun Das, the Senior Subordinate Judge passed a supplementary order dated 6th October 1934, in the following terms :

Bishun Das and Sundar Das, sons of Jowahar Mal, are present. Both of them are equally entitled to the money deposited. Hence, one-half of the amount deposited be given to the petitioner.

Both brothers, it appears, withdrew the half share to which they became entitled by this order. Sundar Das then preferred an appeal to this Court objecting to the decision of the lower Court that Bishun Das was entitled to a half share of the money deposited on the ground that it was passed summarily without taking into consideration the objections made by Sundar Das. The case first came before a Single Judge, before whom a preliminary objection was taken on behalf of Bishun Das that the order passed by the lower Court was not appealable because it did not fall within the purview of S. 47, Civil P. C. The point urged before the Single Bench on behalf of the respondent was that the dispute between Sundar Das and Bishun Das in their capacity as representatives of Jowahar Mal, judgment-debtor, was not a question arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree. The learned Judge noticed a conflict of

authorities on the question as to the applicability of S. 47, Civil P. C., in these circumstances. He was inclined to hold the view that S. 47, Civil P. C., does apply and an appeal is therefore competent, but in view of the importance of the question involved, he recommended that the case should be referred for decision to a Division Bench.

Mr. S. N. Bali on behalf of the appellant has argued before us two alternative positions. He contends in the first place that the case is governed by Cl. (3), S. 47, Civil P. C., and that an appeal is, therefore competent. He complains that the Senior Subordinate Judge in summarily awarding a half share of the money in deposit to Bishun Das, has ignored the objections of Sundar Das and he pleads that the case should be returned to the lower Court for further investigation under S. 47, Civil P. C. In the alternative he urges that if S. 47, Civil P. C., be held to have no application and his appeal be, therefore held incompetent, it should be entertained as an application in revision against the order of the Senior Subordinate Judge awarding a half share to Bishun Das. He contends that this order was without jurisdiction, because the Senior Subordinate Judge had finally disposed of the case by his order dated 1st June 1934, in which he declined to adjudicate on the rival claims but left the parties to pursue their remedy by separate suit. Mr. Bali asks us in revision to set aside the second order of 6th October 1934, and restore the original order of 1st June 1934. Mr. Kanwar Sain on behalf of the respondent Bishun Das urges that S. 47, Civil P. C., has no application because a dispute between the legal representatives of a deceased judgment-debtor does not amount to a question between the parties to the suit and relating to the execution, discharge or satisfaction of the decree. He points out that the decree-holder having deposited in Court the money for which he was liable, and in consequence having been allowed to retain possession of the property awarded to him in the partition decree, had no further interest in the matter of execution, discharge or satisfaction of the decree. The remaining contest between Sundar Das and Bishun Das as the sons of Jowahar Mal, judgment-debtor, is not, he urges, a question arising between the parties to the suit and cannot,

therefore be determined under S. 47, Civil P. C.

The order passed by the lower Court, he contends, is a mere administrative order which is not appealable.

There is nothing on the record to show the precise provision of the Civil Procedure Code, under which the lower Court purported to act in passing the material orders in this case. All that appears is that on 1st June 1934, on an application made by Hari Chand for execution of his decree, the Senior Subordinate Judge passed an order in full satisfaction of the decree, as a result of which the execution application was filed as satisfied. The decree-holder Hari Chand has accepted this order and it is clear that so far as the decree-holder is concerned, no question is outstanding between the parties to the suit relating to the execution, discharge or satisfaction of his decree. The dispute outstanding is between the so-called representatives of the deceased judgment-debtor, for whom the decree-holder had deposited certain money in consideration of retaining possession of part of the disputed property. In passing this order, the lower Court refused to go into the dispute between the so-called representatives, for reasons not clearly specified, but presumably because it considered that it had no jurisdiction to do so. For reasons which will appear later in this judgment, I am of opinion that the lower Court rightly refused to adjudicate on this dispute, because, in fact, it had no jurisdiction, since S. 47, Civil P. C., is not applicable. The only criticism that can be directed to the lower Court's order of 1st June 1934, is the apparent incorrect assumption that Bishan Das and Sundar Das had been brought on the record as legal representatives of Jowahar Mal, deceased. No such actual order seems to have been passed: but it is to be noted that Bishan Das and Sundar Das were both present in Court on 1st June, and according to the Senior Subordinate Judge's order which in this particular has not been questioned, expressed as sons of Jowahar Mal, no objection to Hari Chand, the decree-holder, being granted what was claimed by him.

No doubt at that stage, the question for decision by the Senior Subordinate Judge, being an application by the decree-holder for the execution of his decree, S. 47, Civil P. C., did apply, and

under Cl. (3), S. 47, the Court was bound to appoint a representative of the deceased judgment-debtor. A notice had issued for this purpose and the order passed on the decree-holder's application assumed that such a representative had been appointed in the presence of Bishan Das and Sundar Das who accepted the status of joint representatives. It is clear therefore that in effect the requirements of Cl. (3), S. 47, had been observed. But on Hari Chand's application for execution being thereafter consigned to the record room as fully satisfied, S. 47 ceased to have any further application, since there was no further question outstanding between the parties relating to the execution, discharge or satisfaction of Hari Chand's decree. Hari Chand and the surviving judgment-debtor had no further interest in the decree. It was three months later, on 9th July 1934, that Bishan Das applied for a half-share of the money deposited in the name of his deceased father and secured the order of the Court dated 6th October 1934, to which Sundar Das has now taken exception.

In support of his contention, that the order of the Senior Subordinate Judge is appealable, Mr. S. N. Bali cited a Privy Council authority, 19 Cal 683 (1). This authority does not however support his contention. The relevant question then before their Lordships was whether in a case admittedly relating to the execution, discharge or satisfaction of the decree, an auction-purchaser could be deemed to be a party to the suit for purposes of S. 244 (now S. 47), Civil P. C. Their Lordships expressed the view that the provisions of this section should not be narrowly construed and the mere fact that an auction-purchaser was not strictly a party to the suit, but was nevertheless interested in the result, should not be held to be a bar to the application of the section. Clearly, this is not an authority for the application of S. 47, Civil P. C., to the facts of the present case however wide a construction may be placed on the provisions of the section. Other authorities have been cited in support of the view that the Court is bound to decide under S. 47, Civil P. C., the question of who are the representatives of the par-

1. *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) 19 Cal 683=19 I A 166=6 Sar 209 (PC).

ties to the suit. This contention is self-evident from the provisions of Cl. (3), S. 47, Civil P. C., but the wording of Cl. (3) which limits its application "for the purposes of this section," makes it clear that the Court is only to go into the question of representation for the purposes of deciding a question arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree. In other words, sub-S. 3, S. 47 is ancillary to sub-S. 1 and cannot be invoked unless the case is governed by sub-S. 1.

It was also argued by Mr. Bali that the provisions of S. 47, Civil P. C., should not be confined to the case of parties who are arrayed against each other. In view of the wide construction which according to their Lordships of the Privy Council, should be placed on the provisions of S. 47, I would accept this argument to the extent of holding that the expression "parties to the suit" contemplated by sub-S. 1, S. 47, Civil P. C., should not be restricted to parties ranged against each other on opposite sides. For example, if A sues B and C for possession by partition and in execution of a decree obtained by A against B and C, a question relating to the execution, discharge or satisfaction of the decree arises as between B and C. I would hold that S. 47 is applicable and the question must be determined by the Court executing the decree. This view is in accordance with 4 Rang 418 (2) which related to a case between parties ranged on the same side—an authority with which the learned referring Judge expressed himself in agreement.

But this finding does not help Mr. Bali's client in the circumstances of the present case. Here we are not dealing with a dispute between two parties ranged on the same side, but between two persons, both claiming to derive status from one party deceased. Moreover, since the decree is *qua* the decree-holders and surviving judgment-debtor fully satisfied, no question is outstanding relating to the execution, discharge or satisfaction of the decree. Such a case cannot, in my opinion, fall within the purview of S. 47, Civil P. C., without unduly distorting the plain meaning of that section. The real issue now under consideration has

been fully discussed in 57 Bom 641 (3), a Letters Patent Appeal of the Bombay High Court decided in 1933. This was an appeal arising out of execution of a mortgage decree in which there was a contest between the rival representatives of the deceased mortgagor to recover a certain sum of money to which the mortgagor was entitled under the terms of the decree.

In this case, the Subordinate Judge, during the pendency of the execution proceedings, decided as between the rival representatives purporting to act under the provisions of O. 21, R. 5, Civil P. C. It was common ground during the course of the appellate proceedings (as indeed is conceded before us), that O. 23 would have no application to such a case because that order is not applicable to execution proceedings. The Single Judge before whom the appeal first came took the view that the section applicable was Cl. (3), S. 47, Civil P. C., and that the order of the lower Court was therefore appealable. It was however held by the Division Bench in Letters Patent Appeal that sub-S. 3, S. 47, Civil P. C., must be read as ancillary to sub-S. 1 and only comes into operation where there is a question arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree and that it does not apply to a case in which the question is between the rival representatives of one party, the other party having throughout disclaimed any interest in the question.

The case against the applicability of S. 47 is even stronger in the circumstances of the present case, because the contest between the rival representatives of the deceased judgment-debtor is, as is shown by their conduct during execution proceedings, and by the application of Bishan Das dated 9th July 1934, made after Hari Chand's execution application had been dismissed fully satisfied, entirely separate from any question connected with the execution, discharge or satisfaction of Hari Chand's decree. It is true that the amount deposited in the name of Jowahar Mal was still lying in the Court, but the contest as to the title to withdraw this decree lay solely between the two sons of Jowahar Mal no other parties to

2. Abdul Sattar v. Ohi Doe Rhi, 1927 Rang 45=99 I O 418=4 Rang 418.

3. Venubai Guracharya v. Damodar Vyasrao, 1938 Bom 396=146 I O 396=57 Bom 641=36 Bom L R 609.

the suit having any further interest in the matter. It was also held in 1932 Pat 329 (4), a Letters Patent Appeal, that a dispute between two persons who are the legal representatives of the same party is not a question between parties for the purposes of S. 47, Civil P. C. The view was expressed that such a dispute should be settled by a regular suit and not by way of application for execution. These decisions have been followed in a Single Bench decision of this Court—1935 Lah 384 (5)—in which reliance was placed amongst others on 57 Bom 641 (3), the authority already cited. The weight of authority therefore supports the view taken in this judgment that S. 47, Civil P. C., is not applicable to a dispute confined to the representatives of one party to an application in execution, when the other parties have no further interest and the decree-holder has obtained satisfaction of his decree. I would hold therefore that the order of the lower Court is not appealable and that this appeal must be dismissed as incompetent.

The alternative position taken by Mr. Bali on behalf of his client is that his appeal should be treated as a revision and that in exercise of our revisional jurisdiction, we should vacate the last order passed by the Senior Subordinate Judge dated 6th October 1934, holding that the two brothers are equally entitled to the money deposited on the ground that it was passed without jurisdiction, the matter having been concluded by his previous order of 1st June 1934. While expressing the view that the Senior Subordinate Judge would have been better advised to have adhered to his order of 1st June and left the parties to pursue their remedy by separate suit, I am of opinion that no such injustice has been occasioned by the subsequent order of 6th October 1934, as would justify our interference on the revision side. Although Sundar Das has now challenged this order, it is to be noted that he has withdrawn the half share of the money to which the lower Court has held him entitled. The position therefore is that both brothers have taken their half share of the money deposited in the name of their deceased father; and since Bishan

Das did, for eighteen months, from 20th November 1932, until 26th February 1934, when the final decree was passed, act as the guardian ad litem of his father, and must therefore have incurred considerable expense in conducting this litigation, I see no reason to compel him to restore in revision the half share to which his claim has been summarily upheld by the lower Court merely because the other brother, Sundar Das, has questioned his title. This summary decision will not bar a separate suit. I would therefore dismiss the appeal with costs and I would decline to interfere in revision.

Jai Lal, J.—I agree.

S.R./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 120

COLDSTREAM, J.

Labhu Ram—Plaintiff—Appellant.

v.

Bansi Dhar and others — Defendants and another—Plaintiff—Respondents.

Second Appeal No. 1700 of 1934, Decided on 20th March 1935, from decree of Addl. Dist. Judge, Sialkot, D/- 18th July 1934.

(a) Limitation Act (1908), S. 12 (2)—Application for copies made direct to copying department—Copying Department is not private agent of applicant—Delay by it in giving copy cannot be attributed to applicant.

Where an application for copies of a judgment and decree is made direct to an official of copying department whose duty is to make and deliver copies and not to make a further application to some official authority on the applicant's behalf, the copying department cannot be regarded as a private agent of the applicant and the delay made by it in supplying the copy cannot be attributed to the applicant: 9 I C 381, and 35 P L R 713, *Disting.* [P 122 C 1]

(b) Limitation Act (1908), S. 12 (2)—'Time requisite'—No negligence or want of bona fides on part of applicant or his counsel—Delay in giving copies due to negligence of copying department—Period noted on application is to be regarded as 'time requisite.'

When there has been no mistake of counsel, no negligence, nor inaction, nor want of bona fides imputable to the applicant applying for the copies of a judgment and decree, but the delay in giving copies is due to the slipshod and negligent procedure of the copying department, the time which the department itself notes as having elapsed between the application and the completion of the copy is to be regarded as the "time requisite" within the meaning of S. 12 (2). The applicant is justified in taking advantage of the whole period between the date officially recorded on the certified copy as the date of the application and the date there recorded as that

4. Muhammad Abdul Matin v. Bibi Hamidan, 1932 Pat 329=140 I C 97=13 P L T 557

5. Chanan Shah v. Sardar Khan, 1935 Lah 384=157 I C 73=37 P L R 145.

on which the copy was completed: 1922 P C 352 and 1928 P C 103, Ref. [P 122 C 1, 2]

M. L. Puri—for Appellant.

Nanak Chand—for Respondents.

Judgment.—This appeal is against a judgment of the Additional District Judge, Sialkot, dismissing the appellant's first appeal on the ground that it was barred by limitation and the only point for determination is whether the decision on the point of limitation was proper. The appellant sued the respondents in the Court of the Subordinate Judge, Narowal, for possession of certain house property. His suit was dismissed on 23rd March 1933. On 29th March, he presented an application to the copying department at Sialkot for copies of the judgment and decree. What happened after this is shown by the certified copy of the orders and actions recorded on the application. The application was not rejected but entertained although no fee was paid at the time of the application. No direction was given as to the time when the fee was to be paid nor was the applicant told when to appear to take the copies. The 'Moharrir' of the Sialkot Kacheri reported to the copying agent that the file had not been consigned to the record room. On 10th April, the copyist noted that the appellant should deposit Rs. 20, and notice was sent to him to deposit the money, otherwise the application would be consigned to the record room.

The appellant deposited the money on the next day. Again he was not told when the copies would be ready. On 12th April, the copyist noted that the copying charge would be Rs. 34-2-0, and the copying agent ordered that the applicant should be awaited up to 19th April. On 18th April, the additional amount of Rs. 14-2-0 was deposited, and an order was passed that a copy be prepared ('nakal taiar howe'). On the next day, 19th April, the appellant took his copy which had been certified correct on the 18th by the Clerk of the Court. The endorsement on the copy given recorded that the application for the copy had been made on 29th March, and that the copy had been completed on 18th April. The appellant presented his appeal on 8th May 1933, that is to say, 16 days after the period of limitation for the appeal had expired. A note on the memorandum stated that the appeal was

within time after deducting the time spent in procuring copies (i. e. from 29th March to 18th April) and holidays (29th April to 7th May). The learned Additional District Judge based his decision that the appeal was barred on 9 I C 381 (1) and 35 P L R 713 (2), holding that the copying department is the agent of the applicant and that:

If the copying agent is at fault in delaying his demand for the deposit, the Court cannot excuse the delay.

It is contended by appellant's counsel that these rulings have no application where an application is made direct to the official department whose duty is to make and deliver copies and not to make a further application to some official authority, that the dates noted on the copy delivered are themselves sufficient proof of the time requisite to obtain the copies, that the record of orders and action taken on the application prove that the appellant was not negligent but made his deposits when asked to make them, and that the appellant is entitled by statute to add the period from 29th March to 18th April, to the time allowed for the appeal and that therefore the appeal was presented within time. Prima facie, an appellant is justified in taking advantage of the whole period between the date officially recorded on the certified copy as the date of application and the date there recorded as that on which the copy was completed. But it is argued for the respondents that these dates are not relevant, and it was for the appellant to account for every day's delay beyond the limitation period. Respondent's Counsel draws attention to the note on the copy that the cause of delay in preparing the copy was "Full deposit made on 18th April 1934" and contends that as it was due to the delay in making the deposit that the copy was not ready until twenty-one days after the date of the application, the appeal was rightly held to be barred by limitation. He has referred to a very large number of rulings, including those cited in the judgment of the learned Additional District Judge, which relate to cases where appellant's delays were held to be inexcusable under the provisions of S. 5, Limitation Act.

The Division Bench judgment in 9 I C 381 (1), on which Dalip Singh, J., based

1. *Ashiq Hussain v. Ali Bakhsh*, (1911) 9 I C 381.

2. *Mehr Ali Beg v. Sarwan*, (1984) 35 P L R 713

This ruling in 1928 Lah 16 (3), proceeded on the principles that when an applicant requests a copying agency to procure a copy for him from a Court the copying agency must be regarded as the applicant's private agent whose delay will not excuse his principal. In that case the Copying Agent, Delhi, to whom the application had been made was not shown to be an officer of the copying department. It was also found that the appellants had been guilty themselves of gross negligence; they had not applied for copy of the judgment appealed against until two and a half months after the judgment had been delivered. It is obvious that that ruling is not upon facts similar to those of the present case where the application was made personally (this is not disputed) to the Copying Department, Sialkot, and accepted by that department as an application to itself sufficient for further action by itself to be taken. What were the rules followed in Sialkot at the time for the acceptance of copies and payments of fees is not clear, but it is evident from the endorsement on the application that no request was made for any deposit of fee until 10th April 1933, after the record had been requisitioned from Narowal and the amount of fee payable had been ascertained. Here there was no negligence on the part of the applicant who deposited the amount he was asked to deposit on the next day. Nor was he told when the copy would be ready or that the deposit was insufficient.

The copy was apparently not completed until the 18th (when the order was that it should be completed). It also appears that time was allowed to the appellant up to 19th April, to deposit the additional amount necessary. But it is not shown that the appellant was informed of this. The deposit was made a day before this period expired. The copying department was therefore wholly responsible for the delay in this case. How the department, which was not paid by the applicant, but (and this is not denied before me) by Government and was not asked to make any further application on the applicant's behalf but itself to make and supply a copy can be regarded as a private agent of the applicant is difficult to understand. It is argued for the respondent that the appli-

cant must be presumed to have known the departmental instructions given in Ch. 14-B, Vol. I, (p. 5) of the High Court Rules and Orders, which are that when the copying fees are not paid at the time of the application, the date of the application must be considered to be that on which the fees were filed. My attention has also been drawn to the departmental instructions issued by this Court and printed at p. 7, Ch. 17-C, Vol. 4, of the Rules and Orders. But it is clear that these instructions were not followed at the time in Sialkot, and no regard was paid to the orders in Part C, Ch. 17-C in Vol. 4.

None of the judgments relied upon by the respondents' counsel deals with a case on all fours with the present one. I do not think it necessary to refer to any except the two Privy Council judgments 49 Cal 999 (4) and 1928 P C 103 (5). These certainly lay it down that time which need not have elapsed if the appellant had taken reasonable proper steps to obtain a copy of the decree or order cannot be regarded as 'requisite time' within the meaning of sub-S. (2) of S. 12, Limitation Act, and that requisite time means time 'properly required.' They do not however lay down the proposition that when there has been no mistake of counsel, no negligence nor inaction nor want of bona fides imputable to the applicant but the delay in giving a copy is due to the slipshod and negligent procedure of the copying department, the time which the department itself notes as having elapsed between the application and the completion of the copy is not to be regarded as 'time requisite.' Allowing for this period in the present case I find the appeal to the District Judge to have been presented within time. I accept this appeal, set aside the lower appellate Court's order and remand the case to the District Judge for decision of the appeal before him upon its merits. Stamp on the appeal to be refunded. Costs to abide the event.

R.M./R.K.

Appeal accepted.

4. Pramatha Nath Roy v. Lee, 1922 P C 352=68 I C 900=49 Cal 999=49 I A 307 (P C).
5. Jijibhoy N. Surty v. T. S. Chettiar, 1928 P C 103=109 I C 1=6 Rang 302=55 I A 161 (P C).

* A. I. R. 1936 Lahore 123

BACKET, J.

(Firm) Surjan Das-Gujjar Mal —
Plaintiff—Petitioner.

v.

(Firm) Dawarka Das-Raghbar Dayal
—Defendant—Opposite Party.

Civil Revn. No. 276 of 1935, Decided
on 17th July 1935, from decree of Senior
Sub-Judge, Ludhiana, D/- 24th January
1933.

(a) Practice—Procedure—Record of Court
not of Small Causes and in headquarters —
Application for copy should be to district
copying agent.

Where a copy required is that of the record
of a Court situated at the headquarters and
which is not a Small Cause Court the proper
person to whom the application for copy should
be addressed is the district copying agent.

[P 123 C 2]

*(b) Limitation—Copy of judgment applied
for—No deposit made with application—No
demand by copying department made there-
for—Preparation of copies not held up for
want of deposit — Copying charges paid on
date of delivery—Applicant held entitled to
deduct whole time for copies.

An application for a certified copy of a judg-
ment was not accompanied by the deposit of a
fixed sum which should ordinarily accompany
the application. No demand for deposit was
made by the copying department nor was the
applicant given any warning therefor as required
by rules and the application was accepted as
valid. Preparation of copies was not in any
way held up for want of the deposit. The copy-
ing charges were paid by the applicant on the
date of delivery of the copy :

Held: that the applicant was entitled to
deduct the whole time required for obtaining
copy of judgment. [P 123 C 2; P 124 C 1]

Yashpal Gandhi for Faqir Chand—for
Petitioner.

Faqir Chand Mital — for Opposite
Party.

Order. — The plaintiff's suit was dis-
missed by the trial Court on 31st August
1934. He applied for copies to the Dis-
trict Copying Agency on 3rd September
1934, the trial Court being one situated
at the headquarters of the district. The
application was accepted, the records
were at once summoned, an estimate of
the cost was prepared and the full copy-
ing fee was paid on 6th September 1934.
The copies were prepared and were ready
for delivery on 6th September 1934, and
the appeal was eventually filed in the
Court of the Senior Subordinate Judge on
2nd October 1934, the thirty-second day
from the passing of the decree. The appel-
late Court allowed only one day to be
deducted as the time requisite for obtain-

ing copies and rejected the appeal, hold-
ing that the memorandum of appeal had
not been presented within the time pres-
cribed by law.

In refusing to hear the appeal, the
learned Subordinate Judge has followed a
Single Bench decision of this Court to
the effect that the Copying Agent cannot
be regarded as the agent of the person
who is applying for copies for the purpose
of sending for the records and estimating
the cost of preparing the copies; but this
decision, so far as it relates to the prepa-
ration of copies of the records of the
Courts of Subordinate Judges, has since
been overruled and this principle applies
only to the preparation of copies of the
records of District Courts. In such a case
the District Copying Agent is not the
proper person to whom to apply for
copies, unless he has been specially ap-
pointed for this purpose. When the
records of other Subordinate Courts have
been obtained however the District Copy-
ing Agent is usually (though not always)
the proper person to whom an application
for copies must be addressed under the
rules. In the present instance, the appli-
cation was properly made to the District
Copying Agent, the trial Court being
situated at the headquarters and not
being a Court of Small Causes.

A further objection is raised that no
payment accompanied, although a fixed
sum should ordinarily accompany, the
application for copies. Had the failure to
make this deposit resulted in any delay,
the plaintiff might not be able to claim a
deduction of the additional period caused
by his negligence, though it is to be
observed that he was given no warning
by the copying department, as the rules
require. But, as already mentioned, his
application was accepted as valid by the
department concerned, and it does not
appear that the preparation of copies was
in any way held up for want of a deposit,
so that the time which elapsed was
exactly the same time as that would have
elapsed if the application had been ac-
companied by an advance. The facts of
the present case are similar to those of
37 P L R 510 (1) in which the appellant
was allowed to deduct the full time spent
in obtaining copies, no fee having been
demanded from him at the time of the
presentation of his application, although

1. Labhu Ram v. Banshi Dhar, 1936 Lah 120 =
158 I C 736=37 P L R 510.

the rules require that an application should be returned when it is not accompanied by a deposit. With that decision I respectfully agree. The appellant only required one more day's grace to bring his appeal within time, and it is clear that at least one day was required to send for the records and prepare an estimate of the full cost, before the work of preparing copies could be taken in hand. For all these reasons I am of opinion that the appeal was presented to the Senior Subordinate Judge within the time prescribed by law.

The appellant has a statutory right to deduct the time requisite for obtaining the copies of the decree and judgment, and as the learned Senior Subordinate Judge has wrongly refused to hear the appeal on the ground that the memorandum of appeal was not presented before him in time, I accept this petition and direct that the appeal should not be admitted to hearing for decision on the merits.

S.R./R.K.

*Revision allowed.***A. I. R. 1936 Lahore 124**

JAI LAL AND SALE, JJ.

Sm. Shakuntla Devi — Plaintiff—Appellant.

v.

Kaushalya Devi and others—Defendants—Respondents.

First Appeal No. 1804 of 1934, Decided on 5th July 1935, from decree of Sub-Judge, 1st Class, Lahore, D/- 26th June 1934.

(a) **Hindu Law of Inheritance (Amendment) Act (2 of 1929)—Application of**—It applies to case of person dying before it came into force but having widow alive who inherits him at its enforcement.

The Hindu Law of Inheritance (Amendment) Act 2 of 1929 applies to the case of a person who dies before it came into force, if his widow, who inherits his estate, is alive at the time of its enforcement: 1932 *Lah* 361 and 1934 *Pat* 324, *Foll.*; 1934 *Mad* 138 and 1933 *Lah* 777, *Disting.*; 1933 *All* 152, *Applied.* [P 125 C 2]

(b) **Hindu Law of Inheritance (Amendment) Act (2 of 1929)—Preamble**—"Dying intestate" does not refer to time of death of person—It is mere description of status of deceased—It is intended to signify that law is to be modified as to intestate and not testamentary succession.

The expression "dying intestate in the preamble of the Hindu Law Amendment Act (2 of 1929), has no reference and is not intended to have any reference, to the time of the death of the Hindu male; it is a mere description of the status of the deceased. It is used to signify

that the law is intended to be modified in respect of the estates only of those Hindu males who have died or may die intestate. The question must therefore be decided with reference to the operative parts of the Act and the principles of the Hindu Law. [P 126 C 2]

(c) **Interpretation of Statutes—Retrospective effect.**

The cardinal rule relating to the interpretation of statutes is that unless expressly provided therein, a statute cannot be made to have retrospective effect. [P 127 C 1]

(d) **Hindu Law—Succession — Widow—Inheritance is never in abeyance—Reversioners have no vested interest when widow is alive—Succession opens at death of widow but estate goes not to her but to her husband's next heir—No question of retrospective effect of Hindu Law of Inheritance Amendment Act comes in if widow dies after Act even if husband had died before.**

Inheritance is never in abeyance and reversionary heirs have no vested interest in the estate because the husband's life is assumed to continue in the person of the widow, and therefore the succession opens at the date of the death of the widow, and also that on the death of the widow the estate goes to the next heir of the husband and not of the widow. This is the rule of the Hindu law with regard to the nature of the estate inherited by a widow in the property of her husband. The determination of the next heir of the deceased husband of the widow takes place on the death of the widow. It is therefore obvious that there is no question of retrospective application of the Act if the widow dies after the Act comes into force even if the husband had died before the Act: 1921 *Lah* 85; 1916 *P C* 117 and 5 *Cal* 776 (*P C*), *Rel. on.* [P 127 C 2; P 128 C 1]

(e) **Hindu Law—Reversioner — Right of—Reversioner not inheriting estate of intestate male due to existence of widow—Reversioner dying before widow—Estate goes to heirs of intestate person and not to heirs of reversioner.**

Where a person, who would immediately have inherited the estate of an intestate Hindu male, but has not done so owing to the existence of a widow, dies before the widow, the estate goes to the next heirs of the Hindu male and not to the heirs of such person. [P 128 C 1]

Achhru Ram and *Indar Deo*—for Appellant.

Badri Das, *Tirath Ram* and *Jagan Nath Agarwal*—for Respondents.

Jai Lal, J.—The pedigree of the parties is printed at p. 39 of the paper book. In 1905 there was a division of joint family property among the five sons of Lala Shambhu Das who, it appears, were members of a joint Hindu family; but one question ultimately to be decided in this litigation is whether the two brothers Parma Nand and Devki Nand continued to be joint or were separate. Devki Nand died in 1912 and Parma Nand in 1922. Devki Nand left a son—

Dewan Chand, who died in 1918, leaving a widow, Mt. Shivan Devi, and a sister Shrimati Shakuntla Devi. Parma Nand left a son, Keshwa Nand, who died a couple of years ago. In 1924 a suit was instituted by Mt. Shivan Devi against Keshwa Nand in forma pauperis for recovery of the estate of her husband Dewan Chand. But before the parties went to trial the suit was withdrawn, and, on the same day, i. e., 16th October 1924, an award, said to have been made by some arbitrators appointed by the parties, was filed in Court and a decree granted by the Court in accordance therewith. In this award it was apparently held that Parma Nand and Devki Nand and his son Dewan Chand were joint and therefore on the death of Dewan Chand his interest in the joint property went by survivorship to Parma Nand and, on the death of the latter, the whole property went to Keshwa Nand, and consequently that Mt. Shivan Devi was entitled only to maintenance which was fixed at Rs. 160 a month. Attempts were made by some of the descendants of the other brothers of Devki Nand to have this decree set aside, and also by Mt. Shivan Devi; in the meantime the suit out of which this appeal was arisen was instituted by Mt. Shakuntla Devi for a declaration that the property in the hands of Dewan Chand was his separate property because he was not a member of a joint Hindu family with Parma Nand and Keshwa Nand and therefore that it did not go to Keshwa Nand by survivorship, and consequently that after the death of Mt. Shivan Devi she, Mt. Shakuntla Devi, was entitled to succeed to the estate of Dewan Chand as his sister, and the award and the decree were not binding on her and would not affect her reversionary rights.

This suit has been dismissed by the trial Judge on the ground that the plaintiff has no locus standi to maintain it because according to the Mitakshara law as administered in this Province she is not an heir to the estate of Dewan Chand after the death of his widow Mt. Shivan Devi. Consequently this appeal has been presented by Mt. Shakuntla Devi. It is true that, according to the Mitakshara law as originally administered in this province, a sister was not recognised as one of the Sapinda heirs to the estate of her brother, but the Indian Legislature has introduced a change in this respect

by enacting the Hindu law of inheritance (Amendment Act,) Act 2 of 1929, which came into force on 21st February 1929. The learned trial Judge however has declined to apply this Act in the present case, because in his opinion it governs the succession to the estates of those males only who are governed by the law of Mitakshara and who die after 21st February 1929.

It is contended on behalf of the appellant that the view of the learned Subordinate Judge is erroneous and that the appellant is entitled to the benefit of the provisions of the Act which applies to all cases in which succession to the estate of a deceased male governed by the law of Mitakshara will open out after the Act came into force. In other words, it is contended that the Act also applies to all cases where such a male had died before the date on which it came into force but his estate was held by a female heir, such as the widow, who was alive on such date. There has been some conflict on the question involved. It was held by a Division Bench of this Court in 13 Lah 178 (1) that Act 2 of 1929 applied to the case of a person who had died before it came into force, if his widow, who had inherited his estate, was alive at the time. There is however no discussion of the subject and it appears that there was no contest on it before the learned Judges. The same view was taken by the learned Chief Justice of the Patna High Court in 1934 Patna 324 (2). The learned Chief Justice discussed the matter in all its aspects and concurred with the view taken by this Court in the case mentioned above, and differed from the contrary decision of the Madras High Court in 57 Mad 718 (3).

The Allahabad High Court in 1933 All 152 (4) also applied the provisions of Act 2 of 1929 to a case in which the circumstances were analogous to those of this case. There is however no discussion of the matter. In 1933 Lah 777 (5) a learn-

1. Shiv Das v. Nand Lal, 1932 Lah 361=138 I C 291=13 Lah 178=33 P L R 423.
2. Chulhan Barai v. Mt. Akli Baraini, 1934 Pat 824=150 I C 1039=15 P L T 707.
3. Krishan Chettiar v. Manikammal, 1934 Mad 138=147 I C 1139=66 M L J 70=57 Mad 718.
4. Bandhan Singh v. Daulata Kuar, 1933 All 152=138 I C 389=1932 A L J 384.
5. Mt. Janki v. Sattan, 1933 Lah 777=146 I C 511=34 P L R 964.

ed Judge in Chambers of this Court expressed the same opinion as in 57 Mad 718 (3). His attention however does not appear to have been drawn to the decision of the Division Bench in 13 Lah 178 (1), nor is there any discussion of the question in his judgment. Moreover his judgment is subject to a Letters Patent appeal which is also before us, and will be disposed of by this judgment. Now Act 2 of 1929 is expressed to apply to persons who,

but for the passing of this Act, would have been subject to the law of Mitakshara in respect of the provisions herein enacted,

and

to such persons in respect only of the property of males not held in coparcenary and not disposed of by will.

In S. 2 it is provided that a son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after a father's father and before a father's brother. The order of succession to which this amendment has been made is reproduced on p. 31, S. 43 of Mulla's Hindu Law, Edn. 7. As I have already stated, but for the passing of this Act, a sister would not be recognised as an heir under the law of Mitakshara, but the Act has conferred upon her a status to inherit the estate of her brother in the order specified, and there is no dispute that if the Act governs the succession in this case, then Shrimati Shakuntla Devi would be entitled to inherit the property of Devan Chand after the death of Mt. Shivan Devi. With one exception the arguments of the learned counsel, who contested the application of the Act, followed the lines of the reason given by the learned Judges of the Madras High Court in 57 Mad 718 (3). It would therefore be convenient at this stage to consider that judgment. Two main reasons are given by the learned Judges of the Madras High Court in support of their conclusion. The first is that in the preamble of the Act the use of the words "dying intestate" clearly indicates that the Act was intended to be applied to the property of such males only who might die after the Act came into force. The preamble of the Act is :

Whereas it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate, it is hereby enacted as follows.

The learned Judges also took into

consideration the changes effected by the Select Committee in the Bill as introduced in the Legislative Assembly. Assuming that the Act as now passed is ambiguous and, therefore, it is permissible to refer to the preamble and to the changes effected in the original Bill by the Select Committee, still, in my opinion, the use in the preamble of the expression "dying intestate" does not lend support to the conclusion that the Act applies to the estate of only those "who shall hereafter die intestate." After giving my careful consideration to the matter, I am of opinion that the expression "dying intestate" has no reference and was not intended to have any reference, to the time of the death of the Hindu male; it is a mere description of the status of the deceased. It is used to signify that the law is intended to be modified in respect of the estates only of those Hindu males who have died or may die intestate. The intention of the legislature is to prevent the application of the Act to cases of testamentary succession, i. e., to property "not disposed of by will." The operative part of the Act uses no such expression. The preamble therefore does not lead to the conclusion that the Act is intended to govern the cases of inheritance to property of only those males who had already died when it came into force. The question must therefore be decided with reference to the operative parts of the Act and the principles of Hindu law.

The changes made to the Bill in the Select Committee also do not indicate that the Act was made applicable only to the estates of persons who die subsequent to 1st February 1929. In the Bill the word "deceased" was used before "Hindu dying intestate," but it was omitted in the Select Committee. This appears to have been done purely with a view to remove a defect in drafting and not to alter the original meaning of the preamble. The Bill as originally drafted was expressed to apply to the case of property of Hindus "to which succession opens after 31st July 1928." The Select Committee omitted the reference to the date on which succession opens on the ground that it was unnecessary to assign retrospective effect to the provisions by the Bill or to defer the coming into operation thereof. The Bill was passed

into law early in 1929 and therefore if the provision as to its application to cases where succession opened after 31st July 1928 had been retained, it would have operated retrospectively to cases in which succession opened between that date and the date of coming into force of the Act, and it is this contingency that the Select Committee intended to avoid. The Committee did not wish to defer the coming into operation of the Act. Therefore it must be assumed that the Bill as amended was intended to apply to cases where the succession opened on or after the date on which the Act might come into force.

The second ground has reference to the cardinal rule relating to the interpretation of statutes that unless expressly provided therein a statute cannot be made to have retrospective effect. It was remarked that as there is no such express provision in Act 2 of 1929, the application of the Act to a case like the present would infringe the above rule of the interpretation of statutes. But I venture to remark that the learned Judges took for granted what they had to decide in the case. The question whether the application of the Act to a case like the present involves its application retrospectively depends on whether the inheritance in favour of the persons mentioned in S. 2 of the Act and on whom the right has for the first time been conferred, must be deemed to open out on the death of the male or on the death of the life estate holder; in other words whether the estate of a male who dies leaving a widow vests in the "next full heir," if I may use that expression, on the death of the male or of the widow. The answer to the question involves an examination of the provisions of the Hindu law as to the nature of the estate held by a female heir, such as a widow, in succession to a male, and of the question whether the "next full heir" inherits the estate of the male or the estate of the female who has immediately succeeded the latter. The matter is in my opinion concluded by the decision of their Lordships of the Privy Council in 39 Mad 634 (6) where Lord Shaw in delivering the judgment of their Lordships observed:

The rule of the Hindu law with regard to the

6. Janki Ammal v. Narayannasami Aiyar, 1916 P C 117=37 I C 161=43 I A 207=39 Mad 634 (P C).

nature of the widow's estate may have been subject to various forms of expression, but in substance it is not doubtful. Her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however limited; but to use the familiar language of Mayne's Hindu law, para. 625, p. 870, so long as she is alive no one has any vested interest in the "succession", and also that the reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a spes successionis is recognised by Court of law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life. But such an heir does so in a representative capacity as the question to whom the estate shall ultimately go shall be determined at the proper time.

In 5 Cal 776 (7) their Lordships had previously stated:

According to Hindu law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or by survivorship, does not take a mere life-estate in the property. The whole estate is, for the time, vested in her; though in some respects, for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that, until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband. The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death.

See also 2 Lah 383 (8) at p. 388. It would thus be observed that inheritance is never in abeyance and reversionary heirs have no vested interest in the estate, because the husband's life is assumed to continue in the person of the widow, and therefore the succession opens at the date of the death of the widow, and also that on the death of the widow the estate goes to the next heir of the husband and not of the widow. This is the rule of the Hindu law with regard to the nature of the estate inherited by a widow in the property of her husband, and it is undisputed that the determination of the next heir of the deceased husband of the widow takes place on the death of the widow; it is therefore obvious that there is no retrospective application of the Act if the widow dies after the Act comes into force.

7. Moniram Kolita v. Keri Kolitani, (1880) 5 Cal. 776=6 C L R 322=7 I A 115=4 Sar 103. (P C).

8. Mt. Nasibul-Nisa v. Mt. Ahmad-un-nissa, 1921, Lah 85=66 I C 494=2 Lah 388.

even if the husband had died before that. There is no manner of doubt that where a person, who would immediately have inherited the estate of an intestate Hindu male, but has not done so owing to the existence of a widow, dies before the widow, the estate goes to the next heirs of the male and not to the heirs of such person. For instance, if a Hindu male dies leaving a widow, a brother and a nephew, the estate would ordinarily go to the brother after the death of the widow; but if the brother dies childless before the widow the nephew will inherit the estate, though otherwise he would have been excluded by the brother, and the heirs of the brother would not inherit it. If however the brother leaves sons they would inherit as nephews along with the other nephew of the deceased husband of the widow. But the learned counsel contends that though it is true that the selection of the next heir must take place out of the persons who may be alive on the death of the widow and who would have succeeded to the estate if the husband had died on the date of the death of the widow, (the law according to which the selection should be made should be the law which was in force on the date of the death of the husband and not of the widow.) They, however, take no account of the legal fiction that (when selecting the next heir, it must be assumed that the husband has lived up to the death of his widow.) There is absolutely no logic in the contention that in a case like this for one purpose the husband should be deemed to have lived up to the death of the widow and for the other up to his natural death.

Realising that this interpretation of the law would lead to some practical difficulties one learned counsel suggested an ingenious way out of them. He suggested that the Act should apply only to the first succession to the property of a male governed by the Mitakshara Law who had died after the Act came into force and that the next succession should always be according to the law of Mitakshara unaffected by Act 2 of 1929. He illustrated his contention by stating that if a male governed by the law of Mitakshara dies after 21st February 1929 leaving say, a widow and a sister the widow would succeed but after her the next heir would be from among the heirs originally recognised by the Mitakshara

law and that the sister would not inherit under any circumstances and also that if such a male dies leaving no nearer heirs than a sister, according to the Mitakshara law as amended by the Act, then the sister would inherit, but if after the death of the sister there is a sister's son and a father's brother, then the father's brother would inherit the property and not the sister's son. I am unable to accept this contention; it is not supported by anything in the Act nor by any sound principle. The weight of authority is against the Madras view and the reasons given by the learned Judge of that Court in support of their conclusion are not, if I may say so with great respect, sound. In my opinion the conclusion of this Court in 13 Lah 178 (1) is the correct one and Act 2 of 1929 applies to the estates of those Hindu males who have died intestate before the Act came into force if their estate vested in a life estate holder who was alive on 21st February 1929.

I would therefore hold that, in the present case, Mt. Shakuntla Devi is by virtue of Act 2 of 1929 entitled to inherit the estate of her brother Dewan Chand if she survives his widow Mt. Shivan Devi, and is consequently entitled to maintain this suit. I would, therefore, accept this appeal and setting aside the decree of the learned trial Judge, would remand the case to him with direction to proceed with the trial of the suit in accordance with law. Court-fee on the memorandum of appeal shall be refunded to the appellant but the other costs will abide the result. It was mentioned by the respondent's counsel that there are other objections to the competency of the appellant to maintain the suit. This judgment merely disposes of the one objection mentioned above and if there are any other objections and have been properly raised before the trial Court it will be for that Court to decide them.

Sale, J.—I agree.

R.W./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 129

JAI LAL, J.

Deputy Commissioner, Kangra — Petitioner.

v.

Thakar Ramgopal Tempal and another — Opposite Parties.

Civil Ref. No. 22 of 1935, Decided on 13th November 1935, from Deputy Commissioner, Kangra, D/- 1st April 1935.

Punjab Land Alienation Act (13 of 1900), S. 3—Gift of land to bona fide religious and charitable purposes—Bonafides should be decided by Civil Court—Sanction by Deputy Commissioner is not necessary.

If a gift can be held to be in good faith for a religious or charitable purpose, the question of the sanction by Deputy Commissioner does not arise at all. S. 3 does not provide that if a gift is made in good faith for a religious or charitable purpose the Deputy Commissioner shall sanction the same; on the other hand it debars the jurisdiction of the Deputy Commissioner to consider the question of sanction in the case of a gift made in good faith for a religious or charitable purpose, which is to be determined by a Civil Court. [P 129 C 2; P 130 C 1]

Ramlal—for Petitioner.

Dwarka Nath Aggarwal and Amar Nath Chona—for Opposite Parties.

Order.—This is a petition by the Deputy Commissioner of Kangra under S. 21—A (3), Punjab Alienation of Land Act. The facts are these.

Mt. Kirpo, a widow of a member of an agricultural tribe in the Kangra District, made a gift of the entire agricultural land held by her in favour of the temple called Thakar Ramgopal Mandir at Damtal in the district of Kangra. A mutation of this gift was entered by the Patwari in the mutation register and was sent to the Collector by the Assistant Collector with a recommendation that the mutation of names be refused, because no land had been left in possession of the donor for her own maintenance, and Mt. Kumlo, a widow of a son of Mt. Kirpo, was alive and objected to the mutation. The Collector accordingly refused to sanction the mutation. The donee thereupon instituted a suit for a declaration that the land in dispute had been validly gifted to the temple and was owned by it. On a confession of judgment by Mt. Kirpo this suit was decreed. It was alleged before the Subordinate Judge, who decreed this suit, that the gift was in favour of the temple, that it was a bona fide gift, that the income of the land was credited to the

treasury of the temple and that the poor and travellers were being fed out of the said income. The Deputy Commissioner thereupon applied for the revision of the decree to the District Judge of Hoshiarpur under S. 21—A (2) of the Punjab Alienation of Land Act on the ground that the gift was not a bona fide one and it was not valid without his sanction. The District Judge, however, has held that it was a bona fide gift to the temple and that it did not require the sanction of the Deputy Commissioner. He has therefore, dismissed the application for revision. Consequently the Deputy Commissioner has applied for the revision of the order passed by the District Judge. I have heard the learned Government Advocate on behalf of the Deputy Commissioner and am of opinion that this application must be dismissed.

There is no force in the contention that the Civil Courts had no jurisdiction to decide the question of the bona fide nature of the gift or otherwise. S. 21, Punjab Alienation of Land Act excludes jurisdiction of the Civil Courts in any matter which the Local Government or a Revenue Officer is empowered by the Act to dispose of or in which the Local Government or any Revenue Officer exercises any power vested in it or in him by or under the Act. But a reference to S. 3, Punjab Alienation of Land Act, shows that this is not a matter which the Revenue Officer is empowered to dispose of or in which he could be deemed to have exercised any power vested in him under the Act, because S. 3 (2) expressly provides that sanction shall not be necessary in the case of a gift made in good faith for a religious or charitable purpose whether *inter vivos* or by will. If, therefore, a gift can be held to be in good faith for a religious or charitable purpose, the question of the sanction by the Deputy Commissioner does not arise at all. The section does not provide that if a gift is made in good faith for a religious or charitable purpose, then the Deputy Commissioner shall sanction the same, on the other hand, it debars the jurisdiction of the Deputy Commissioner to consider the question of sanction in the case of a gift made in good faith for a religious or charitable purpose. Therefore S. 21, does not oust the juris-

diction of the Civil Courts to decide whether the gift is made in good faith for a religious or charitable purpose.

It has been found both by the learned Subordinate Judge and the District Judge that the gift in this case was made bona fide for a religious purpose. I see no good reason to differ from this conclusion. It is obvious that the purpose of the gift is bona fide a religious and charitable one. It may be that the widow of the son of the donor has been deprived of her right of maintenance; in that case she has her remedy in the Civil Courts to have the gift set aside; but it is no function of the Deputy Commissioner under the Punjab Alienation of Land Act to object to a gift which is for a religious or charitable purpose on the mere ground that the donor has no means of livelihood left for herself or the effect of the gift was to deprive some other person of his or her right of maintenance. Such a gift cannot be held to require the sanction of the Deputy Commissioner under the Punjab Alienation of Land Act. In the present case all that was necessary for the Civil Court to see was whether the gift was for a bona fide religious or charitable purpose, and the finding on this question is in favour of the donee. I am, therefore, unable to interfere on revision and dismiss this application but make no order as to costs.

B.D./R.K. *Application dismissed.*

A. I. R. 1936 Lahore 130

BHIDE AND CURRIE, JJ.

Sajjan Singh—Plaintiff—Appellant.

v.

Mt. Dhanti and others—Defendants—Respondents.

Second Appeal No. 17 of 1935, Decided on 22nd October 1935, from decree of Dist. Judge, Jullundur, D/- 6th October 1934.

(a) Custom (Punjab)—Succession—'Jats' in Phillaur Tahsil, Jullundur District—Collaterals up to fifth degree exclude daughters—No distinction between ancestral and non-ancestral property.

In the Phillaur Tahsil among Jats daughters are excluded by collaterals up to and including the fifth degree in matter of succession and there is no distinction between ancestral and non-ancestral property. [P 130 C 2]

(b) *Riwaj-i-am*—Statement unsupported by instances—*Riwaj-i-am* is not bad—Value of entry in *Riwaj-i-am*.

The fact that a statement of custom in a *riwaj-i-am* is not supported by instances does not in itself provide the necessary rebuttal; and if on an issue regarding the existence of an exception to a general rule of custom the sole evidence offered is a *riwaj-i-am* entry without instances, the issue must be decided in accordance with that entry. [P 131 C 1; P 132 C 1].

Achhru Ram—for Appellant.

Badri Das—for Respondents.

Currie, J.—The sole question for decision in this case is whether daughters succeed to the non-ancestral property left by their father. The parties are Jats of the Phillaur Tahsil of the Jullundur District. The *riwaj-i-am* of the district is clearly in favour of the collaterals. According to the answer to question 45 (a) in the Phillaur Tahsil among Jats daughters are excluded by collaterals up to and including the fifth degree. The answer to question 45 (b) shows that no distinction is drawn between ancestral and non-ancestral property. For the appellant Mr. Achhru Ram urges that the statement in the *riwaj-i-am* should not be accepted as it is opposed to the general custom of the province. He further urges that in certain cases this *riwaj-i-am* has not been accepted by the Courts as a correct statement of custom. He urges that the *riwaj-i-am* may be rebutted by showing that in other matters it is incorrect and in this connexion refers to 8 Lah 281 (1) at p. 300, but in that ruling despite the remark at p. 300 that:

One of the numerous methods of rebuttal is to convince the Court from an examination of other portions of the *riwaj-i-am* that it has not been compiled in a properly, careful manner or that for other reasons it is not a reliable record, the learned Judge proceeded to lay down that,

The fact that the statement of custom in a *riwaj-i-am* is not supported by instances does not in itself provide the necessary rebuttal and if on an issue regarding the existence of an exception to a general rule of custom the sole evidence offered is a *riwaj-i-am* entry without instances, the issue must be decided in accordance with that entry.

In the present case the entry is clear. In the vernacular *riwaj-i-am* of which a copy has been placed on the file one instance is cited in which collaterals failed to establish their claim in a suit, but it is not stated in what degree the collaterals were. Two mutations among Hindu Jats were cited in which daughters succeeded, but in neither case is it stated whether there were any collaterals. A

1. *Labh Singh v. Mt. Mango*, 1927 Lah 241=100 I C 924=8 Lah 281.

copy of the original mutation in the first case has been placed on the file and that shows that the girl in whose favour the mutation was sanctioned was an unmarried child of four years so that the instance is of very little force. In addition some witnesses were examined and it is significant that they placed the degree at which collaterals were excluded as the fourth degree presumably because in the present case the collaterals are of the fifth degree. Further one of the plaintiffs' own witnesses, P. W. 5, states that a daughter does not exclude collaterals up to the fourth degree whether the property is ancestral or non-ancestral. Mr. Badri Das for the respondents further points out that one of the defendants' witnesses D. W. 4 states that formerly the Female Infanticide Act was in force in this village and from this circumstance he argues that in such circumstances it is unlikely that any rights would be conceded to daughters.

As regards the argument that the *riwaj-i-am* has not been accepted in certain cases reference was made, particularly to the unreported case, Civil Appeal No. 475 of 1932 (2), decided on 1st April 1935, in which this *riwaj-i-am* was adversely criticised. The case related to Sainis and it was held that there was evidence sufficient to rebut the presumption raised by the entry in the *riwaj-i-am*. The respondents' counsel points out however that in at least two cases this statement of custom has been accepted, viz., 15 Lah 586 (3) (dealing with Kambohs of Nakodar) and 1934 Lah 580 (4), a case of Brahmins. It is thus impossible to say that this *riwaj-i-am* should be discarded in its entirety. Certain answers might be shown to be at variance with the real custom if a sufficient number of instances were produced against the custom as stated, but it would, in my opinion, be unsafe to reject any particular statement in the *riwaj-i-am* merely on the ground that a custom had been wrongly stated with regard to some other matter. As regards the contention that the custom as stated in this *riwaj-i-am* is contrary to the general custom of the province, this argument loses its force when we find as

pointed out by the learned counsel for the respondents that this identical custom of the exclusion of daughters from succession to non-ancestral property, has been held to prevail among Jats in the neighbouring District of Amritsar: vide 8 Lah 281 (1) and 1933 Lah 899 (5). It is therefore necessary in the present case to see whether there is any evidence to rebut the statement of the custom as given in the answer to question 45 (a) and (b). The instances cited in the present case prove nothing as the necessary details are lacking. Mr. Achhru Ram has further referred to two cases decided by this Court. One is a Single Bench decision reported in 1935 Lah 505 (6). The decision of the District Judge in this case was cited in the lower appellate Court and has been discussed therein. No instances are given and the decision turned on the decision in a previous suit between the parties in which it had been conceded that the plaintiff was not competent to challenge the gift in respect of non-ancestral property. This instance is therefore of little value.

The second case is a decision of a Division Bench reported in 1935 Lah 607 (7), a case among Dosanjah Jats of the Phillaur Tahsil, Jullundur District, who had migrated to Lyallpur. That case was decided in favour of the daughters' rights, it being held that there were six instances in favour of the daughters supported by reliable documentary evidence. Three of these instances it may be noted were among Arains and not among Jats. Of the other three, one was a really strong instance in favour of the daughters' rights. The second was a case in which counsel had conceded that the collaterals could not challenge the gift in respect of self-acquired property. In the third case the brother of the last male holder had consented to the gift in favour of the daughters and it was a remote collateral who attempted to contest it. This case was not cited before the lower Court and the instances given therein cannot, in my opinion, be used as the respondents in the present case had no opportunity of producing evidence to rebut these instan-

2. *Mt. Santi v. Dharm Singh*, 1935 Lah 834=156 I O 1011.

3. *Mt. Naraini v. Bhag Singh*, 1934 Lah 280=149 I O 962=15 Lah 586=36 P L R 381.

4. *Mt. Chajji v. Bhagat Ram*, 1934 Lah 580=148 I O 862=15 Lah 789=35 P L R 388.

5. *Godha Waryam v. Emperor*, 1933 Lah 899=1933 Cr O 1287=146 I O 648=35 Cr L J 143=84 P L R 1000.

6. *Mt. Mahon v. Mt. Rali*, 1925 Lah 505.

7. *Narain Singh v. Chand Kuar*, 1935 Lah 607=156 I O 174=37 P L R 220.

ces. In my judgment therefore the appellants in the present case have entirely failed to rebut the presumption raised by the entry in the *riwaj-i-am* and that entry even though unsupported by instances must be accepted until rebutted. I would therefore dismiss the appeal with costs.

Bhide, J.—I agree.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 132

JAI LAL, J.

Ghulam Rasul Khan and others —
Plaintiffs—Appellants.

v.

Ali Bakhsh and others — Defendants—
Respondents.

Second Appeal No. 1203 of 1935, Decided on 31st October 1935, from decree of Dist. Judge, Ludhiana, D/- 1st June 1935.

(a) **Limitation**—Delay in getting copies attributable to Copying Department—Benefit of S. 5, Lim. Act, should be given.

Where any delay that takes place in getting copies of the judgment and the decree is attributable more to the Copying Department than to the applicant benefit of S. 5, Lim. Act, should be given. [P 132 C 2]

(b) **Injunction**—Suit for injunction that obstruction in public street be removed—Plaintiff should prove injury — Amount of injury is immaterial.

Where a person institutes a suit for declaration that a particular street is a public street and that the defendants have obstructed it, praying for a perpetual injunction that the defendants should not obstruct the street, the plaintiff must establish that he is entitled to use a public highway which has been obstructed by the defendant and that he is inconvenienced by the obstruction. It is not necessary for him to prove that he has been inconvenienced in excess of any other member of the public who may have the right to use the public highway or that he has suffered some special damage of a kind not common to the public. So long as he can establish an injury, whether it is special injury to him or in common with the other members of the public who are entitled to use the highway, he is entitled to maintain his suit for the removal of the obstruction: 1925 P C 36 and 1933 Cal 884, *Foll.*; 4 P R 1895, *held not good law.* [P 133 C 1, 2]

Achhru Ram—for Appellants.

Mela Ram—for Respondents.

Judgment.—This judgment will dispose of appeals Nos. 1203 and 1204 of 1935. Two suits were instituted in the Court of a Subordinate Judge at Ludhiana for a declaration that the street known as Chauri Bihi, situate at village Ram Garh Sardaran, thana Dehlon, tahsil and Dis-

trict Ludhiana, was a public thoroughfare and was used by the plaintiffs and the public in general as of right. It was alleged that on a portion of this street the defendants had built their houses which caused obstruction to the public and to the plaintiffs and a prayer was therefore made for the issue of a perpetual injunction restraining the defendants from continuing the obstruction. These suits were defended by two out of the three defendants; defendant 3, Ramzan, appeared in Court and confessed judgment. The Subordinate Judge decreed the suits. Two appeals were preferred to the District Judge by the defendants which have been accepted by him on the main ground that the suits, if considered to have been instituted after obtaining the consent of the Collector under S. 91, Civil P. C., were not maintainable because the consent was defective inasmuch as the Collector had not been specially authorised by the Local Government to give the consent as required by S. 93, and as suits instituted by the plaintiffs as persons aggrieved in their individual capacity were not maintainable in the absence of proof of special damage to the plaintiffs by the alleged obstruction. A question was raised before the learned District Judge that the appeals were barred by time. This was however decided by him in favour of the then appellants.

On these second appeals Mr. Achhru Ram repeated the objection as to limitation. I am however of opinion that there is no force in it. The District Judge has, in my opinion, rightly held that the appeals were not barred by time and in any case gave the benefit of S. 5, Lim. Act, in one of the cases before him. If I had felt any doubt as to the correctness of the view of the learned District Judge that the appeals were not barred by time I would have treated them within time by the application of S. 5, Lim. Act, because in my opinion there is no doubt that any delay that took place in their getting copies of the judgment and the decree was attributable more to the Copying Department of the trial Judge than to the appellants. On the merits of the appeals however in my opinion the appellants must succeed. 4 P R 1895 (1), in which it was held that in the case of a public nuisance an individual alleging

1. Chajju Mal v. Ganda Mal, (1895) 4 P R 1895.

himself to be aggrieved is not entitled to maintain an action for the removal of the nuisance unless he can prove special damage both in kind and quantity to him by the nuisance over and above what is suffered by the public generally, was based on 2 Bom 457 (2). In 47 All 151 (3) however the law laid down in the Bombay case was not accepted to be correct by the Judicial Committee of the Privy Council and since then the Calcutta High. Court in 60 Cal 1003 (4), has expressed the same opinion and this Court, in 16 Lah 517 (5), has laid down that the law enunciated in 4 P R 1895 (1) is not correct. This is what the learned Judges in the Lahore case say :

The principle of English law which requires proof of special damage in such cases is not applicable to India. The learned counsel for the Municipal Committee has relied on 4 P R 1895 (1), where a Bench of the Chief Court, Punjab, held that in order to sustain an action for the removal of an obstruction in a public street it is necessary for the plaintiff to show, not merely that the damage he suffered is greater in degree or frequency than that suffered by the rest of the public, but that it is different in kind. This authority was based on 2 Bom 457 (2) which affirmed the principle that no civil suit in respect of obstruction on the public highways could be maintained unless some particular damage in addition to the general inconvenience occasioned to the public was proved. This judgment however has been disapproved by their Lordships of the Privy Council in 47 All 151 (3), which has been followed in 60 Cal 1003 (4). If the foundation falls the superstructure must fall, and we have no hesitation therefore in holding that in face of the Privy Council ruling mentioned above, the Punjab Chief Court judgment is no longer good law.

The learned District Judge was of opinion that in spite of 16 Lah 517 (5), he should follow 4 P R 1895 (1), because the judgment of this Court did not expressly overrule the Chief Court judgment. The remarks quoted above however clearly indicate that a Division Bench of this Court did not consider that the Punjab Chief Court judgment laid down good law; it must therefore be assumed to be no longer binding on the Subordinate Courts. I must follow the judgment of this Court. The effect of this judgment is that the plaintiff in a case like the present must

establish that he is entitled to use a public highway which has been obstructed by the defendant and that he is inconvenienced by the obstruction. It is not necessary for him to prove that he has been inconvenienced in excess of any other member of the public who may have the right to use the public highway or that he has suffered some special damage of a kind not common to the public. So long as he can establish an injury, whether it is special injury to him or in common with the other members of the public who are entitled to use the highway, he is, according to the latest authority of this Court, entitled to maintain his suit for the removal of the obstruction.

I must therefore accept the appeals and set aside the decrees of the learned District Judge and remand the cases to him with directions to re-hear the appeals in the light of the observations made above. The learned Judge will consider the question in case he be still of opinion that the plaintiffs are not entitled to the relief claimed by them on the merits what the effect of the confession of judgment by Ramzan is. In view of the above decision I have refrained from discussing whether the consent given by the Collector in this case was sufficient to entitle the plaintiffs to maintain the suits under Ss. 91 and 93, Civil P. C., but it seems to me that the view of the learned District Judge on this aspect of the case is correct. The costs of these appeals will abide the result.

B.D./R.K.

Case remanded.

A. I. R. 1936 Lahore 133

HILTON AND RANGI LAL, JJ.

Jagdish Ram—Plaintiff—Appellant.

v.

Mt. Chinto and others—Defendants—Respondents.

First Appeal No. 1351 of 1932, Decided on 11th July 1934, from decree of Senior Sub-Judge, Kangra, D/-29th June 1932.

Pre-emption—Appeal—Land valued for jurisdiction at less than Rs. 5,000—Decree for pre-emption on payment of more than Rs. 5,000—Appeal lies to District Judge and not to High Court.

In a pre-emption suit relating to land of which the value for purposes of jurisdiction under the Suits Valuation Act is less than Rs. 5,000, but in which a decree has been passed on payment of more than Rs. 5,000, an appeal lies to District Judge and not to the High Court: 83 P R 1912,

2. Saktu v. Ibrahim, (1877) 2 Bom 457.
3. Manzur Hasan v. Mahomed Zaman, 1925 P C 86=86 I C 236=52 I A 61=47 All 151 (P C).
4. Mandakinee Debee v. Basanta Kumaree Debee, 1938 Cal 884=147 I C 811=60 Cal 1003.
5. Municipal Committee, Delhi v. Mahomad Ibrahim, 1935 Lah 196=152 I C 850=16 Lah 517.

Foll.; 16 P R 1908; 1926 Lah 376 and 1934 Lah 545, *Expl. and Disting.* [P 134 C 1]

Mehr Chand Sud and Vishnu Datta—for Appellant.

Mehr Chand Mahajan and Fakir Chand—for Respondents.

Facts.—The pre-emption decree ordered the plaintiff to pay into Court on or before 3rd October 1932, Rs. 4,000 less the amount he had already deposited and (if he did so) get possession of the land as its proprietor, but if he did not make the payment on or before the said date, his suit shall stand dismissed with costs. The plaintiff appealed to the High Court.

Hilton, J.—A preliminary objection is made that this appeal should have been presented to the District Judge. This objection is correct. A case on all fours is 83 P R 1912 (1). The authorities relied upon by the appellant are 16 P R 1908 (2), 7 Lah 570 (3) and 1934 Lah 545 (4). Those authorities lay down the law for suits for rendition of accounts and for redemption of mortgages, but the principles therein enunciated cannot be extended to pre-emption suits, but can only be applied to suits for which the Suits Valuation Act 7 of 1887 lays down no rule for the determination of the jurisdiction value. I would therefore follow 83 P R 1912 (1) and would order that the memorandum of appeal be returned to the appellant for presentation in the proper Court. The costs of the respondents in this Court should be paid by the appellant.

Rangi Lal, J.—I agree.

R.K.

Appeal returned.

1. *Iftikhar Ali v. Thakar Singh*, (1912) 83 P R 1912=15 I C 347.
2. *Mahomed Afzal Khan v. Nand Lal*, (1908) 16 P R 1908=73 P W R 1907 (F B).
3. *Jaswant Ram v. Moti Ram*, 1926 Lah 376=96 I C 890=7 Lah 570=27 P L R 605 (F B).
4. *Ganga Ram v. Hakim Rai*, 1934 Lah 545=151 I C 703=15 Lah 512=36 P L R 361 (F B).

A. I. R. 1936 Lahore 134

AGHA HAIDAR, J.

Gokal—Plaintiff—Appellant.

v.

Hamira—Defendant—Respondent.

Second Appeal No. 711 of 1935, Decided on 17th October 1935, from decree of Senior Sub-Judge, Hoshiarpur, D/- 15th January 1935.

Tort—Nuisance—Abatement—Branches of tree overhanging can be cut off.

If the branches of a tree growing on neighbour's land overhang one's land and thereby

cause nuisance, he is entitled to lop off those branches. This right is described as the abatement of nuisance 1918 Bom 68 and 31 Cal 944, *Foll.* [P 134 C 2]

Amar Nath Chopra—for Appellant.

Ram Lal Anand I—for Respondent.

Judgment.—The respondent appears to be a very unreasonable person. He is related to the plaintiff as his uncle. According to the plan Ex. 10 the house shown in green colour belongs to the plaintiff and the one marked yellow to the north of the plaintiff's house belongs to the defendant. In between these two houses there is a vacant site. On this vacant site and near the wall of the plaintiff's house there stands a beri tree. This intervening plot of land is admittedly the joint property of the parties and the tree growing thereon must also be considered as joint property. Some of the branches of this beri tree overhang the northern wall of the plaintiff's house. The plaintiff's case is that he intends to raise the height of the northern wall, but the overhanging branches of the beri tree obstruct him and the defendant does not consent to the removal of the offending branches. The concurrent findings of the two Courts below are that the branches of the beri tree overhang the property of the plaintiff. The trial Court decreed the plaintiff's suit. The defendant then went up in appeal and the learned Senior Subordinate Judge has allowed the appeal and held that the plaintiff is not entitled to cut the branches of the tree which belong to both the parties and should be enjoyed in common. The plaintiff has come up to this Court in second appeal and has argued that the decision of the Court below is erroneous. I agree with this contention. The law on the subject is very clear. If the branches of a tree growing on my neighbour's land overhang my land and thereby cause nuisance, I am entitled to lop off those branches. This right is described by the text-writers on the subject as the abatement of nuisance. If authority is needed for this elementary proposition, 43 Bom 164 (1) and 31 Cal 944 (2) may be quoted. This is what the plaintiff could lawfully do, for the branches are causing a nuisance to his property. But the plaintiff proceeded

1. *Vishnu Jagan Nath v. Vasudeo Raghu Nath*, 1918 Bom 68=47 I C 629=43 Bom 164=20 Bom L R 826.
2. *Lakshmi Narain Banerjee v. Tara Prosanna Banerjee*, (1904) 31 Cal 944=8 C W N 710.

by a more lawful and peaceful method and instead of cutting off the branches with his own hand he instituted the present suit for injunction and asked the assistance of the Court in removing the offending branches. In my opinion the plaintiff was entitled to the injunction asked for.

I therefore allow the appeal, set aside the decree of the lower Court and restore that of the first Court. The executing Court shall remove the branches which overhang the northern portion of the plaintiff's house, and the costs of this removal shall be defrayed by the defendant. The plaintiff shall get his costs throughout.

B.D./R.K.

Appeal allowed.

* A. I. R. 1936 Lahore 135

JAI LAL, J.

Pir Shah—Plaintiff—Appellant.

v.

Mahmud Shah—Defendant—Respondent.

Second Appeal No. 1162 of 1935, Decided on 1st November 1935, from decree of Addl. Dist. Judge, Lyallpur, D/- 11th May 1935.

* **Legitimacy**—Legitimacy is question of legal character—Suit for declaration of legitimacy is valid.

The question of legitimacy is a question of legal character within the meaning of S. 42, Specific Relief Act, and there is nothing in S. 42 of the Act to debar a person from claiming a declaration that he is the legitimate son of the defendant: 1928 Lah 833; 35 Cal 777 and 1930 Lah 795 Disting. 34 Bom 676 and 29 Mad 48, Ref. [P 136 C 1]

Badri Das—for Appellant.

Arjan Dev Bagai—for Respondent.

Judgment.—The appellant instituted a suit for a declaration that he was a legitimate son of the respondent, being born to his wife, Mt. Maqsood Bibi. The necessity for the suit arose because the appellant purchased some property and the respondent instituted a suit to pre-empt that sale alleging that he was entitled to a superior right of pre-emption because the vendee, that is to say, the plaintiff in this case, was his illegitimate son. That suit ultimately did not reach the stage of decision because it had to be withdrawn because a person, who claimed to have a still superior right of pre-emption, claimed to pre-empt the sale. The present suit was decreed by the trial Judge, but it has been dismissed on appeal

by the Additional District Judge solely on the ground that a suit like the present is not maintainable. The learned Judge has relied upon two judgments in support of his conclusion: 35 Cal 777 (1) and 1928 Lah 833 (2). An examination of both these cases, however, shows that the respective plaintiffs therein claimed the right to succeed to the property in the hands of the respective defendants after their death. Such suits were held not to be maintainable, mainly on the ground that they were really speculative suits as it could not be asserted with certainty that when the succession opened the plaintiffs would be alive and on this ground those suits were dismissed.

Before me the learned counsel for the appellant relies upon 34 Bom 676 (3) and 29 Mad 48 (4). In both these cases the suits were for a declaration that the defendants were not related to the respective plaintiffs as they had alleged. These cases, therefore, indirectly support the contention of the appellant, but no case has been cited which may be held to be directly applicable to the facts of this case. 1930 Lah 795 (5) was cited for the respondent, but that case was decided on its own peculiar facts and the observations made therein must be confined to such facts. The suit in that case was held to be non-maintainable because it was found that the plaintiff was entitled to a further relief than a mere declaration. At the same time there are some observations in the judgment which might under different circumstances have supported the contention of the respondent, but the facts of the present case are peculiar. Here the direct question involved is the legitimacy of the plaintiff. The defendant's assertion is that he is his illegitimate son and I am inclined to hold that the question of legitimacy is a question of legal character within the meaning of S. 42, Specific Relief Act. Moreover in the present case by virtue of the Punjab Alienation of Land Act the question of the plaintiff's legitimacy is

1. *Shamarendra Chandra Dev v. Birendra Kishore*, (1908) 35 Cal 777=8 C L J 1=12 C W N 777.
2. *Ruchiram Sukha Nand v. Charan Das*, 1928 Lah 833=110 I C 575.
3. *Bai Sri Vaktaba v. Agar Singji*, (1910) 34 Bom 676=7 I C 945.
4. *Chinnaswami Mudaliar v. Ambalaunna Mudaliar*, (1906) 29 Mad 48.
5. *Akbar Khan v. Farman Ali*, 1930 Lah 795=121 I C 417=31 P L R 900.

very material to decide whether he does or does not belong to an agricultural tribe in the Punjab. It is undeniable that members of agricultural tribes have in this province by virtue of the Punjab Alienation of Land Act special rights and privileges and the declaration claimed by the plaintiff affects his right under the Act seriously. It is not merely therefore that the plaintiff seeks by this suit a declaration of his relationship to the defendant, but as I have stated above the question relates to the legal character that the plaintiff enjoys as the legitimate son of the defendant and as a member of an agricultural tribe. I hold, therefore, that the case cited on behalf of the respondent is not applicable to the facts of this case and that there is nothing in S. 42, Specific Relief Act, to debar the plaintiff from claiming a declaration that he is the legitimate son of the defendant. As the Additional District Judge has not decided the other points involved in the case it must be remanded to him with directions to re-hear the appeal and to decide it on the merits. I accept this appeal, set aside the decree of the Additional District Judge and remand the case to him with directions to re-hear the appeal in accordance with law. The remand is under O. 41, R. 23, Civil P. C. The Court-fee on the memorandum of appeal shall be refunded to the appellant. Other costs will abide the result.

B.D./R.K.

Case remanded.

* A. I. R. 1936 Lahore 136

AGHA HAIDAR, J.

Hafiz Qamar Din—Petitioner.

v.

Nur Din—Opposite Party.

Civil Revn. No. 341 of 1935, Decided on 15th October 1935, from order of Addl. Dist. Judge, Lahore, D/- 10th April 1935.

* (a) **Partnership—Arbitration—Partnership unregistered—Partners referring to arbitration—S. 69 (1), Partnership Act, excludes 'suits' by unregistered firms—Application by unregistered firms under Sch. 2, Para. 20, Civil P. C., is not excluded by the provisions of Partnership Act.**

The word used in S. 69 (1), Partnership Act is 'suit' and under Sch. 2, Para. 20, the party is authorised to apply to any Court having jurisdiction and the application shall be in writing and shall be numbered and registered as a suit between the applicant and the opposite party. Therefore only a suit as understood in forensic language is excluded by S. 69 and not

an application such as is contemplated in Para. 20, Sch. 2. [P 137 C 2]

(b) **words and Phrases—Suit—No definition of 'suit' in any Act—Suit begins with plaint—Application under Sch. 2, Para. 20, Civil P. C., is not a suit.**

The word 'suit' has not been defined, but it has been described in various authorities. One indicia of a suit is that it begins with a plaint. An application under Sch. 2, Para. 20, is not a plaint. The language of the paragraph is entirely against the contention that the application is a plaint. The proceedings may be treated as a suit for certain purposes, but they are not a suit properly so called. [P 137 C 2]

(c) **Partnership—Dissolution of—Application to arbitration for dissolution of partnership of unregistered firm under S. 69 (3) (a)—Provisions of S. 69 (1), Partnership Act do not affect proceedings of dissolution.**

Under S. 69, sub-S. 3 (a), the provisions of sub-S. (1) are not to affect the enforcing of any right to sue for the dissolution of partnership. Where therefore arbitration proceedings are on the face of them taken for the purposes of the dissolution of partnership of an unregistered firm, the proceedings under Sch. 2, Para. 20, would be protected from the application of S. 69, Partnership Act. [P 137 C 1]

(d) **Arbitration—Arbitrator fully empowered to make award—Party cannot challenge award, because given in particular way.**

An arbitrator has full power and jurisdiction to make his own award and it does not lie in the mouth of the party referring to challenge the award because it is given in a particular way. [P 138 C 1]

Akbar Ali—for Petitioner.*Brij Lal*—for Opposite Party.

Order.—This is an application in revision. It arises out of the following circumstances: Nur Din is the author of a certain book called *Lama'at-i-Nur*. Qamar Din is a publisher. The author and the publisher entered into an agreement on 25th July 1924. That agreement is on the record. The publisher had agreed to print 3,000 copies and this publication was to constitute the first edition of the work. He was at liberty to publish these 3,000 copies at once or by instalments. It is admitted that the publisher published only 1,000 copies during the ten years that elapsed between the date of the partnership and the dispute which arose between the parties subsequently in 1934. The book, it may be mentioned, was in existence on the date on which the deed of partnership was executed. Differences arose between the parties and on 2nd February 1934 they referred them to the arbitration of Mr. Fazal Din, a Vakil. It is recited in the reference that the parties are desirous of ending the partnership and appoint Mr. Fazal Din,

Vakil, as their arbitrator, empowering him to dissolve the partnership and that his decision in respect of all matters in dispute, arising out of the partnership shall be accepted by the partners who would have no right to raise any objection. On 29th June 1934 the award was delivered by the arbitrator. Under this award a sum of Rs. 1,500 was allowed as damages to Nur Din, the author, on the ground that Qamar Din has not published the remaining 2,000 copies. There were two minor items which were not pressed and which may be left out of consideration. On the delivery of this award an application was made on 27th August 1934 by Nur Din in the Court of the Subordinate Judge under the provisions of Sch. 2, Para. 20, Civil P. C., for filing the award with a prayer that the Court may grant a decree in terms of the award. Various objections were filed by Qamar Din, but it is necessary to consider only two of these objections :

(1) That the applicant, namely Nur Din, was precluded under the provisions of S. 69, Partnership Act 9 of 1932, from taking proceedings under Sch. 2, Para. 20 ;

(2) that the arbitrator had exceeded his authority inasmuch as no power was given to him to assess damages, and in spite of the absence of such a power being conferred upon him, he gave a substantial sum of Rs. 1,500 as damages against the respondent Qamar Din ;

(3) the judicial misconduct of the arbitrator was also pleaded.

The trial Court accepted the first two of these objections and setting aside the award, dismissed the application of the applicant, Nur Din. Nur Din went up in appeal to the learned District Judge under the provisions of S. 104 (1) (f), Civil P. C. The learned Judge has held that the proceedings taken by Nur Din, applicant, under Sch. 2, Para. 20, were not obnoxious to the provisions of S. 69, Partnership Act, and further held that under the circumstances of the case the arbitrator could award damages to the applicant against the publisher, Hafiz Qamar Din. As the question of misconduct had not been decided by the trial Court, the learned Judge remanded the case for the decision of that question. Qamar Din has come up to this Court in revision under S. 115, Civil P. C. Mr. Akbar Ali, his learned counsel, has argued this application at considerable length, and, I must say, with considerable ability. His case is that under the provisions of S. 69, Partnership Act, Act 9 of 1932, no suit

was entertainable by or on behalf of any person suing as a partner in a firm against any person who is alleged to be a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of firms as a partner in the firm. The partnership in the present case had not admittedly been registered and therefore the applicant could not have recourse to the civil Court by initiating proceedings under Para. 20, Sch. 2, Civil P. C. This is a highly technical objection and a technical answer can be given to it.

The word used in S. 69 (1), Partnership Act is "suit", and under Sch. 2, Para. 20, the party is authorised to apply to any Court having jurisdiction and the application shall be in writing and shall be numbered and registered as a suit between the applicant-plaintiff and the opposite party as defendant. It follows therefore that only a "suit" as understood in forensic language was excluded and not an application such as is contemplated in para. 20, Sch. 2. The word "suit" has not been defined, but it has been described in various authorities. One indicia of a suit is that it begins with a plaint. Now it is perfectly clear that an application under Sch. 2, Para. 20, is not a plaint. The language of the paragraph is entirely against the contention that the application is a plaint. The proceedings may be treated as a suit for certain purposes, but they are not a suit properly so called. No direct authority has been pointed out to me contrary to this view and in the absence of such authority I overrule this contention of the learned counsel. I may also point out that under S. 69, sub-S. 3 (a), the provisions of sub-S. 1 are not to affect the enforcing of any right to sue for the dissolution of partnership. The arbitration proceedings were on the face of them taken for the purposes of the dissolution of partnership and on that ground too the proceedings under Sch. 2, Para. 20, would be protected.

As regards the second point, it is true that there is no specific provision either in the deed of partnership of 25th July 1924 or in the agreement to refer to arbitration dated 2nd February 1934 about the assessment of damages ; but Cl. 4 of the deed of partnership is comprehensive enough to cover the awarding of damages. It runs as follows :

The present partnership is confined only to the first edition and the number of copies printed in the first edition is 3,000. Deponent 2 has the option to print the full number of the first edition at once or in two instalments. . . .

Admittedly this was not done and during the ten years that passed between the date of the deed of partnership and the dispute between the parties only 1,000 copies were printed. Before the arbitrator the following statement was made by the publisher Hafiz Qamar Din on 14th March 1934 :

Condition 4 of the deed of partnership is correct. I am ready to publish 2,000 copies according to condition 4 and to sell them if I am given reasonable time. If within the time given I fail to print that number or if I do not print that number at all, then I shall be liable to pay such compensation as the arbitrator might award.

From this it would appear that the publisher admitted the breach and wanted time to make good the breach by supplying the deficiency and publishing the total number. The arbitrator did not give him time. The breach therefore remained and the arbitrator assessed damages for the breach at Rs. 1,500. The sum appears to be somewhat excessive, but an arbitrator has full power and jurisdiction to make his own award and it does not lie in the mouth of the applicant in this Court to challenge the award of the arbitrator on this point. In my opinion the order of the Court below was correct. The question of the judicial misconduct will have to be decided by the proper Tribunal and at the proper time with which I am not concerned ; but, on a consideration of the whole case I have no hesitation in accepting the decision of the two Courts below on the points raised. The application therefore is dismissed. I make no order as to costs.

B.D./R.K. *Revision dismissed.*

A. I. R. 1936 Lahore 138

BHIDE, J.

Sundar—Appellant.

v.

Hiru and others—Respondents.

Second Appeal No. 1609 of 1934, Decided on 20th May 1935, from decree of Senior Sub-Judge, Hoshiarpur, D/- 6th July 1934.

(a) Document — Admissibility — Appeal—Document produced after arguments—Opposite party absent—Notice to opposite party held necessary, hence document not properly received in evidence.

A document was produced by a party in the appellate Court after the arguments were completed and in absence of the other party:

Held : that it was necessary that the opposite party should have been given notice of the same and an opportunity to produce any evidence in rebuttal should have been allowed; but as this was not done the document could not be considered to have been properly received in evidence at all. [P 139 C 1]

(b) Landlord and Tenant—Trees on holding—Wajib-ul-arz allowing tenant to cut one tree for marriage or funeral with lambardar's permission—Chil trees allowed to be cut on payment—Terms held not compelling landlord to preserve trees for tenant's use—They could not restrain landlord by injunction to cut trees.

According to the terms of a Wajib-ul-arz the tenant was allowed to cut one tree out of the trees growing on his holding for purposes of marriage or funeral, with the permission of the lambardar and was allowed to cut chil trees on payment:

Held : that there was nothing in the terms of the Wajib-ul-arz to show that the landlord was bound to preserve the trees for the use of the tenant and that the tenant had no such interest in the trees as to restrain the landlord by means of a perpetual injunction from cutting down the trees. [P 139 C 1, 2]

Ram Lal Anand II—for Appellant.

Badri Das and Gullu Ram—for Respondents.

Judgment. — The plaintiffs in this case are the occupancy tenants and certain other residents of the village Guhwar Chhan in Tappa Lohara, while the defendants are the landlords of the village. The landlords sold some pine trees from the village forest land which was not assessed to land revenue. The plaintiffs sued for a perpetual injunction restraining the defendants from cutting the trees. The trial Court dismissed the suit and its judgment was upheld on appeal by the learned Senior Sub-Judge. From this decision, Sunder, plaintiff, has come up to this Court in second appeal. The pine trees in dispute were found originally to belong to Government and the ownership was transferred to the village proprietors by an agreement between the Government and the proprietors about the year 1868. The terms of the agreement are given at pp. 103 and 104 of the District Gazetteer and are reproduced in the judgment of the learned Senior Sub-Judge. There is no provision in this agreement giving any rights to the occupancy tenants or other residents of the village in respect of the pine trees. The plaintiffs however rely on the Wajib-ul-arz of the village of which a

copy (Ex. P. A.) was produced by them in the appellate Court. The learned Senior Sub-Judge has found that even this Wajib-ul-arz does not support the plaintiffs' claim.

The learned counsel for the defendants-respondents however points out that this copy was produced by the plaintiffs in the appellate Court after arguments were completed and in the absence of the defendants. This contention appears to be correct. The learned Senior Sub-Judge has given no reasons for admitting this additional evidence in appeal and in my opinion this copy cannot be considered to have been properly received in evidence at all. The learned counsel for the plaintiff stated that the plaintiffs had originally produced Ex. P. 7, another copy of a Wajib-ul-arz, but that Wajib-ul-arz related to a different village. This mistake was not originally discovered and hence Ex. P. A. was produced in the appellate Court. Even if this be correct and the document was to be admitted it was obviously necessary that the respondents should have been given notice of the same and opportunity to produce any evidence in rebuttal, but this was not done. The appeal must fail on this ground alone. But it seems to me that even the terms of Ex. P. A. do not really support the plaintiffs' claim. The terms of Ex. P. A. on which the plaintiffs rely are as follows : (a) the lambardar was to see that trees were not needlessly cut ; (b) any khewatdar, that is, owner or occupancy tenant, might with the permission of the lambardar cut free of charge one tree for marriage or funeral ceremonies ; (c) he might cut chil trees for any other purpose at Rs. 0.4-0 a tree creditable to the malba fund, but the trees were not to be cut for purposes of trade.

The first term is not relevant; the second merely allows the occupancy tenants to cut one tree on the occasion of marriage or funeral with the permission of the lambardar ; the third term allows them to cut chil trees on payment. There is nothing in these terms to show that the landlords were bound to preserve the pine trees for the use of the occupancy tenants. There is no doubt that the landlords alone were the proprietors of the trees and in my opinion the document relied on is not sufficient to show that the plaintiffs had any such interest in the trees as could enable them to sue

for the perpetual injunction prayed for. I may further note that the learned Senior Sub-Judge has found that there was no allegation even that the defendants landlords were entirely doing away with the forest. I dismiss the appeal with costs.

S.R./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 139

JAI LAL AND SALE, JJ.

Mt. Sattan—Plaintiff—Appellant.

v.

Janki—Defendant—Respondent.

Letters Patent Appeal No. 79 of 1933, Decided on 5th July 1935, from decree of Dalip Singh, Judge, High Court, Lahore, D/- 12th June 1933, reported in 1933 Lah 777.

Hindu Law of Inheritance (Amendment) Act (2 of 1929)—Male governed by Mitakshara dying before Act—Widow alive when Act came in force—Act applies.

Hindu Law of Inheritance (Amendment) Act does apply to cases in which a male governed by the law of Mitakshara has died before the date on which the Act came into force leaving a widow who was alive on such date: 1936 Lah 124, *Foll.* (P 139 C 2)

Jagannath Aggarwal—for Appellant.

Kishen Dayal—for Respondent.

Judgment.—This is a Letters Patent appeal from the judgment, dated 12th June 1933, of Dalip Singh, J. The learned Judge set aside the decree of the District Judge and dismissed the plaintiff's suit on the ground that the appellant Mt. Sattan was not competent to maintain it as she was not an heir under the law of Mitakshara. On behalf of the appellant it was claimed that under Act 2 of 1929 a sister had been given a right to inherit the property of her brother and, therefore, she was entitled to maintain this suit. The learned Judge, however, held that that Act did not apply to her case as Chanan, the Hindu male through whom she claims, died before the passing of the Act. In First Appeal No. 1804 of 1934 (1), we have held that the Act does apply to cases in which a male governed by the law of Mitakshara has died before the date on which the Act came into force leaving a widow who was alive on such date. The consequence is that this appeal must be accepted, the decree of the learned Judge in Chambers set aside and that of the District Judge

1. *Shakuntala Devi v. Kaushalya Devi*, 1936 Lah 124.

restored. We order accordingly. We make no order as to the costs of this appeal.

S.R./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 140

AGHA HAIDAR, J.

Barkat Ram—Defendant—Petitioner.

v.

Suggar Electric Stores, Ludhiana, —
Plaintiffs and *another*—Defendant—Res-
pondents.

Civil Revn. No. 405 of 1935, Decided on 17th October 1935, from order of Judge, Small Cause Court, Ludhiana, D/- 15th May 1935.

(a) Provincial Small Cause Courts Act (1887), S. 17—Court has discretion to allow time to deposit security by defendant—Defendant cannot postpone depositing of security indefinitely.

The provisions of S. 17 as regards the deposit of the amount due from the defendant under the decree are directory and not mandatory, and that it is open to the Court in appropriate cases to extend the time within which the deposit is to be made. These words do not give an unlimited license to the defendant and certainly are no justification for not depositing for an indefinite period the decretal amount as directed by the section: 1931 Lah 332, *Rel. on.*
[P 140 C 2]

(b) Revision — High Court reluctant to interfere with discretion of lower Courts.

In a matter of discretion unless there are very special circumstances High Court is reluctant to interfere with the orders of the Court below.
[P 140 C 2]

S. L. Puri—for Petitioner.

J. R. Agnihotri—for Respondents.

Order.—This application for revision arises out of certain Small Cause Court proceedings. The plaintiff brought a suit for recovery from the defendant of Rs. 99 12-0, the price of certain electric stores supplied by him. On 23rd March 1935 an ex parte decree was passed against the defendants. On the same day an application was made by the defendant Barkat Ram for the setting aside of the ex parte decree. The requisite security under S. 17, Small Cause Courts Act, was not deposited. On 29th March 1935 the word 'zamanat' was endorsed on the application for restoration. Apparently it meant that zamanat (security) should be deposited. This somewhat laconic order was passed in the presence of the applicant. On 1st April 1935 a notice was issued to the plaintiff to appear on 24th April 1935.

On 24th April 1935 the parties were ordered to lead evidence and 15th May 1935 was fixed for the recording of evidence. On that very day the application was dismissed on the ground that security had not been filed within a reasonable time. The applicant defendant has come up to this Court in revision and has offered to pay the security for the first time. If this application were to be granted it would amount to putting a premium upon gross negligence. The Full Bench decision reported in 12 Lah 359 (1) no doubt lays down that the provisions of S. 17, Provincial Small Cause Courts Act, as regards the deposit of the amount due from the defendant under the decree, are directory and not mandatory and that it is open to the Court in appropriate cases to extend the time within which the deposit is to be made.

These words in my judgment do not give an unlimited license to the defendant applicant and certainly are no justification for not depositing for an indefinite period the decretal amount as directed by the section. The defendant made his application for restoration on 23rd March 1935 and this application was dismissed on 15th May 1935. At no time during this interval of about two months minus one week did the defendant offer the decretal amount by way of security. It is only in this Court that his learned Counsel has asked permission to do so. According to the Full Bench decision the Court in appropriate cases can allow time for depositing the decretal amount. The Court below in the present case has not thought fit to exercise this discretion and I think rightly. In a matter of discretion, unless there are very special circumstances, this Court is reluctant to interfere with the orders of the Court below. I therefore dismiss this application with costs.

B.D./R.K.

Application dismissed.

1. Gedi Mal Dharam Das v. Huna Mal Sedhnam, 1931 Lah 332=131 I C 635=12 Lah 359=32 P L R 504.

* A. I. R. 1936 Lahore 141

AGHA HAIDAR, J.

Preman Shah—Defendant—Petitioner.

v.

Benarsi Das — Plaintiff — Opposite Party.

Civil Revn. No. 408 of 1935, Decided on 25th October 1935, from order of Sub-Judge, 2nd Class, Rawalpindi, D/- 18th March 1935.

(a) Practice—Procedure—Defendant filing written statement—Witnesses summoned but not examined—Defendant taking up new plea of defence going to root of case—Plea should be allowed—High Court can interfere under S. 107, Government of India Act, when plea is not allowed—Rules of procedure ancillary to object of administering justice.

The Courts have to observe the rules of procedure but they must always remember that procedure is only ancillary to the primary objects for which the Courts exist, namely administration of justice between parties, and the Court ought to know that a party can even raise inconsistent pleas or plead in the alternative.

[P 141 C 2; P 142 C 1]

In a certain case the defendant filed a written statement, issues were framed, witnesses were summoned but they were not examined. At this stage defendant raised a plea which if it was true would go to the root of the case which would then be dismissed. The lower Court held that the plea raised was at a late stage and was an entirely new plea that could not be allowed:

Held: that as the case had been raised only at the stage of evidence, the plea, if allowed, would not injure the plaintiff, and being an important plea should be allowed to be raised. [P 141 C 2]

(b) Practice—Revision—Powers of superintendence — High Court can interfere in judicial matter.

In rare causes, in order to do substantial justice between the parties, High Court while exercising its powers of superintendence under S. 107, Government of India Act, can interfere in matters which are not merely administrative but judicial: 1933 Lah 259, *Foll.*

[P 142 C 1]

Dev Raj Sawhney—for Petitioner.*H. L. Bhagat* — for Opposite Party.

Order. — This is an unusual application, purporting to have been made under the provisions of S. 107, Government of India Act, 1915. The facts leading up to the present application are as follows: On 26th June 1934 the present suit was filed by the plaintiff for the recovery of a sum of Rs. 2,200 as arrears of his salary. The defendant filed his written statement on 5th December 1934. On the same date issues were framed, witnesses were summoned but were not examined. On 26th February 1935 the defendant made an application that he should be permitted to raise a plea that

the present suit was not maintainable in view of the fact that on 26th February 1934 the matter in controversy between the parties had been settled and decided by an award delivered by one Lala Devi Das. The plaintiff took objection to this new plea being raised at that stage. On 18th March 1935 the Court below dismissed the application of the defendant on the ground that it was belated and was in the nature of an afterthought and inconsistent with the pleas already taken by the defendant in his written statement. The trial Court further observed that the award on which the defendant proposed to rely was indefinite and therefore incapable of execution and that the plea sought to be raised on the basis of that award was *prima facie* of doubtful merits. The defendant has come up to this Court in revision.

In my opinion the application dated 26th February 1935, though it raised a new plea which was not to be found in the original statement, dated, 5th December 1934, was not belated having regard to the circumstances of the case. No evidence had been recorded. It is true that some witnesses had been summoned, but they were not examined; hence no injury could have been done to the plaintiff. At any rate the plaintiff could have been compensated by awarding costs to him. Furthermore the issue regarding the alleged award would have been a self-contained one and the evidence in support of it and against it would have constituted a compact block quite independent of the other pleas raised in the case. The plea is an important one because, if it is established, it would go to the root of the plaintiff's claim and the suit would be dismissed on this ground alone. The Court below was wrong in animadverting upon the award, when it had shut out the very plea, in deciding which the award would have been the subject-matter of a proper adjudication. The Courts have to observe the rules of procedure, but they must always remember that procedure is only ancillary to the primary objects for which the Courts exist, namely administration of justice between parties. The action of the Court below in this case was unjustifiable and in my opinion the discretion exercised by it was arbitrary. Furthermore, the Court ought to have known that a party can raise inconsistent pleas or plead in

the alternative. I therefore, acting under the provisions of S. 107, Government of India Act, allow this application, set aside the order of the Court below dated 18th March 1935 and direct that the plea may be admitted and a proper issue be raised on it and the parties should be given full opportunity to lead relevant evidence thereupon. I have no doubt in my mind that in rare cases, in order to do substantial justice between the parties, this High Court while exercising its powers of superintendence under S. 107, Government of India Act, can interfere in matters which are not merely administrative but judicial. There are a number of reported decisions on the subject, but as an illustration I would refer to 1933 Lah 259 (1). In two cases at least I remember having interfered under S. 107, Government of India Act, in order to enable the Court to promote the interests of justice. Costs would abide the result.

B.D./R.K.

Case remanded.

1. Firm Ganesh Das Shankar Lal v. Firm Asa Nand-Radhe Sham, 1933 Lah 259=144 I C 515=34 P L R 781.

A. I. R. 1936 Lahore 142

AGHA HAIDAR, J.

Dalip Singh—Appellant.

v.

Gian Singh and others—Respondents.

Misc. First Appeal No. 568 of 1935, Decided on 16th October 1935, from order of Senior Sub-Judge, Shahpur, D/- 22nd November 1934.

(a) **Guardians and Wards Act (1890)**—Act does not deal with lunatics.

The Guardians and Wards Act does not deal with cases of lunatics. [P 142 C 2]

(b) **Guardian—Guardian of person and property appointed—Ward is minor till he attains age of twenty-one—Another guardian should be appointed if minor is below twenty-one and if guardian appointed resigns.**

Where a guardian of the person and property of a minor has been appointed, the minor should be treated as a minor or infant and would not be able to enter into a contract or to transact any kind of business himself until the age of 21, and when a guardian so appointed has resigned another guardian should be appointed to the person and property of the minor even though he has exceeded the age of 18 years.

[P 142 C 2; P 143 C 1]

S. L. Puri—for Appellant.*Jhanda Singh*—for Respondents.

Judgment.—The judgment of the Senior Subordinate Judge is extremely unsatisfactory. One Gian Singh was ap-

pointed the guardian of the person and property of his minor brother, Jiwand Singh, on 8th March 1928. Jiwand Singh was born somewhere in September 1916, so that he would now be little more than 19. An application was made that Gian Singh should be removed from his guardianship because of certain malpractices. Thereupon Gian Singh made an application offering to resign the guardianship. Subsequently he made an application withdrawing his resignation, but the Court on 13th October 1934 did not give him permission to withdraw his resignation. The Court removed Gian Singh from the guardianship. After his resignation several applications were made by various other relations of the minor each claiming a right to be appointed as the guardian of the person and property of the minor. The Court below framed the following issues:

1. Whether it is necessary to appoint a guardian of the person and property of Jiwand Singh, minor? 2. If it is, whether any one of the applicants is a proper person to be appointed a guardian?

It was brought out in the course of evidence that Jiwand Singh is mentally deficient and the Court below threw out a suggestion that the District Court should be approached and proceedings under the Lunacy Act 4 of 1912 should be taken. I understand that those proceedings are still pending, but the learned Judge went on to observe that, if the proceedings under the Lunacy Act fell through, it might become necessary to see whether Jiwand Singh's mental condition requires a guardian under the Guardians and Wards Act. This remark is due to a misapprehension because the Guardian and Wards Act does not deal with cases of lunatics. The learned Judge has observed that, because Jiwand Singh is now 19 years old and understands his interests quite well, it is not necessary to appoint a guardian for his person and property and that he would certainly like to manage his property and receive income. This finding is palpably erroneous and is based upon a total ignorance of the law of guardianship. A guardian of the person and property of Jiwand Singh had been appointed on 8th March 1928 by the proper Court. The result of this appointment is that Jiwand Singh would be treated as a minor or infant and would not be able to enter into a contract or to transact any

kind of business himself until the age of 21. The learned Counsel for the parties inform me that the minor is possessed of fairly considerable landed property and it would be necessary for him from time to time to grant receipts, etc. Under the law, as I understand, he would not be able to grant a valid receipt or enter into any other contract. The inconvenience therefore is apparent and the estate of the minor would be entirely mismanaged during the interval. Under the circumstances the Court below was in error in refraining from appointing a guardian of the person and property of Jiwan Singh even though he had exceeded the age of 18 years. I therefore allow this appeal and setting aside the order of the Court below direct that Court to make a suitable appointment of a guardian of the person and property of the minor. I make no order as to costs.

B.D./R.K.

Order accordingly.

A. I. R. 1936 Lahore 143

BHIDE AND CURRIE, JJ.

Kanwar Bhan—Defendant—Appellant.
v.

Bhagat Jiwan Das and others—Defendants and another—Plaintiff—Respds.

Letters Patent Appeal No. 87 of 1933, Decided on 30th October 1935, from decree of Dalip Singh, J., D/-23.10.1933.

Custom (Punjab)—Alluvion and Diluvion—Makhan Bela village, Alipur Tahsil—Wajib-ul-arz—Adna Malik regains land submerged on paying Haq Jhuri—Amount of Jhuri is to be determined in consideration with land and capacity of Adna Malik.

When the land is submerged the rights of the Adna Malik in village Makhan Bela, Tahsil Alipur, are extinguished but on its re-emergence he is entitled to regain possession of it by paying Haq Jhuri. The rate of the Jhuri is not fixed and if the superior owner refuses to accept the Jhuri offered by the Adna Malik the matter is to be determined with due regard to the quality of the land and the capacity of the Adna Malik.

[P 143 C 2]

Har Gopal—for Appellant.

Yashpal Gandhi for M. C. Mahajan—for Respondents.

Currie, J.—The sole point arising in these two appeals is the interpretation to be placed on the clause in the wajib-ul-arz of village Makhan Bela in the Alipur tahsil relating to the rights of Adna Maliks in land which has been subject to diluvion. In these cases it was held that the Adna Malik on the re-emergence of the land was entitled to

regain possession of the land on payment of Haq Jhuri. The learned Judge who decided the appeal in Chambers adopted this view in consideration of the ruling given in 12 Lah. 318 (1), but expressed certain doubts as regards the interpretation of the wajib-ul-arz. the relevant clause of the wajib-ul-arz runs as follows:

Doom:—Andar Hadud Mauza Burd Baramad Ka Asar:—Is Mauza men do Kism Ki milkiat Adna-o-Ala hai. Jis Malik Adna Ki Zamin burd ho jati hai-to Baramdgi Ke waqt woh Zamin milkiat Malkan-i-ala Ki hoti hai-Malkan Adna Ka is Zamin par Kuchh istehqag nahin rehta. Malkan-i-Ana bad hag dene "Jhuri" Malkan-i-ala Ko mustahaq qabza karneke is zamin per honge, bila dene hag "Jhuri" ko unka kuchh wasta nah hoga. Agar Malkan-i-Ala Jhuri amdan nah leven to Malkan-i-Adna is ragba baramdah par qabza karneke majaz nahin hai, aur Jhuri ka tasfia Malkan-i-Ala-o-Adna hasab haisiat arazi-o-malik Adna ho jata hai. Sharah koikhas muqarrar nahin hai.

I would interpret this as meaning that when the land is submerged the rights of the Adna Malik are extinguished, but on its re-emergence he is entitled to regain possession of it by paying Haq Jhuri. The rate of the Jhuri is not fixed and if the superior owner refuses to accept the Jhuri offered by the Adna Malik the matter is to be determined with due regard to the quality of the land and the capacity of the Adna Malik. That, I think, is the only interpretation that can be put on this clause. Mr. Har Gopal argues that the Ala Malik has an absolute right to refuse to accept Jhuri. If that was so, it would, in my opinion, have been unnecessary to insert in the wajib-ul-arz the condition that the Adna Malik had the right to regain possession on payment of Jhuri, and further the words relating to the method of assessment of the Jhuri in case of dispute would have been entirely unnecessary. These words form part of the same sentence as the words relating to the refusal of the Ala Malik to accept Jhuri and must be read with the first part of the sentence. They cannot be separated into two separate and distinct clauses. In my opinion, therefore, the interpretation placed on this clause by the learned Judge in Chambers was correct and I would dismiss the appeal with costs.

Bhide, J.—I agree.

B.D./R.K.

Appeal dismissed.

1. Khuda Bux v. Virbhan, 1931 Lah 486=132.
I O 837=12 Lah 318=32 P L R 693.

A. I. R. 1936 Lahore 144

COLDSTREAM, J.

Hari Ram—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1000 of 1935, Decided on 28th October 1935, from order of Sessions Judge, Karnal District, D/- 10th July 1935.

(a) **Punjab Municipal Act (3 of 1911), S. 195**—S. 195 applies to notified area of Karnal.

Section 195, Punjab Municipal Act, has been made applicable to the notified area of Karnal by notification No. 11832, dated the 29th May 1918 (p. 164 of Part 1-A of the Punjab Gazette). Of this notification the Courts must take judicial notice. [P 144 C 2]

(b) **Punjab Municipal Act (3 of 1911), S. 81—Magistrate recovering money under S. 81—Magistrate has no authority to determine whether proper notice was given or not.**

A Notified Area Committee gave notice to a person asking him to demolish certain structure built on the notified area. Afterwards a compensation was arranged but it was not paid. Committee applied to the Magistrate under S. 81 for recovery of compensation. It was contended that the notice given was defective and hence the Magistrate cannot recover compensation:

Held: that the position of a Magistrate in recovering money under S. 81, Punjab Municipal Act, is similar to that of a Magistrate recovering under the Criminal P. O., a fine passed by another Magistrate. The Magistrate has no authority to determine whether the notice was or was not actually given according to law and so to re-open a matter which was determined by the Commissioner's order. [P 145 C 1, 2]

S. L. Puri—for Petitioner.

R. C. Soni—for Opposite Party.

Order.—On 18th June 1930 the Committee of the notified area of Karnal served a notice on Hari Ram Mahajan of Karnal under S. 195, Punjab Municipal Act, requiring certain shops within the notified area to be demolished. The President of the Committee (the Deputy Commissioner of Karnal) refused to withdraw the notice on a representation made to him by Hari Ram, but on 18th August 1930 gave Hari Ram notice that the Committee was prepared to accept compensation in lieu of the demolition of the buildings. Hari Ram accepted this proposal and asked the President to fix compensation which he would gladly pay. After some negotiations the Committee resolved on 12th November 1931 to fix the amount at Rs. 450 and Hari Ram was informed of this on 20th November 1931. On 23rd January 1932 Hari Ram

appealed to the Commissioner against the resolution of 12th November 1931, the ground urged being that the order to pay compensation was not justified because the Committee had no power to levy house tax on the property concerned. The Commissioner rejected the appeal finding that the buildings were within the notified area limits.

On 30th May 1934 the Committee resolved to take action under S. 81, Punjab Municipal Act. Application was made to the local Magistrate accordingly and the Magistrate passed an order for recovery under that section. Against this order Hari Ram presented a petition to the Sessions Judge and the Sessions Judge has recommended that this Court should in exercise of its power of revision set aside the order. The learned Sessions Judge is of opinion that the order is illegal because (1) it is not proved that S. 195, Punjab Municipal Act, has been made applicable to the notified area of Karnal, and (2) that as the buildings were admittedly completed in November 1929, more than six months before notice to demolish them, was given to Hari Ram on 18th June 1930, the notice was *ultra vires*.

Before me the learned counsel for the Committee points out that Ss. 81 and 195, Punjab Municipal Act, were extended to the notified area of Karnal by Notification No. 11832, dated 29th May 1918, (p. 164 of Part 1-A of the Punjab Gazette). Of this notification the Courts must take judicial notice. The first objection raised by the learned Sessions Judge has therefore no force.

Counsel for the Committee contends that the Magistrate had no jurisdiction to question the legality of the Committee's order requiring payment of compensation, his function under the provisions of S. 81, Punjab Municipal Act, being similar to that of a Court executing a decree, the merits of which do not concern him. In reply petitioner's counsel argues that it was the duty of the Magistrate to see that on the facts as stated by the claimant the amount was claimable, that is to say whether the claim was *intra vires* or *ultra vires*, and that in this case he should have decided that it was not claimable because the notice to demolish the buildings was not given within six months of the date of their com-

pletion. He relies on 2 P R 1910 Cr (1) and 1 P R Cr 1891 (2), in support of this argument. It cannot, I think, be disputed now that a revision petition may be entertained against the Magistrate's order by this Court. This Court has on several occasions interfered in such cases where it has found the action of a Municipal Committee to be ultra vires (e. g., 99 I C 1030 (3) and 1931 Lah 315 (4), as well as 2 P R 1910 Cr (1), already cited).

The question as observed in 1 P R 1891 Cr (2) is how far the Magistrate's enquiry is to extend. The present case is not one in which the Municipality's claim arises out of a contract or out of a relationship of landlord and tenant, 1931 Lah 315 (4), but is to recover an amount claimable under the provisions of S. 195, Municipal Act. In the present case there was the final order of the Commissioner which certainly made the amount legally 'claimable.' If there was a mistake regarding the true date of the completion of the buildings (which the petitioners had stated to be November 1933) the petitioners could have asked the Commissioner to review his order. I do not think it was open to the Magistrate to try the question whether owing to a mistake in procedure the Commissioner's order was incorrect. There are no provisions indicating that the Magistrate is applied to in a judicial capacity when an application is made to him under S. 81, Municipal Act. Had the legislature intended to leave it open to the Magistrate to hold a judicial enquiry some indication of this intention would surely have been made in the section. See the remarks of Blair, J., in 22 All 111 (5). In 1 P R 1891 Cr (2), Roe, J., observed that the position of a Magistrate in such a case is similar to that of a Magistrate recovering under the Criminal Procedure Code a fine passed by another Magistrate. In my view the Magistrate had no authority to determine whether the notice was or was not actually given within six months of the demolition of the buildings and so

1. Kanhaiya Lal v. Emperor (1910) 2 P R 1910 Cr=4 I C 951=11 Cr L J 87.
2. Lagi v. Municipal Committee Lahore, (1891) 1 P R 1891 Cr.
3. Maya Dass v. Municipal Committee, Chiniot, 1927 Lah 161=99 I C 1030=28 Cr L J 230.
4. Hafiz Abdullah v. Municipal Committee, Delhi, 1931 Lah 315=133 I C 278=32 P L R 172.
5. W. J. Ellis v. Municipal Board, Mussoorie, (1899) 22 All 111=1899 A W N 202.

1936 L/19 & 20

to re-open a matter which was determined by the Commissioner's order. I dismiss the petition accordingly.

B.D./R.K.

Petition dismissed.

A. I. R. 1936 Lahore 145

JAI LAL, J.

Hira Lal—Plaintiff—Appellant.

v.

Mt. Jiwan and another—Defendants—Respondents.

Second Appeal No. 890 of 1935, Decided on 18th October 1935, from decree of Addl. Dist. Judge, Lahore, D/- 2nd February 1935.

Pre-emption—Notification excepting land in Municipal limits from right of pre-emption—Notification covers land brought within Municipal limits after notification.

Notification exempting the limits of a Municipality from the operation of the pre-emption Act is wide enough to cover the areas which may be included within the limits of the Municipality after the date of the notification.

[P 146 C 1]

Jai Gopal Sethi—for Appellant.

Achhru Ram—for Respondents.

Judgment.—The plaintiff appeals against the decree of the Additional District Judge of Lahore dismissing his suit for pre-emption. The land in dispute is admittedly situated within the Municipal limits of Lahore. S. 8, Punjab Pre-emption Act, authorizes the Local Government to declare by notification that in any local area or with respect to any land or property or class of land or property or with respect to any sale or class of sales no right of pre-emption or only such limited right as the Local Government may specify shall exist. By Notification No. 15926 of 11th May 1920 the Local Government directed that no right of pre-emption shall exist within the boundaries of the Municipality of Lahore except in respect of the areas therein defined.

It is admitted that the land in suit is not situated within the limits of the areas excluded from the operation of the notification. But the plaintiff's claim now on appeal is that this area was brought within the limits of the Municipality of Lahore after 1920, i. e. after the date of the notification referred to above, and therefore is not exempt from the right of pre-emption. In the first instance it is a question whether it is open to the appellant to contest that the land in dispute was brought within the limits of the

Lahore Municipality after the date of the notification. The learned counsel for the appellant admits that there are only two notifications defining the limits of the Lahore Municipality: one was issued in 1918 and the other in 1923. The plaintiff, examined as a witness, stated that in 1920 the land in dispute had been included within the limits of the Lahore Municipality. The only interpretation of that statement can be that it was brought within the Municipal limits by the notification of 1918 because according to his own counsel there was no notification between 1920 and 1923 extending the limits of the Lahore Municipality. It may however be that the plaintiff was not certain of his ground when he made the statement referred to above, though I am not prepared to believe that he did not understand what he was saying. But the notification exempting the limits of the Lahore Municipality from the operation of the Pre-emption Act is in my opinion wide enough to cover the areas which may be included within the limits of the Lahore Municipality after the date of the notification of 1920.

The learned counsel for the appellant concedes that if the notification had been merely that no right of pre-emption shall exist within the boundaries of the Municipality of Lahore the area now in dispute would have been governed by the notification even if included in such limits after the notification. But his contention is that by virtue of the exceptions mentioned in the notification, the area which may be included after the notification, cannot be held to be governed by it. I am unable to see the force of this argument. Certain portions were expressly excluded from the operation of the notification and admittedly the area now in suit is not so excepted. It is therefore covered by the operative part of the notification which excepts the lands situated within the limits of Lahore Municipality from the operation of the right of pre-emption. In order to escape the effect of the notification the learned counsel must establish that the area in suit was expressly excepted by the Government. Admittedly this has not been done. Consequently there is no force in this appeal and I dismiss it with costs.

B.D./R.K.

*Appeal dismissed.** **A. I. R. 1936 Lahore 146**

JAI LAL, J.

Dogar Singh—Plaintiff—Appellant.

v.

Mt. Parbati and others—Defendants—Respondents.

Second Appeal No. 1059 of 1934, Decided on 29th October 1935, from decree of Dist. Judge, Rawalpindi, D/- 12th March 1934.

*** Partnership — Suit for accounts—Partnership dissolved—Account-books in possession of person claiming accounts—Such person can lay suit for accounts.**

It is the right of each partner to claim an account of a dissolved partnership and the mere fact that the account-books are in possession of the partner claiming accounts, does not necessarily enable him to find out what the amount due to him would be, because, before this is done various matters have to be decided in the presence of the parties, as for instance, the valuation of the assets including the debts due to the firm is one of the most important matters which has to be decided and the plaintiff alone is not competent to do so; in the alternative the assets must be realised before the accounts can be settled. The plaintiff in such case cannot be expected either to place his own value on the assets of the firm including the debts due to the firm or to realize them before suing for accounts. So a partner who is in possession of the partnership books is competent to maintain a suit for accounts of the dissolved partnership. [P 147 C 1]

J. R. Agnihotri and M. L. Puri—for Appellant.

Amar Nath Chona—for Respondent No. 1.

Judgment.—The appellant instituted a suit for accounts of a dissolved partnership and impleaded the other partners and the legal representatives of the deceased partners as defendants. Some of the defendants denied that they were partners. Both the Courts below are agreed that the defendants were partners in the firm and are also agreed as to the share that each of them had. The trial Court decreed the suit but the District Judge has, on appeal by one of the defendants or rather the legal representatives of one of the partners, dismissed the suit on the ground that the account-books were in possession of the plaintiff and he was therefore in a position to determine what amount was due to him from the defendants. The learned Judge is of opinion that the plaintiff should have sued for the specific amount alleged to be due to him and should not have sued for rendition of accounts. He has cited some cases in support of his view, but an exa-

mination of these cases shows that they related to disputes about accounts between principals and agents and plaintiffs' suits for accounts were held not to be sustainable on the ground that the account-books in such cases were in possession of the respective plaintiffs who could ascertain from them what the amounts due to them were.

No authority has been cited in support of the respondent's attempt to apply the same principle to suits between partners. The right of partners in this respect is defined in S. 257, Contract Act, corresponding to S. 9, Partnership Act. It is the right of each partner to claim an account of a dissolved partnership and the mere fact that the account-books are in possession of the plaintiff does not necessarily enable him to find out what the amount due to him would be because, before this is done, various matters have to be decided in the presence of the parties, as for instance, the valuation of the assets including the debts due to the firm is one of the most important matters which has to be decided and the plaintiff alone is not competent to do so; in the alternative the assets must be realised before the accounts can be settled. The plaintiff in such a case cannot be expected either to place his own value on the assets of the firm including the debts due to the firm or to realize them before suing for accounts. I have indicated one practical difficulty in applying the same principle to suits for accounts between partners as is applied to suits between principal and agents. It is not therefore merely a question of the legal right of each partner to claim an account of a dissolved partnership in Court even if the books are in his possession but there are practical difficulties in his way for himself to determine on a mere inspection of books the amount that would be due to him.

In my opinion the view of the learned District Judge that a partner who is in possession of the partnership books is not competent to maintain a suit for the accounts of the dissolved partnership, is erroneous. Such a right vests in each partner and no authority has been cited to enable me to hold that it does not exist under the circumstances disclosed in this case. I accept this appeal and set aside the decree of the District Judge,

and restore that of the trial Judge with costs throughout.

B.D./R.K.

Appeal allowed.

* A. I. R. 1936 Lahore 147

JAI LAL, J.

Girdhari Lal—Defendant—Appellant.
v.

Dharam Das and another—Plaintiffs—Respondents.

Misc. Second Appeal No. 778 of 1935, Decided on 17th October 1935, from order of Dist. Judge, Delhi, D/- 25th February 1935.

***Limitation—New party—Misdescription—Person intended to be sued described wrongly—Plaint amended by correcting proper defendant—Defendant is not new substitution within meaning of S. 22, Limitation Act.**

A person wanted to sue one G, who had given a cause of action to the plaintiff. Plaintiff was not aware of the identity of the person of G. A particular G was served, but it appeared that he was not the person whom the plaintiff wanted to sue. So the plaintiff amended the plaint by correcting the description of G and got the right person served. The defendant contended that S. 22, Lim. Act, applied as he was a substituted defendant and the suit was instituted against him on the date when the plaint was amended and on that date the suit was barred by time:

Held: that the case was one not of substitution within S. 22, Lim. Act, but was one of mere misdescription and suit should be held to be instituted against the defendant when the suit was filed; 1932 *Lah* 314; 1925 *Cal* 716 and 1924 *Cal* 74, *Disting.* [P 148 C 1, 2; P 149 C 1]

J. C. Sethi—for Appellant.

Khalifa Shuja-ud-Din—Respondents.

Judgment.—It is not without hesitation that I have decided to dismiss this appeal. The facts are these: The respondent Dharam Das instituted a suit against Girdhari Lal alleging that the latter had in collusion with his step-mother obtained a fraudulent decree against him and realised some money which belonged to him and which was lying in deposit in Court. He alleged that he was a minor then. The defendant was described to be Girdhari Lal, shopkeeper, Sadar Bazar, cloth-seller, Street Nathan Singh Pahari Dhiraj, Delhi. Summons was issued to the defendant and was served upon Girdhari Lal who answered the description given in the plaint and who, it is alleged, was pointed out by the plaintiff himself. The plaintiff denies that he pointed out any particular person or that he accompanied the process-server. The report of the process-server, however states that the plaintiff accompanied him and point-

ed out the person and it is signed by the plaintiff. It thus appears that the plaintiff did point out a Girdhari Lal as the person who should be served with summons. When the case came up for hearing Girdhari Lal who had been served with summons appeared in Court and stated that he had nothing to do with any transaction relating to the plaintiff. The latter then realised his mistake and stated that he was not the person whom he intended to sue. He was allowed to amend his plaint and the defendant then was described as Girdhari Lal, son of Faqir Chand, landlord of Mohalla Jattan, Sadar Bazar, Delhi. This defendant was then served and appeared in Court and raised the plea that the suit was barred by time because the plaint as against him must be deemed to have been presented on the day on which it was filed as amended with his correct description and that on that date the normal period for the suit had expired. The trial Court gave effect to this plea but the District Judge on appeal has reversed the decree of the trial Court dismissing the suit and has remanded the case for trial on the merits. The defendant Girdhari Lal, on whose objection the suit was originally dismissed as barred by the time, has appealed to this Court.

His contention is that on the facts mentioned above S. 22, Limitation Act applies. That section is where after the institution of a suit a new plaintiff or defendant is substituted or added the suit shall, as regards him, be deemed to have been instituted when he was so made a party. There is no contention that if it be found in this case that a new defendant was added or substituted the suit would be barred by time, but it has been found by the learned District Judge, and is contended by the learned counsel for the respondent, that there is no question of any substitution of a new defendant in this case, and that it was a case of misdescription of the defendant. It does appear that the plaintiff when he originally instituted the suit was not aware of the personal identity of the person against whom he instituted the suit. All that he knew was that he was a Girdhari Lal residing in the Sadar Bazar Delhi. But the ground on which the learned District Judge has held that it was a case of misdescription

is that the plaintiff intended to sue the person who realised the money from the Court and he was called Girdhari Lal and the fact that he was not aware of his identity did not matter so long as the suit was instituted in the name of the person who had realised the money.

This argument is met by Mr. Sethi for the appellant by stating that the intention of the plaintiff should be judged by his after-conduct and that the description given in the plaint tallies with the person whom he pointed out subsequently as his defendant and on whom he got service effected, and this clearly shows that he originally intended to sue the Girdhari Lal who was subsequently discharged at his own request and therefore the suit must be deemed to be against a new Girdhari Lal after amendment of the plaint. This argument is a plausible one and has created some difficulty in my mind. At the same time there is force in the contention of the plaintiff-respondent which contention was accepted by the District Judge, that he intended to sue the person who realised the money from Court and admittedly his name was Girdhari Lal and the fact that he impleaded originally a wrong Girdhari Lal, amounts to a misdescription and not the substitution of a new defendant within the meaning of S. 22, Lim. Act. 1932 Lah 314 (1), cited by the appellant's counsel, does not appear to be of material assistance. In that case a wrong legal representative was substituted in place of the deceased party and the real legal representative was brought on the record after the normal period for the appeal had expired. It was held that the legal representative must be deemed to have been brought on the record on the date when the real legal representative was substituted and not when the wrong person was brought on the record. In 52 Cal 783 (2), also cited by Mr. Sethi, the suit was originally brought against the Agent of the Bengal Nagpur Railway.

The plaint was then amended so as to describe the defendant as the Bengal Nagpur Railway and it was held that it was not a case of misdescription of the defendant but of the substitution of a

1. Northern Bank of India Ltd. v. Ramesh Chander, 1932 Lah 314=137 I C 89=33 P L R 253.

2. Agent, Bengal Nagpur Railway v. Behari Lal Dutt, 1925 Cal 716=90 I C 426=52 Cal 783=29 C W N 614.

new defendant. It is obvious that the Bengal Nagpur Railway is quite a separate entity to its agent. The respondent's counsel cited 50 Cal 549 (3). That also does not materially help us. No case has been cited by either party in which the precise proposition that is involved in the present case has been discussed. I am personally inclined to agree with the view of the learned District Judge and therefore dismiss this appeal, but leave the parties to bear their own costs in this Court.

B.D./R.K. *Appeal dismissed.*

3. Sheodayal Khemka v. Joharmul Manmull,
1924 Cal 74=75 1 C S1=50 Cal 549.

A. I. R. 1936 Lahore 149

AGHA HAIDAR, J.

Salig Ram—Purchaser—Appellant.

v.

Balak Ram and others—Creditors—Respondents.

Misc. Second Appeal No. 973 of 1935, Decided on 18th October 1935, from order of Dist. Judge, Hoshiarpur, D/- 6th February 1935.

Insolvency—Fraud practised upon receiver—Receiver applying for setting aside sale—Action of Receiver falls within S. 4, Provincial Insolvency Act—Sale can be set aside even after two years.

A Receiver in insolvency applied to Court to set aside the sale which the Receiver himself held, on the ground that purchaser had practised fraud upon him. The application was made many days after the sale. The action of the Receiver did not fall within S. 68, but was within S. 4, Provincial Insolvency Act, and when the Court is taking action under S. 4 of the Act it can set aside the transfer although made more than two years before the order of adjudication: 1935 *Lah* 60, *Doubted*; 1934 *Lah* 365 and 1927 *Sind* 66, *Applied*. [P 150 C 1, 2]

N. C. Pandit—for Appellant.

Judgment.—This petition arises out of certain insolvency proceedings. One Phangan was declared an insolvent on 14th January 1932. On 17th June 1932 he applied for his discharge. Notices were served upon the creditors. On 17th August 1932 the Receiver sold certain materials of a house for a sum of Rs. 100 and the sale was subsequently confirmed. These materials were purchased by Salig Ram, the present applicant. On 15th April 1933 the Receiver made a report to the Insolvency Judge that the sale had been brought about by fraud which was practised upon him, and the property therefore had been sold for a grossly inadequate price. The Receiver

stated in this report that the purchaser, who had been appearing as a surety for the insolvent, had given him to understand that the value of the materials was not more than Rs. 25 and that he was purchasing the same for Rs. 100 merely to oblige the debtor. The Insolvency Court set aside the sale. The purchaser, Salig Ram, appealed to the District Judge and it was argued before him that the sale having taken place on 17th August 1932, the report of the receiver for setting aside the sale which was made after a period of about eight months was not entertainable and the order of the trial Court was without jurisdiction. The District Judge overruled this contention. On the question of fact, the District Judge agreed with the Court below and held that the sale had been brought about by misrepresentation and the property had been sold to the appellant for Rs. 100 when it was really worth much more. He accordingly dismissed the appeal. The purchaser, Salig Ram, has come up to this Court. It is unfortunate that neither the receiver nor any one of the creditors was represented in this Court at the time of the arguments. The counsel who appeared for the purchaser, Salig Ram, was not quite clear as regards his legal position whether an appeal lay or not. At one time he suggested that the application in this Court was covered by the first proviso to S. 75, Provincial Insolvency Act. He then argued that he had a right of second appeal under the second proviso though he was reluctant to admit that the present proceedings were taken by the receiver under S. 4, Provincial Insolvency Act. I however allowed him to argue the question of law which arose in the case.

I must observe at the outset that the reasoning of the District Judge does not appear to me to be sound. His view is that the Court acted under some undefined and inherent powers in entertaining the application, or the report as he calls it, for setting aside the sale. In my opinion the proceedings taken by the receiver fall within the scope of S. 4, Provincial Insolvency Act, though he himself purported to invoke the inherent powers of the Court. It was urged by the learned counsel that the Insolvency Court should not have entertained the application because it was made long after the date of the sale and that the period of limitation which

governed the application is given in S. 68, Provincial Insolvency Act. I do not think that this contention is sound. S. 68 clearly lays down that, if the insolvent or any other creditor or any other person is aggrieved by any act of the receiver, he may apply to the Court, but that such an application must be made within 21 days from the date of the act or decision complained of. In the present case it is quite clear that it was the receiver who was moving the Court against a sale held by himself and his object was to rectify the error which had resulted in the loss to the assets of the debtor, to the detriment of the creditors. Therefore, S. 68 has no application. S. 4 is very wide in its terms and the trend of decisions seems to be to construe it liberally so as to do complete justice between the parties and make a complete and equitable distribution of the property of the insolvent. The learned counsel relied upon a Division Bench decision of this Court reported in 1935 Lah 60 (1). There the learned Judges laid down that even an application under S. 4 should be made within 21 days if it is one to set aside an order of the Official Receiver. This case is clearly distinguishable because it refers to an application which had been made by a party to set aside the order of the Official Receiver under S. 68. In the present case it is the Official Receiver who is moving the Court to set aside the sale which he had himself held on the ground of fraud. Furthermore, in dealing with S. 4, Provincial Insolvency Act, a Division Bench of this Court, to which I was a party, laid down in 15 Lah 294 (2), vide also 1927 Sind 66 (3), that S. 53 of the Act does not control or restrict the jurisdiction conferred upon the Court by S. 4, to decide all questions of title. S. 53, Provincial Insolvency Act, strikes at certain transfers, after the transferor is adjudged insolvent by means of a petition presented by the Receiver within two years after the date of the transfer. But, according to the Division Bench decision noted above, when the Court is taking action under S. 4, it can set aside the transfer although made more than two

years before the order of adjudication. If the learned Judges in 1935 Lah 60 (1), intended to lay down that the proceedings under S. 4, Insolvency Act, could only be taken within a period of 21 days as provided in S. 68 I would respectfully prefer to follow the Division Bench decision in 15 Lah 294 (2), to which I was a party. The question however does not arise as I have pointed out that the action of the Receiver did not fall within the purview of S. 68. In my opinion the Insolvency Judge had jurisdiction to entertain the application of the Official Receiver in spite of the fact that it was made more than 21 days after the date of the sale. The question of fraud and misrepresentation on the part of the auction-purchaser is a question of fact and was not raised by the counsel for the applicant. I therefore affirm the decision of the lower Court though on different grounds. The present petition is dismissed but without costs as the respondents were not represented.

B.D./R.K

*Petition dismissed.***A. I. R. 1936 Lahore 150**

ADDISON, J.

Mayya Mal—Judgment-debtor—Appellant.

v.

Mt. Dhan Devi and another—Decreeholder—Respondents.

Misc. First Appeal No. 954 of 1935, Decided on 9th October 1935, from order of Senior Sub-Judge, Ferozepore, D/- 20th May 1935.

Punjab Relief of Indebtedness Act (1934), S. 34—Warrant of arrest issued before commencement cannot be executed after commencement of Act.

A warrant of arrest against a judgment-debtor was issued but was not executed upon the date on which the Punjab Relief of Indebtedness Act came into force. It was contended that as the warrant was issued prior to the commencement of the Act, it could be executed even after that:

Held: that there was nothing in S. 34, about the date of issue of the warrant. What the section says is that after 19th April 1935 no judgment-debtor shall be liable to arrest unless the necessary conditions are fulfilled.

[P 151 C 1]

Gullu Ram—for Appellant.*Nawal Kishore*—for Respondents.

Judgment.—A warrant of arrest was ordered to issue on 27th March 1935, against the judgment-debtor *Mayya Mal*. It was not served up to 19th April 1935, on which date the Punjab Relief of In-

1. *Jai Kishen Das v. Chirag Din*, 1935 Lah 60.

2. *Ram Ditta Mal v. Official Receiver, Lahore*, 1934 Lah 365=147 I C 1026=15 Lah 294=35 P L R 271.

3. *Official Receiver v. Tirathdas-Mewa-Ram*, 1927 Sind 66=97 I C 321.

debtless Act, 1934, came into force. It was represented to the executing Court that under the provisions of S. 34 of that Act, the warrant could no longer be executed. The Senior Subordinate Judge, Ferozepore, repelled this objection and ordered the bailiff to execute it, though he added in his order that if the judgment-debtor refused to accompany the bailiff, the bailiff should not touch him or force him to come to Court and should only report his refusal to the Court. Against this decision this appeal has been preferred. S. 34 is quite clear:

No judgment-debtor shall be liable to arrest for default in the payment of any money due under a decree unless the Court is satisfied that the judgment-debtor has, without just cause, contumaciously refused to pay the amount of the decree, in whole or in part, within his capacity to make payment.

There is nothing in this section about the date of issue of the warrant. What the section says is that after 19th April 1935 no judgment-debtor shall be liable to arrest unless the necessary conditions are fulfilled. I therefore accept this appeal, set aside the order of the senior Subordinate Judge and direct that no action be taken under the warrant in question. If the conditions of the section are satisfied, the decree-holders can move the Court for his arrest and a warrant of arrest can issue if the Court comes to the necessary finding. I make no order as to costs.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 151

DALIP SINGH, J.

Misri Lal—Appellant.

v.

Babu Lal—Respondent.

Second Appeals Nos. 1433 of 1932 and 5 of 1933, Decided on 22nd May 1935, from order of Dist. Judge, Delhi, D/- 20th June 1932.

(a) Custom (Punjab)—Gaur Brahmins of village Chiragh, Delhi Province—Succession to property—They are governed by custom which admits right of representation so far as collateral succession is concerned.

The Gaur Brahmins of village Chiragh in the Delhi Province in the matter of succession of property are governed by a custom which admits the right of representation so far as collateral succession is concerned: *Case law referred.*

[P 151 C 2; P 152 C 2]

(b) Hindu Law—Applicability—High caste Hindus in the Punjab.

In the case of high caste Hindus, the first presumption is that they follow Hindu law and not "Punjab Customary law or Agricultural Customary law." [P 152 C 1]

(c) Words and Phrases—Meaning of "Punjab Customary Law"—There is no such thing as Punjab Customary Law in same sense that there is Hindu or Mahomedan Law—It describes certain customs which govern agricultural and village communities in Punjab.

There is no such thing as the Punjab Customary law in the same sense that there is a Hindu law or a Mahomedan law. The expression is nothing more than a convenient phrase for describing certain customs which long experience has shown frequently govern tribes occupied in agriculture and forming compact village communities throughout the Punjab.

[P 152 C 1]

(d) Riway-i-am—Evidentiary value—Onus lies on person claiming that it is wrong.

Where the riway-i-am is perfectly clear and it states that the answer of all tribes to the question whether in matters of succession they recognise the right of representation was in the affirmative, the onus lies on the person claiming that the riway-i-am is wrong: 1928 P C 294, *Rel. on.*

[P 152 C 1, 2]

Kishan Dyal—for Appellant.

J. G. Sethi—for Respondents.

Judgment.—These two connected appeals can be disposed of in one judgment. The point arising in the first appeal is whether Gaur Brahmins of village Chiragh in the Delhi Province in the matters of succession of property are governed by a custom which admits the right of representation so far as collateral succession is concerned or whether they are governed by Hindu law by which the nearer kindred would exclude the more remote. The learned appellate Court has held that the parties are governed by custom. In the second appeal the same point arises with reference to village Pahladpur Bangar. In this case also the appellate Court held that the parties were governed by the custom stated above. Certificate of appeal was granted in both cases. The learned counsel for the appellant has cited the following cases, 86 P. R. 1904 (1), a decision concerning the family in the first appeal; 1931 Lah 491 (2), 7 Lah 522 (3), 4 Lah 254 (4),

1. Chuttan v. Ramchand, (1904) 86 P R 1904.
2. Bhagwani v. Sitaram, 1931 Lah 491=134 I C 302=32 P L R 284.
3. Wazir Singh v. Moti Singh, 1926 Lah 395=94 I C 492=7 Lah 522=27 P L R 846.
4. Salig Ram v. Badhawa, 1923 Lah 501=73 I C 759=4 Lah 254.

6 Lah 524 (5) and 99 P R 1909 (6). The learned counsel for the respondents in the first appeal has cited 15 Lah 739 (7) and 137 I C 81 (8). He has also referred to Exs. D-4, D-7, D-1 and 142 I C 284 (9).

The same counsel appeared for the appellants in the second appeal. There is a different counsel for respondents but the arguments are the same in both appeals, with the distinction that, in the second appeal, the parties are not proved to have and it was not contended on their behalf, that they exercised any priestly functions. It may be taken as settled law that, in the case of high caste Hindus, the first presumption is that they follow Hindu law and not what by a convenient phrase is generally called "Punjab Customary law or Agricultural Customary law." It should, however, always be borne in mind that there is no such thing as the Punjab Customary Law in the same sense that there is a Hindu Law or a Muhammadan Law. The expression is nothing more than a convenient phrase for describing certain customs which long experience has shown frequently govern tribes occupied in agriculture and forming compact village communities throughout the Punjab. It must, however, be always remembered that, in the case of any particular tribe, it does not follow that because they are governed in certain cases by certain customs it follows as a matter of course that they have adopted or followed the entire body of customs common to various agricultural tribes. If the position is kept clearly in mind many of the rulings cited really can be shown to apply only to the facts of the particular case. In this appeal the *riwaj-i-am* is perfectly clear and it states that the answer of all tribes to the question whether in matters of succession they recognise the right of representation was in the affirmative. This being so, according to the ruling of their Lordships of the Privy Council, 10 Lah 86(10), it follows

5. Khazanchand v. Parasram, 1925 Lah 646=90 I C 1045=5 Lah 524=26 P L R 627.
6. Mansa v. Surta, (1909) 99 P R 1909=16 P L R 1910.
7. Chhajji v. Bhagatram, 1934 Lah 580=148 I C 862=15 Lah 739=35 P L R 383.
8. Thakardas v. Gopaldas, 1932 Lah 326=137 I C 81=33 P L R 257.
9. Badlu v. Umrao Kuer, 1933 Lah 473=142 I C 284=34 P L R 351.
10. Vaishno Detti v. Rameshri, 1928 P C 294=113 I C 1=55 I A 407=10 Lah 86 (PC).

that the onus lies on the person claiming that the *riwaj-i-am* is wrong.

There is no proof in this case of any instance, judicial or non-judicial, contrary to the statement made in the *riwaj-i-am*. The learned counsel, however, relies on the fact that these Brahmins, though they form a compact village community or at any rate a large section of one, do not follow agriculture as their main profession. He contends that the parties still exercise priestly functions and that the members of the tribe as a rule depend more on their priestly functions and on service than on agriculture. All this argument, it appears to me, might be a good argument, if an inference was sought to be drawn that these persons followed the custom common to agricultural tribes in the Punjab. But, in this case, it is not necessary to go so far as that at all. The right of representation is recognised in Hindu Law in joint families to a limited extent. It would be an easy step as a modification of Hindu Law that custom should extend the right of representation to collateral succession beyond the joint family. The mere fact that the persons are parties or had nothing to do with agriculture would not, I consider, show that a definite statement made in a *riwaj-i-am* was wrong nor would it shift the onus cast, by that statement on the party asserting the contrary without proof of much more than a mere hypothetical argument based on the caste of the parties or their occupation. I consider therefore that the appeals fail and they are dismissed with costs accordingly.

R.W./V.V.

Appeals dismissed.

* A. I. R. 1936 Lahore 152

JAI LAL, J.

Lyallpur Bank, Ltd. — Decree-holder
Petitioner.

v.

Manohar Lal — Judgment-debtor and
another—Decree-holder—Respondents.

Civil Revn. No. 29 of 1935, Decided on 9th October 1935, from order of Sub-Judge, First Class, Gujrat, D/- 8th October 1934.

* Execution—Decree transferred to another Court for execution—Decree-holder going into liquidation—Official Receiver taking its place applying to transferee Court for execution—As decree does not vest in Official Receiver and he is not transferee of decree he

can apply to transferee Court for execution of decree.

A decree obtained by a bank was transferred to another Court for execution. In the meantime the bank went into liquidation and the Official Receiver applied to transferee Court for execution. It was contended that in view of O. 21, R. 16, Civil P. C., the Receiver could not apply to transferee Court for execution but should apply to the Court that passed the decree:

Held: that the Official Liquidator was merely the agent of the Court for the purposes of liquidation of the bank. The decree did not vest in him. He could not take any proceedings in execution in his own name. S. 179, Companies Act, makes it quite clear that the Official Liquidator was not the transferee of the decree and therefore the decree could be executed by the transferee Court on his application made on behalf of the bank in liquidation and in its name.

[P 153 C 1, 2]

Achhru Ram—for Petitioner.

Order.—The Lyallpur Bank, Limited, obtained a money decree against the respondent and had the same transferred for execution to Gujrat. The decree was passed by the Senior Subordinate Judge of Lyallpur. After the decree had been transferred to Gujrat the bank went into liquidation and an Official Liquidator was appointed. The Official Liquidator applied to the Court at Gujrat to execute the decree, but this application has been rejected on the ground that under O. 21, R. 16, an application by the transferee can be made for execution of the decree to the Court which passed it and therefore direct application to the transferee Court was incompetent. The Official Liquidator has appealed to this Court in the name of the Bank and it is contended that O. 21, R. 16, does not apply to the facts of this case as the Official Liquidator does not come within the ambit of the expression 'transferee of the decree.' O. 21, R. 16 provides that where a decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it. Now it is clear that the decree has not been transferred by assignment in writing. I am also clear that it has not been transferred by operation of law. The Official Liquidator is merely the agent of the Court for the purposes of liquidation of the Bank. The decree does not vest in him. He cannot take any proceedings in execution in his own name. On the other hand S. 179, Companies Act, makes it quite clear that the Official Liquidator shall have power with the sanction of the

Court inter alia to institute or defend any suit or prosecution or other legal proceedings, civil or criminal, in the name or on behalf of the Company. This leaves no doubt that the Official Liquidator is not the transferee of the decree and therefore the decree could be executed by the Gujrat Court on his application made on behalf of the Bank in liquidation and in its name.

I accept the petition, set aside the order of the Subordinate Judge of Gujrat and send the proceedings back to him with directions to proceed with the execution of the decree in accordance with law. The respondents shall pay the costs of the petitioner in this Court.

B.D./R.K.

Order accordingly.

A. I. R. 1936 Lahore 153

TEK CHAND AND DALIP SINGH, JJ.

Gurmukh Singh—Plaintiff—Appellant.
v.

Sundar Singh and others—Defendants
—Respondents.

Second Appeal No. 1754 of 1934, Decided on 27th March 1935, from decree of Dist. Judge, Gujranwala, D/- 24th June 1934.

(a) **Mortgage—Sale of mortgaged property in execution of mortgage decree—Rights of mortgagee are not extinguished.**

When the mortgaged property is sold in execution of a decree obtained on the footing of the mortgage, the rights of the mortgagee are not extinguished as S. 89, T. P. Act, has been repealed by O. 34, Civil P. C.: 1924 P C 206, *Expl.*; 1922 P C 11, *Foll.*; 1933 Lah 361, *Expl.* and *Dissent*; 1918 P C 34 and 1920 P C 79, *Expl.* and *Disting.* [P 154 C 2; P 155 C 1]

(b) **Mortgage—Suit by prior usufructuary mortgagee auction-purchaser for possession of mortgaged property as of right—He has claim over puisne mortgagee—Full court-fee need not be paid even if suit is on footing of mortgage.**

Where the suit by a usufructuary mortgagee auction-purchaser is a simple suit for possession of mortgaged property he has a prior right to possession against the puisne mortgagee because his mortgage deed is also with possession and is prior to the mortgage deed in favour of the puisne mortgagee. Full court-fee need not be paid even if the suit is on the footing of the mortgage: 1915 L B 49; 1934 Nag 36; 26 Mad 484; 1916 Mad 875 and 1933 Mad 588, *Disting.* [P 155 C 2]

The puisne mortgagee was however allowed by the High Court to retain possession on payment by him of the sum found due to the prior mortgagee. [P 156 C 2]

M. C. Mahajan and Nawal Kishore—for Appellant.

Kanwar Sain—for Respondents.

Dalip Singh, J.—The facts of this appeal are as follows: On 6th January 1922 one Jaswant Singh mortgaged the house in dispute and other properties which included a shop and three vacant sites to the plaintiff for Rs. 18,000 with possession. Jaswant Singh also executed a rent-deed in favour of the plaintiff and thus retained actual possession of the house. In August 1927 Gurmukh Singh, the plaintiff, sued Jaswant Singh on the footing of the mortgage deed for sale of the mortgaged property. To this suit was impleaded one Mohan Lal to whom Jaswant Singh had sold a shop for Rs. 12,000 on 1st March 1922. In this sale Rupees 9,000 were left with the vendee for payment to the plaintiff-mortgagee in order to complete the sale. One Anand Singh was also made a party to the suit because on 6th March 1922 Jaswant Singh had sold three vacant sites to him for Rs. 12,000; Rs. 9,000 had been left with the vendee in order to redeem Gurmukh Singh. In that suit Gurmukh Singh obtained a decree for about Rs. 32,000, as a charge on the properties, on 5th February 1929. He had not received the Rs. 9,000 left with Mohan Lal or the Rs. 9,000 left with Anand Singh except to the extent of Rs. 1,520 which had been paid by way of interest on the principal sum of Rs. 18,000 and which was given credit for in the decree.

The defendant in the present suit, Sundar Singh, was not made a party to this suit. This Sundar Singh had become mortgagee from Jaswant Singh, the original mortgagor, on 9th July 1925, for a sum of Rs. 4,000. This mortgage was also with possession. Gurmukh Singh proceeded to execute his decree and on 23rd January 1930 the house was sold and was purchased by the decree-holder for Rs. 3,600. The sale was confirmed on 16th May 1930. When Gurmukh Singh endeavoured to obtain possession under this sale he was resisted by Sundar Singh, the present defendant, who was in possession.

It appears that Sundar Singh had sued Jaswant Singh on his mortgage on 5th October 1928. He had not impleaded Gurmukh Singh, though it has been held that he was fully aware that Gurmukh Singh was a prior mortgagee. He got a preliminary decree on 21st December 1928 and a final decree on 2nd November 1929. It is alleged that he got possession

of the property by collusion with Jaswant Singh, mortgagor.

The objection taken by Sundar Singh was upheld by the executing Court and Gurmukh Singh was referred to a civil suit. He brought the present suit paying a court-fee of Rs. 307-8-0 on the value of the house, which he valued at Rupees 3,600, the sum for which he had purchased it in the auction sale. He referred in his plaint to the fact that he was a prior mortgagee with a right to possession, also that he was the auction-purchaser in the decree on the foot of that mortgage-deed, and that in both capacities he was entitled to possession of the property. It appears that in the trial Court an objection was taken by the counsel for Sundar Singh defendant that the plaintiff Gurmukh Singh had properly valued his suit and paid the proper court-fee if he was suing as auction-purchaser, but that if he was suing as a mortgagee he should pay court-fee on the principal sum of the mortgage, i. e., Rs. 18,000. It appears that in the course of the reply at the end of the case the counsel for the plaintiff made a statement which the Court understood to mean that he abandoned his rights as a prior mortgagee and rested his suit merely on his right as an auction-purchaser. The trial Court thereupon held that a mere auction-purchaser could not oust a puisne mortgagee from possession of the property without redeeming the puisne mortgagee.

In appeal before the learned District Judge the first two grounds taken were that the plaintiff-appellant was mortgagee with possession and as such was entitled to possession against the defendants who were only trespassers, or at best subsequent mortgagees, and that the statement of the counsel was mistaken. The learned District Judge held that the rights of a mortgagee under a mortgage are extinguished when in execution of his decree, obtained on the footing of the mortgage, the mortgaged property is sold. Secondly, that a prior mortgagee who claims possession of a portion of the mortgaged property in possession of a puisne mortgagee, not in his capacity as a prior mortgagee but in his capacity as auction-purchaser of the said property, cannot assert his preferential right as a prior mortgagee against the puisne mortgagee who must be redeemed before he can be asked to deliver posses-

sion to the auction-purchaser. He therefore upheld the judgment and decree of the trial Court and dismissed the plaintiff's appeal with costs. The plaintiff has come in second appeal and contends that the first proposition affirmed by the learned District Judge as to the extinction of the rights of a mortgagee is incorrect and he has cited 43 All 469 (1), a Privy Council ruling, in support of his contention. This ruling certainly supports the contention. The learned District Judge had relied on authorities, 40 All 407 (1) and 42 All 364 (3), of their Lordships of the Privy Council, for this proposition. As explained in I L R 43 All 469 (1) by their Lordships of the Privy Council themselves, those rulings were under S. 89, T. P. Act, wherein it was expressly enacted that when the sale had taken place the security was extinguished.

Their Lordships pointed out that that section had been repealed by the enactment of O. 34, Civil P. C., and that these words do not occur in the relevant rules of that order. I therefore consider that this contention of the learned counsel for the appellant is correct. As regards the second proposition it does not seem to me necessary to enter into the question as to the capacity of the auction-purchaser because on the plaint as framed, and as admittedly argued, the suit was based on both capacities, namely that of auction purchaser and prior mortgagee. The statement of the learned counsel in reply before the trial Court was not recorded and possibly there was some misunderstanding on the point. At any rate this was repudiated before the learned District Judge and the counsel who appeared before the learned District Judge also appeared here and stated that he had contended before the learned District Judge that the suit was in both capacities and this was admitted by the junior counsel for the respondent who was present before the learned District Judge.

There is no force whatsoever in the objection that full Court-fee on Rs. 18,000 had to be paid by the mortgagee if the suit was on the footing of the mortgage. The suit was not for sale or foreclosure

1. Sukhi v. Ghulam Salfar Khan, 1922 P C 11 = 65 I O 151 = 48 I A 465 = 43 All 469 (PC).
2. Het Ram v. Shadi Ram, 1918 P C 34 = 45 I O 798 = 45 I A 130 = 40 All 407 (PC).
3. Matru Mal v. Durga Kunwar, 1920 P C 79 = 55 I O 969 = 47 I A 71 = 42 All 364 (PC).

by the mortgagee. It was simply a suit for possession of certain property to which he alleged he had a prior right to possession because his mortgage deed was also with possession and was prior to the mortgage deed in favour of the defendant. The maximum possible amount of Court-fee that could be demanded from the plaintiff was on the market value of the property in dispute which was Rs. 3,600, which sum was not disputed before the trial Court as adequately representing the value of the house. This Court-fee had been paid, and in the circumstances I do not consider that any mistaken repudiation of the suit in the capacity as a mortgagee, if made by the learned counsel for the plaintiff in answer to this untenable objection of the defendant-respondent, should be held to bind him in the suit.

The question therefore is whether a mortgagee with possession who has obtained a decree in a suit brought on the footing of his mortgage without impleading a puisne mortgagee, also with possession, is entitled to get possession of the property which he has purchased in an auction sale from the puisne mortgagee. It seems to me that there can be only one answer to this question. At no time had the mortgagee lost his right to possession in any way and the right to possession conferred on the second mortgagee by the mortgagor in derogation of his own prior grant to the plaintiff mortgagee could not possibly be held to confer a better title to possession on the subsequent mortgagee. The learned counsel for the defendant-respondent has cited various rulings: 30 I C 710 (4), 1934 Nag 36 (5), 26 Mad 484 (6), 29 I C 916 (7) and 56 Mad 846 (8). But these are all rulings where the first mortgage was without possession and they do not appear to me to have any bearing on a case where the first mortgage is with possession. The learned counsel for the respondent also endeavoured to contend that

4. San Bwin Mg v. A. N. K. Nagamuthu, 1915 L B 49 = 30 I C 710 = 8 L B R 266.
5. Ganpat Rao v. Vithabai, 1934 Nag 36 = 148 I C 62 = 30 N L R 284.
6. Rangaswami Naicken v. Komarammal, (1903) 26 Mad 484 = 13 M L J 131.
7. Arumugasundara Maharaja v. Narasimha Iyer, 1916 Mad 875 = 29 I C 916 = 29 M L J 583.
8. Nagendra Chettiar v. Lakshmi Ammal, 1933 Mad 583 = 144 I C 883 = 56 Mad 846 = 65 M L J 103 (F B).

the possession of the first mortgagee was only a paper possession, but I am unable to see why there was only a paper possession because the mortgagor had executed a rent deed in favour of the mortgagee on the same day as he executed the mortgage. It appears to me that possession passed to the plaintiff mortgagee and nothing whatsoever has been shown in what way he forfeited it or lost it. The learned counsel has also cited 82 I C 794 (9), a Privy Council ruling, and 1933 Lah 361 (10), a Single Bench ruling of this Court, for the proposition that the rights of a mortgagee are extinguished by the property being brought to sale. The headnote of the Privy Council ruling as given in 82 I C 794 (9) is misleading. The word "transaction" in the body of the Privy Council judgment, quoted from the High Court judgment in the case, does not refer to the mortgage at all but refers to a special arrangement made by the mortgagee with the judgment-debtor to hold certain properties in lieu of his interest charges at a certain fixed rate. It seems to me, speaking with all deference, that this headnote misled the learned Judge in 1933 Lah 361 (10). The point was expressly discussed in 43 All 469 (1), also a Privy Council ruling, and it seems to me impossible to hold that if the mortgage charge had ceased to exist their Lordships could speak of it as being used as a shield. I therefore see no force in the contentions urged by the learned counsel for the respondent on this point.

The learned counsel for the respondent further contended that at any rate he was entitled to redeem the prior mortgagee and that he should have been given an option to retain possession by ascertainment of the sum due to the prior mortgagee if he wished to retain possession by payment of the sum found due. I am not certain that this point was clearly raised in his pleadings, but on the merits of the case and in order to shorten litigation between the parties, it seems to me desirable in the interests of justice that a remand should be granted to the Court below for the purpose of ascertaining, what is the sum now due on the footing of the mortgage to the plaintiff, the prior mortgagee, and to pass a decree

giving him possession subject to the right of the defendant Sundar Singh, the puisne mortgagee, retaining possession of the property by paying up the sum found due. I would therefore remand the case under O. 41, R. 25, to the trial Court to determine the sum due to the prior mortgagee, the plaintiff, Gurmukh Singh, and for this purpose to allow parties to lead evidence thereon and to return the same with his opinion thereon through the District Judge who will also give his opinion thereon and then return the report to this Court within three months. The parties have been warned to appear before the Senior Subordinate Judge, Gujranwala, on 23rd April 1935, to obtain a date for hearing.

Tek Chand, J.—I agree.

R.W./R.K.

Case remanded.

A. I. R. 1936 Lahore 156

TEK CHAND AND SKEMP, JJ.

Buta—Plaintiff—Appellant.

v.

Mt. Hapho and others—Defendants and another Plaintiff—Respondents.

Second Appeal No. 751 of 1932, Decided on 17th April 1935, from decree of Dist. Judge, Jullundur, D/- 22nd January 1932.

Custom (Punjab)—Gift—Arains of Nakodar Tahsil, Jullundur District—Sonless proprietor can gift ancestral property to daughter of predeceased son.

Among Arains of Nakodar Tahsil, Jullundur District, a sonless proprietor can make a valid gift of his ancestral property in favour of his predeceased son's daughter. [P 157 C 2]

Indar Dev for Achhru Ram—for Appellant.

Devi Das and Barkat Ali—for Respondents.

Skemp, J.—On 19th August 1930, Gaman, an Arain of Nakodar Tahsil, District Jullundur, gifted his property 63 kanals and 3 marlas to his daughter Mt. Hapho and his grand-daughter Mt. Nur Bibi, daughter of his deceased son Dulla. On 1st December 1930 Gaman's nephew Buta and his grand-nephews Pir Mohammad and Shan Mohammad brought a suit for a declaration that the gift would not affect their reversionary rights after Gaman's death. The Courts below have found that the property gifted was ancestral except for 15 kanals and 5 marlas. They have, however, dismissed the suit entirely, holding that among Arains of the Nakodar Tahsil a proprietor is em-

9. Rameshwar Singh v. Hitendra Singh, 1924 P C 206=82 I C 794 (P C).

10. Malawa Mal v. Sunder Singh, 1933 Lah 361=142 I C 313.

powered by custom to make a gift not only to his daughter, but to his pre-deceased son's daughter. The plaintiffs have come up to the High Court in second appeal on a certificate.

Before us there is no contest as to the gift in favour of Mt. Hapho, counsel admitting that a sonless Arain of Nakodar Tahsil can gift ancestral property to his daughter; nor is there any contest as to the non-ancestral property. The only contest is as to the one-half of Gaman's ancestral property which was gifted to his grand-daughter Mt. Nur Bibi. In view of the Question and Answer No. 90 (A) in Rai Bahadur Hotu Singh's Customary Law of the Jullundur district, the onus was rightly placed on the defendants. The following instances have been cited: three on behalf of the plaintiffs and five on behalf of the defendants:

On behalf of the plaintiffs:

1. Ex. P/8, a judgment by Lala Achhru Ram, Munsiff, dated 24th December 1888.

2. Ex. P/6, a judgment by Lala Munna Lal, Munsiff, dated 30th July 1909. A petition against Lala Munna Lal's judgment was dismissed in kutchha peshi by Reid, J. on 17th May 1910.

3. Ex. P/7, a judgment by Pandit Rajindar Krishna, Subordinate, Judge 4th Class, dated 11th December 1924.

These three instances undoubtedly support the plaintiffs' case.

On the other hand, the respondents rely on (1) a judgment by Lt. Col. B. C. Roe, District Judge of Jullundur, given on 10th March 1926.

Rahmatullah, an Arain of the Nakodar Tahsil had made a will in favour of his pre-deceased son's daughters. It was admitted before the District Judge by respondents' counsel that such a will was valid. The factum of the will was contested, but found in favour of the grand-daughters.

(2) Ex. D/2, a judgment by E. R. Anderson, District Judge of Jullundur, dated 26th May 1927. This judgment cited 133 P R 1906 (1) and also instances given in Prenter's Codification of Custom, Vol. I, p. 206, and held that a gift made by a sonless proprietor in favour of son's daughter and daughter's son was valid by custom.

(3) Ex. D/A, a judgment by Khan Zaka-ud-Din, District Judge of Jullundur, dated 10th August 1929.

1. Bala v. Nur Mohamed, (1906) 133 P R 1906.

(4) They also rely on 133 P R 1906 (1) in which Lal Chand, J., rejected an appeal and upheld a gift by Ambia, an Arain of the Nakodar Tahsil, in favour of his daughter's son and son's daughter who had married his daughter's son. The Judge said,

It is now established beyond doubt that a gift by an Arain of Jullundur District of his entire estate in favour of his daughter's son is valid by custom. It appears to me that there is no distinction in principle where the gift is made in favour of a son's daughter, specially as in the present case, she is married to a daughter's son.

(5) Civil Appeal No. 841 of 1921, decided on 14th April 1924, by a Division Bench of the High Court. The Bench rejected an appeal against the judgment of Khan Bahadur Mirza Zafar Ali, Additional Judge, Jullundur, upholding a gift by an Arain of the Jullundur Tahsil in favour of his daughter and three daughters of his deceased son. The judgment discusses the law at some length and also cites three instances of mutations. In my opinion the instances quoted on behalf of the defendants are more cogent and more authoritative than those quoted for the plaintiffs. They include two judgments by this Court and three judgments by District Judges. Further, it is well-known that among Arains, an endogamous tribe, women hold an unusually favoured position, and there are numerous authorities in which a right to make a gift to daughters, has been upheld. If a man can make a gift to his daughter, it is hard to see why he should not also make a gift in favour of his pre-deceased son's daughter, who in this case must have been brought up as a daughter. For these reasons I am of opinion that the appeal should be dismissed with costs.

Tek Chand, J.—I agree.

K.S./V.V.

Appeal dismissed.

A. I. R. 1936 Lahore 157

BHIDE AND CURRIE, JJ.

Mt. Kishni—Defendant—Appellant.

v.

Munshi and others — Plaintiffs and another—Defendant—Respondents.

Second Appeal No. 293 of 1934, Decided on 23rd October 1935, from decree of Dist. Judge, Hoshiarpur, D/- 13th November 1933.

Custom (Punjab) — Jats of Garhshanker Tahsil, Hoshiarpur District — Non-ancestral Property — whether daughters preferred to

collaterals of 5th degree in succession — (*Quaere*).

Quaere—There should be a further enquiry on the question of custom whether amongst Jats of Garhshankar Tahsil in the Hoshiarpur District daughters succeed to non-ancestral property in preference to collaterals of the fifth degree: 1933 Lah 107 and 1925 Lah 306, *Ref.* [P 159 C1]

D. N. Aggarwal—for Appellant.

Achhru Ram—for Respondents.

Bhide, J.—This second appeal arises out of a suit by collaterals of the 5th degree to challenge a gift made by a widow named Mt. Bhagwani in favour of her daughter, Mt. Kishni. The property has been found to be non-ancestral. The parties are Jats of the village Sahungra, in Garhshankar Tahsil of the Hoshiarpur District. The widow has not been shown to have any power to make a valid gift of the property but it is contended that a daughter has the right to succeed to non-ancestral property in preference to collaterals and hence the gift being merely tantamount to acceleration of succession is valid. This is now the only point for decision in this appeal, which has been filed on behalf of the daughter, Mt. Kishni. The plaintiffs rely upon the answer to question 45 of the Customary Law of the Hoshiarpur District as attested at the last settlement of 1914. The question and the relevant portion of the answer are as follows :

Question 45: Under what circumstances can daughters inherit? If there are sons, widows or near collaterals, do they exclude the daughter? If the collaterals exclude her, is there any fixed limit of relationship within which such near kindred must stand? *Answer.* Jats of Tahsil Dasuya, Rajputs of Tahsil Garhshankar, Mahatons, Gujars (except the Mohamedan Gujars of Hoshiarpur), Chhangs, Dogars, Awans, Brahmans and Khatris state that a daughter cannot succeed in the presence of heirs up to and including collaterals of any degree. Jats of Tahsil Hoshiarpur and Garhshankar and Kalals say that a daughter can succeed in the absence of heirs up to and including collaterals of the fifth degree. * * *

The learned counsel for the appellant has urged that this answer should be taken to have reference only to ancestral property and has referred to various rulings of the Punjab Chief Court and this High Court in which it has been held that in the absence of any clear indication to the contrary, entries in the *riwaj-i-am* should be taken to refer to ancestral property only. The learned District Judge has relied however on a judgment of this

Court reported as 1933 Lah 107 (1), in which the above answer to question 45 in the Customary Law of the Hoshiarpur District was held to cover self-acquired property as well. That decision was based on a consideration of the answers given to some other questions in the same Customary Law from which it appeared to the learned Judges that the tribesmen examined did make a distinction between self-acquired and ancestral property when such distinction existed, even though the questions were of a general character (see answers to questions 34, 87 and 90). The learned counsel for the appellant has urged that this view is against the trend of previous decisions and should not be accepted and that in any case the entry in the *riwaj-i-am* being opposed to custom as found to be generally prevalent in the Province, and being unsupported by any instances directly in point, the presumption raised by it is not strong and the onus on the appellant should be considered to be discharged by the evidence on the record. The learned counsel referred to 5 Lah 473 (2), 6 Lah 332 (3) and 10 Lah 249 (4), in which in similar circumstances the burden of proof on the daughters was considered to be light and was held to be discharged by citation of a few instances.

There is no doubt that the entries in *riwaj-i-ams* are usually taken to refer to ancestral property in the absence of any clear indication to the contrary (see, e. g., 38 P R 1916 (5), 13 Lah 404 (6) and 13 Lah 458 (7)). The answer to question 45 in the present case does not specifically refer to non-ancestral property and the view taken in 1933 Lah 107 (1), does not appear to have been previously taken with reference to this question, though there are some 'obiter' observations to that effect to be found in 6 Lah 332 (3). The questions in reply to which the tribesmen made a distinction between an-

1. Mahomed Bakhsh v. Jeeo, 1933 Lah 107=140 I C 778=33 P L R 1061.
2. Umra v. Mt. Raji, 1925 Lah 222=85 I C 185=5 Lah 473.
3. Pir Bukhsh v. Abo, 1925 Lah 306=88 I C 71=6 Lah 332=26 P L R 688.
4. Sultan v. Sharfan, 1928 Lah 703=111 I C 846=10 Lah 249.
5. Rajkaur v. Talok Singh, 1916 Lah 343=39 I C 992=38 P R 1916.
6. Rahmat Ali Khan v. Sadiqul Nissa, 1932 Lah 353=138 I C 280=13 Lah 404.
7. Abdul Rahman v. Natho, 1932 Lah 591=140 I C 469=13 Lah 458=33 P L R 770.

cestral and self-acquired property, though not specifically asked, appear to be very few. There is therefore justification for the appellant's counsel's contention that his clients could never have expected that the answer to question 45 in the Customary Law would be construed to cover non-ancestral property. The decision of the learned District Judge is practically based only on 1933 Lah 107 (1). There is very little evidence on the record to come to a definite conclusion independently. In fact, what little evidence there is seems to go rather in favour of the appellants, because there are at least two judicial instances relating to the same tribe produced by the appellants while the respondents relied on some oral evidence only, which is worthless. In view of all these facts it seems necessary in the interests of justice that there should be a further enquiry on the question of custom involved, viz., whether amongst Jats of Garhshanker Tahsil in the Hoshiarpur District daughters succeed to non-ancestral property in preference to collaterals of the fifth degree. I would therefore remand the case to the trial Court for an enquiry and finding on this point. The trial Court may appoint a local commissioner to make a local investigation if considered necessary. The parties are directed to appear before the trial Court (Senior Subordinate Judge, Hoshiarpur) on 7th November 1935. Report by 1st February 1936. Objections within ten days and the case should be put for final disposal as soon as possible thereafter.

Currie, J.—I agree.

S.R./R.K.

Case remanded.

A. I. R. 1936 Lahore 159

TEK CHAND AND BHIDE, JJ.

Shankar Das and others—Appellants.

v.

(Firm) Desa Mal-Mula Mal and another—Respondents.

Letters Patent Appeal No. 19 of 1932, Decided on 16th July 1934, from order of Jai Lal, J., D/- 10th February 1932.

(a) Civil P. C. (1908), S. 48—Instalment decree for money—Provision in it that on default of any instalment whole decree would become payable at once—Execution of such decree is governed by latter part of S. 48 (1) (b).

A decree which provides that the whole decree shall become payable in the event of a default in the payment of any instalment is not

a decree for money payable on a certain date within the meaning of the first part of S. 48. Such a decree does not cease to be an instalment decree when a default takes place; therefore after 12 years from the date of the default only that instalment will become barred in respect of which the default is made under the latter portion of S. 48: 1928 All 629, *Rel on.*

[P 160 C 1]

(b) Civil P. C., (1908), S. 48 (1) (b)—Instalment decree giving option to decree-holder to execute full decree on default—He may not exercise this option.

Where the terms of an instalment decree give an option to the decree-holder to enforce the penalty for default, the decree-holder should not be deprived of that option. Thus the whole decree does not become payable on the date of the first default leaving no option to the decree-holder in the matter: 1921 Lah 42 and 1930 Lah 124, *Foll.*

[P 160 C 2; P 161 C 1]

Din Dayal Kapur—for Appellants.

Manohar Lal Suchdev—for Respondents.

Bhide, J.—The sole point for decision in this appeal is whether the execution of a compromise decree for Rs. 650 which was payable in six-monthly instalments commencing from 15th February 1917, was barred by the provisions of S. 48, Civil P. C. None of the instalments were admittedly paid. According to the terms of the decree, in default of payment of any instalment, the decree-holder was entitled to realize the whole of the decretal amount at once. The contention of the judgment-debtor was that owing to this default clause the whole decree became capable of execution on the date on which the first instalment was due, i. e., on 15th February 1917, and the present application for execution made on 20th March 1929 was barred under S. 48, Civil P. C., inasmuch as it was made more than 12 years since that date. The Courts below have held that execution was barred with respect to the first instalment, but not with respect to the subsequent instalments and this view has been upheld by a learned Judge of this Court in Chambers. From this decision, the present appeal has been preferred under Cl. 10 of the Letters Patent. The learned counsel for the appellant has contended that S. 48, Civil P. C., ought to be construed independently of any judicial decisions with reference to Art. 75 or Art. 182 (7), Lim. Act, and that on a true construction of that section, execution of the whole decree was barred in the present instance. It seems to me however that the wording of that section goes against

the appellant. According to Cl. (b) of that section, which is admittedly the only relevant portion for the purposes of this appeal, the 12 years' period is to be computed from

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

In the present instance the decree being payable by instalments, strictly speaking, only the latter portion of the clause is applicable and according to that portion execution will be barred only with respect to the first instalment, which was not within 12 years from the date of the present application. The contention of the learned counsel for the appellant is that since there was a default in payment of the first instalment, the whole decree became payable on 15th February 1917 and the period of 12 years should be computed from that date for the whole decree. There is however nothing in the wording of S. 48 itself to support this contention. The only authority directly in point, which the learned counsel was able to cite was 1925 Bom 326 (1). It was held in that case that a decree of this kind ceases to be an instalment-decree when a default takes place and therefore the period of 12 years must be reckoned from the date of default. This view is tantamount to holding that in the event of a default the decree becomes payable 'on a certain date' within the meaning of the first part of S. 48, Civil P. C. With all respect however I must say that this seems to me to be straining the language of the section. The first part of this clause refers to a decree which directs any payment of money, etc., to be made 'at a certain date'. Can it be said that a decree which provides that the whole decree shall become payable in the event of a default in the payment of any instalment, is a decree for money payable 'on a certain date'? When the decree is passed it is uncertain whether a default will take place at all and if so in payment of which of the instalments. It is therefore difficult to see how such a decree could be properly held to be a decree for money payable 'at a certain date,' within the meaning of the first part of S. 48. This was the view

taken by a Full Bench of the Allahabad High Court in 51 All 237 (2) with reference to Art. 182 (7), Limitation Act, where the same expression occurs and the reasoning appears to me to be applicable to Cl. (b), S. 48, Civil P. C., as well.

If the above view is correct, it is clear that execution would not be barred in the present case except in respect of the first instalment. But it may be pointed out further that the learned counsel's contention that the whole decree became payable on the date of the first default and left no option to the decree-holder in the matter is opposed to the view taken by this Court as well as by the Punjab Chief Court in a long series of decisions (see 100 P R 1902 (3), 6 P R 1913 (4), 2 Lah 155 (5), 10 L L J 382 (6) and 1930 Lah 124 (7)). The High Courts of Bombay and Calcutta have taken a different view (see, e. g., 21 Cal 542 (8), 53 Cal 277 (9), 27 Bom 1 (10), 42 Bom 728 (11); but the view taken by this Court is in accord with the views of the High Courts of Allahabad, Patna and Madras as expressed in 51 All 237 (2), 11 Pat 440 (12) and 36 Mad 66 (13), 49 Mad 403 (14), etc. It seems to me that the construction of a bond or a decree of this kind must depend primarily upon the intention of the parties as disclosed by the terms of the bond or decree, and if these terms clearly give an option to the creditor or the decree-holder to enforce the penalty for default I do not see why the creditor or the decree-holder should

1. Gulab Rao Yeshwant v. Magan Ghelabhai, 1925 Bom 326=87 I C 769=27 Bom L R 461.

2. Joti Prasad v. Srichand, 1928 All 629=112 I C 73=26 A L J 966=51 All 237.
 3. Allah Bakhsh v. Bhavani, (1902) 100 P R 1902=131 P L R 1902.
 4. Kishan Chand v. Gopal Singh, (1913) 6 P R 1913=16 I C 842=172 P L R 1912.
 5. Har Gopal v. Ram Rachpal, 1921 Lah 42=63 I C 664=2 Lah 155=80 P L R 1921.
 6. Raja v. Hazari, (1928) 109 I C 272=10 L L J 382.
 7. Wasu Ram v. Mahomed Bakhsh, 1930 Lah 124=121 I C 80=31 P L R 904.
 8. Hurri Prasad v. Nasib Singh, (1894) 21 Cal 542.
 9. Basanta Kumar v. Nabin Chandra, 1926 Cal 789=96 I C 594=53 Cal 277.
 10. Kashi Ram v. Pandu, (1903) 27 Bom 1=4 Bom L R 688.
 11. Raichand v. Dhondo, 1918 Bom 163=47 I C 313=42 Bom 728=20 Bom L R 773.
 12. Braham Kishun v. Harihar, 1932 Pat 253=139 I C 202=11 Pat 440.
 13. Karunakaran Nair v. Krishna Menon, (1913) 36 Mad 66=12 I C 57.
 14. Muthia Chettiar v. Venkatasubbarayulu Naidu, 1926 Mad 160=90 I C 1033=49 Mad 403=49 M L J 394.

be deprived of that option. As pointed out in 2 Lah 155 (5), a provision of this kind is meant for the benefit of the decree-holder and it is for him to decide whether he will take advantage of the option or not. The view taken by this Court receives support from a recent decision of their Lordships of the Privy Council in 7 Luck 442 (15). That was a case, in which the mortgage deed provided that interest was to be paid annually and in default of payment of interest in any one year, the mortgagee was entitled to realize the entire mortgage-money at once. It was held by their Lordships that a proviso of this nature is meant exclusively for the benefit of the mortgagee and it gave him the option either to enforce the security at once or stand by his investment for the full terms of the mortgage bond. The same principle would, I think, govern the present case. A similar construction appears to have been placed by their Lordships on an instalment-decree in 5 Rangoon 422 (16).

The learned counsel for the appellant urged in the end that even if the decree-holder be held to have had an option in the matter, his mere abstinence to sue for the whole amount was not sufficient to establish "waiver" and hence the decree should be held to have become payable on the date of the first instalment. The question whether "abstinence" when coupled with other circumstances would or would not amount to waiver is largely if not wholly a question of fact. This point was not taken up before the learned Judge in chambers and cannot now be allowed to be raised in this appeal. I would accordingly hold that the contention of the learned counsel for the appellant that the 12 years' period under S. 48, Civil P. C., must be computed from the date of the first default is unsustainable in the circumstances of this case, and would dismiss the appeal with costs.

Tek Chand, J.—I agree.

R.M./R.K.

Appeal dismissed.

15. *Lasa Din v. Mt. Gulab Kunwar*, 1932 P C 207=198 I C 779=59 I A 876=7 Luck 442 (P C).

16. *Maung Sin v. Ma Tok*, 1927 P C 146=101 I C 786=54 I A 272=5 Rang 422 (P C).

A. I. R. 1936 Lahore 161

DIN MOHAMMAD AND ADDISON, JJ.

Mt. Kalsum Begum—Plaintiff—Appellant.

v.

Mohammad Ismail and others—Defendants—Respondents.

Appeal No. 6 of 1933, Decided on 18th December 1934, from order of Sub-Judge, 1st Class, Delhi, D/- 1st June 1932.

(a) Civil P. C. (1908), O. 32, R. 4—Partition suit—Interest of each litigant is exclusive—Minor sister cannot ordinarily be represented by step-brother.

The interest of every litigant in a partition suit is mutually exclusive and comes, so to say, into direct conflict with that of the other. In such suits, therefore, it cannot be presumed as a matter of course that a minor sister can safely and properly be represented by an adult brother. The interest of one is clearly adverse to that of the other and as such one is legally disqualified to act as the next friend of the other. This remark applies with greater force to a case where the adult brother happens to be the step-brother of his sister: *Case law Ref.* [P 162 C 2]

(b) Transfer of Property Act (1882), S. 41—Father transferring minor son's property—Transferee cannot claim benefit of S. 41.

Minors who have an interest in the property cannot by reason of the disability of infancy give their consent and the adult members of a joint family, including the father of a minor member, are not competent to give on behalf of the minor express or implied consent to a transferee of property of the joint family being the ostensible owner of it, so as to enable a purchaser from him to claim the protection of S. 41: 1931 P C 118, *Foll.* [P 164 C 1]

Ghulam Mohy-ud-din—for Appellant.

Barkat Ali, Bashir Ahmad for *Haji Nabi Bux* and *Madan Lal*—for Respondents 2, 3 and 8.

Din Mohammad, J.—Master Kalloo owned some immovable property at Kasauli and in Delhi. He had married two wives. By one who had pre-deceased him, he had two sons, Mohammad Ismail and Abdul Rahim, and by the other, named Mt. Bashiran, he had two daughters, Mt. Kalsum Begum and Mt. Khurshid alias Bibi. He died in 1918, leaving him surviving his widow and four children named above who were all his heirs under Mohammadan Law. Mt. Bashiran also died in 1921. On 6th January 1923, Abdul Rahim instituted a suit in the Court of the Senior Subordinate Judge, Delhi, for partition of the property left by Master Kalloo. In this suit Mohammad Ismail alone was impleaded as defendant, and the two girls, who were admittedly minors then, were arrayed as plaintiffs, but Abdul

Rahim himself was shown as their next friend. No reference was made to Mt. Bashiran in the plaint and the whole property was sought to be partitioned among the daughters and sons of Kalloo according to their shares under Mahomedan law. On 12th February, an application was made by Abdul Rahim that there was no dispute between the parties, that the two girls were minors and that he may be allowed to refer the case to arbitration on their behalf also. On the same day the Subordinate Judge granted the necessary permission. It appears that one Sharafuddin was appointed the sole arbitrator in the case and he made his award on 20th March 1923. He allotted separate shares to the two brothers of the face value of Rs. 14,000 each and assigned a house in Delhi jointly to the girls and mentioned its face value also to be Rs. 14,000. On the same day, the award was produced in Court, the statements of Abdul Rahim and Mohammad Ismail were recorded and a decree for partition was passed in accordance with the award.

On 11th April 1924, both Abdul Rahim and Mohammad Ismail sold the property that had fallen to their share at Kasauli in favour of Nabi Baksh; the former for Rs. 15,500 and the latter for Rs. 18,000 respectively. To Abdul Rahim, however, there was still left one house of the face value of Rs. 3,500 situate in the same locality as the house allotted to the girls. It may be mentioned here that one Mohammad Yasin started some litigation in connection with the house that was allotted to the girls and brought the case on appeal to this Court. In the meantime Mt. Khurshid also died leaving behind her husband Mohammad Ramzan.

On 24th June 1931, Mt. Kalsum Begum instituted the present suit impleading all the necessary parties including Mohammad Ramzan and the vendee Nabi Bakhsh and claimed 30/96ths share of her father's property on the ground that since her father's death, she had added to her original share of 14/96ths, the additional 16/96ths on account of her mother's and sister's death. When this suit was pending, notice of Mohammad Yasin's case in this Court was served upon her which put her on her guard and on enquiry she came to know about the previous litigation and amended her plaint with the permission of the Court. She then alleged that she was a minor at the time of the

previous suit and was consequently not bound by the decree for partition, as she was not properly represented in that case. Various pleas were raised by the defendants in answer to the plaintiffs' claim, but the share as demanded by her was not disputed. The Senior Subordinate Judge dismissed her suit mainly on the ground that she was bound by the previous decree. Dissatisfied with this decision, she has appealed. We may say at once that the only crucial point in this case is whether or not the plaintiff is bound by the previous decree of 20th March 1923. If she is so bound, she is at once out of Court, but if not, then no law can stand between her and the relief she claims.

It is common ground that both she and her sister were minors in 1923 and in order to bind them therefore with what took place in Courts at that time, it must be shown that all those formalities were duly observed which law has laid down for the protection of minors. Now, R. 4, O. 32, Civil P. C., provides for minor plaintiffs and enacts that any person who is of sound mind and has attained majority may act as next friend of a minor provided that his interest is not adverse to that of the minor and that he is not a defendant in the case. Let us now apply this test to her case and see whether she was properly represented before the Court in 1923. The suit then was a partition suit in which, as is known, a decree can also be made in favour of every member of the family who is on the record irrespective of the fact whether he is arrayed as plaintiff or defendant. Besides, the interest of every litigant in a partition suit is mutually exclusive and comes, so to say, into direct conflict with that of the other. In such suits therefore it cannot be presumed as a matter of course that a minor sister can safely and properly be represented by an adult brother. The interest of one is clearly adverse to that of the other and as such one is legally disqualified to act as the next friend of the other. This remark applies with greater force to this case as here the adult brother happened to be the step-brother of his sister, and the way in which the two brothers have conducted themselves in that litigation leaves no manner of doubt whatever that they were harbouring a design to rob these fatherless and motherless minors of as much of

their patrimony as they possibly could. As pointed out above, not even a remote reference was made to the minors' mother in the plaint and by this omission alone, they succeeded in slicing off 12/96ths of the minor's property and adding it to their own quota. Again by arraying the minors as plaintiffs and, showing himself as their next friend Abdul Rahim made it impossible for any process of Court to be served upon them personally and this was all the more inexcusable, as the respondents themselves have admitted before us that Mt. Kalsum Begam at least was just on the verge of her majority and was even married about a year afterwards. Abdul Rahim, as subsequent events have disclosed, was not anxious to keep the minors' share joint with his own and there is no valid reason why in these circumstances he did not alone figure as plaintiff and implead the minors as defendants. Further the brothers, if honest, could easily have delayed this suit by one year and let the plaintiff attain her majority or secure the protection of her husband. They hurried through everything as otherwise their schemes would have been shattered. They even managed to dispose of the property that fell to their share with hot haste and thus shoved their burden to some other shoulders.

The very division, which was proposed by the arbitrator and which was most innocently accepted by the brothers in the Court of the Subordinate Judge, proved most favourable to them even within the course of a year. One of them made a clean profit of Rs. 4,000 and another, besides making a cash profit of Rs. 1,500, could still reserve a house for himself in Delhi. As against this, the house that jointly fell to the minors' share appears to have been immediately brought into litigation by Mohammad Yasin and was not valued at more than Rs. 5,500 even by that stranger. In the present suit also, its value has not been assessed at any higher figure, and keeping in view the profits made by the two brothers in one year on their own shares, one is forced to an irresistible conclusion that the house allotted to the minor was intentionally over-valued and was under no circumstances worth more than Rs. 5,500 and that the balance of the minors' share was equally misappropriated by both the brothers. Much stress has been laid on

the fact that the reference to arbitration was made with the permission of the Court, that subsequently the award was a rule of the Court and that such solemn proceedings should claim every respect. We are however satisfied that the Senior Subordinate Judge did not apply his mind properly to the facts of the case and took no step to ascertain whether the award was or was not to the benefit of the minor. For this omission we hold the adult members of the family chiefly to blame as they scrupulously tried to avoid all suspicion by the omission of the minors' mother from the plaint. We are convinced therefore that the plaintiff was not properly represented in the previous suit and is not consequently bound by the decree of 20th March 1923.

Every case of this nature proceeds on its own facts and it is difficult to lay down any hard and fast rule to determine the adverse nature of a next friend's interest. In support of our conclusion however it may be helpful to refer to a few authorities that have been cited before us and particularly to 31 All 572 (1), 46 All 620 (2) and 47 Mad 79 (3). In 31 All 572 (1) one S died leaving two daughters U and R, an illegitimate son A and his brother M, who were entitled under the Mohammadan law to succeed to shares of his estate. M applied for mutation of names in the revenue registers and U, purporting to act on behalf of her minor sister R, opposed the application, and allowed it to be supposed that A was the legitimate son of S. By agreement the dispute was referred to arbitration and the award allotted to each of the claimants respective shares. In some subsequent execution proceedings, conducted at the instance of M, U was appointed guardian ad litem of her minor sister R. On a suit by the minor R their Lordships of the Privy Council upheld her objection that she had not been properly represented throughout the litigation by her own sister and was consequently not bound by what took place then. In 46 All 620 (2), one N had been legally appointed guardian of his minor brothers. In a suit brought by the mortgagees the minors

1. Rashid-un-nissa v. Mahomed Ismail Khan, (1909) 31 All 572=3 I C 864=36 I A 163 (P O).
2. Chiranjil Lal v. Syed Ilias Ali, 1924 All 751=79 I C 556=46 All 620=22 A L J 498.
3. Sellappa Goundan v. Masa Naiken, 1924 Mad 297=76 I C 1018=47 Mad 79=45 M L J 675.

were impleaded under the guardianship of N and a decree obtained. Later the minors sued to set aside the decree and it was held that the interest of N being obviously adverse to that of the minors, they could not be considered as having been properly represented in the suit on the mortgage.

In 47 Mad 79 (3) it was found in the circumstances mentioned in that case that the interest of the father was adverse to that of the minor sons, and that the appointment of the father as guardian was improper and illegal. Reference may with advantage be also made to 56 I C 97 (4), 79 I C 556 (2), 59 I C 31 (5), 55 I C 218 (6) and 1932 All 293 (7). The only other point argued before us is that the vendee at least can claim the benefit of S. 41, T. P. Act. This matter is however concluded by authority. In 53 All 290 (8), it has been laid down by their Lordships of the Privy Council that minors who have an interest in the property cannot by reason of the disability of infancy give their consent, and the adult members of a joint family, including the father of a minor member, are not competent to give on behalf of the minor express or implied consent to a transferee of property of the joint family, being the ostensible owner of it, so as to enable a purchaser from him to claim the protection of S. 41, T. P. Act, 1882. For the reasons given we accept this appeal, set aside the decree of the Court below, and pass a preliminary decree for partition of 30/96ths share in the properties in suit in favour of the appellant. Costs both here and in the Court below will be paid by the respondents other than Mohammad Ramzan and Nabi Baksh.

K. S.

Appeal accepted.

4. Bejoy Singh v. Muthuria Debya, 1920 Cal 178=56 I C 97.
5. Bakhtawar v. Kesar Singh, (1921) 59 I C 31.
6. Ghulam Rasul v. Begam, 1920 Lah 101=55 I C 218.
7. Siraj Fatima v. Mahomed Ali, 1932 All 293=138 I C 465=54 All 646 (F B).
8. Shankar v. Daooji Misir, 1931 P C 118=132 I C 602=58 I A 206=53 All 290 (P C).

A. I. R. 1936 Lahore 164

MONROE, J.

Baru Mal and others—Plaintiffs—Appellants.

v.

Daulat Ram and another—Defendants—Respondents.

Second Appeal No. 1567 of 1934, Decided on 19th July 1935, from decree of Dist. Judge, Karnal, D/- 4th May 1934.

(a) **Contract—Breach—Mortgage of mortgagee rights for sum due on previous account—Claim to recover sum barred—Mortgage not completed—Suit for recovery of amount held not to lie, there being no consideration for mortgage.**

H mortgaged his mortgagee rights in certain trees to P for a certain sum admitted to be due under a previous account. The registration of the document was refused as it contravened the provisions of law and P instituted a suit for recovery of the amount due by reason of failure of consideration through the mortgage not having been completed. It was found that at the date of the mortgage-deed the claim to recover the amount was barred by statute:

Held: that the suit did not lie as there was no consideration for the mortgage, the debt for which it was given being barred by statute: 11 All 47 (P C), *Disting.* [P 164 C 2; P 165 C 1, 2]

(b) **Limitation—Fresh cause of action—Claim barred—Only express promise provides fresh period of limitation.**

Where a claim is barred by statute nothing short of an express promise can provide a fresh period of limitation. [P 165 C 2]

*Asa Ram Aggarwal—*for Appellants.

*Mehr Chand Sud—*for Respondents.

Judgment.—On 4th January 1928, Harnam Das, the father of the minor defendants, executed, in favour of the plaintiffs, a mortgage of his mortgagee rights in certain trees for the sum of Rs. 570 admitted to be due under a previous account. The registration of the document was refused on the ground that it contravened the provisions of the Alienation of Land Act, and the plaintiffs instituted this suit for the recovery of Rs. 570 due by reason of the failure of consideration through their not being able to have the mortgage completed. In the first instance the trial Court and, on appeal, the District Judge dismissed the suit without examining the merits, holding that though the plaintiffs claimed a refund of their money, the suit must fail as the deed was compulsorily registerable and a suit could not be founded on the acknow-

ledgment in the deed though it would have lain on the original dealings.

An appeal was taken to this Court and Mr. Justice Addison remanded the suit for a decision on the merits. He held that the document could be used as the basis of a claim for return of the money acknowledged to be due therein and that it was not necessary to base the claim on the original dealings. He also stated that all defences on the merits, including limitation, ought to be open to the defendant. The case was accordingly tried and was dismissed by the trial Judge on the ground that the plaintiffs clearly came to Court for the recovery of the original debt, and furthermore that, on the date of the execution of the mortgage deed, the original debt was barred by limitation. This decision was upheld on appeal by the learned District Judge. The plaintiffs have now appealed, and the argument presented on their behalf by Mr. Asa Ram is that the mortgage deed of 4th January 1928 gave a new cause of action, first because it involved the promise to pay the Rs. 570 intended to be secured by it, and also because it became a debt of another character, it having been the subject of an arrangement by which it was to be retained by the debtor as consideration for a new transaction. That arrangement failed. The second argument is based on 11 All 47 (1) a decision of the Judicial Committee of the Privy Council.

In the present case it has been found by the learned District Judge that, at the date of the mortgage deed, the claim to recover this sum of Rs. 570 had become barred, the debt having originally been contracted in 1924. I am in agreement with this finding of the learned Judge and consider that he was right in treating it as a separate item which had never come into other accounts which were settled from time to time between the parties. The Allahabad decision is based on S. 65, Contract Act, which compels a person, who has received an advantage under an agreement that becomes void to restore it or make compensation for it. I do not think that it can be said that in the present case Harnam Das received any advantage under the agreement, because in law he could not have been compelled to pay the sum of Rs. 570

secured by it. As the debt for which the mortgage was given was barred by statute there was no consideration for the mortgage. It remains to examine the first proposition that this document contains a promise to pay. This argument is based on S. 25, Contract Act, which makes an agreement made without consideration void, unless

it is a promise, made in writing, and signed by the person to be charged therewith . . . to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

But it has been decided that nothing short of an express promise can provide a fresh period of limitation, 23 All 502 (2), and I have been unable to find anything anywhere else in the mortgage-deed which could be construed as an express promise. The nature of the whole transaction as well as the terms of the mortgage-deed gives ample ground for implying a promise to pay and I would hold without hesitation that there is such promise. But, as I have said, that is not enough to support the claim. It has been argued that the judgment of Mr. Justice Addison has already decided this point in the plaintiffs' favour, but after a careful perusal of the judgment I have no doubt that this point was not considered by Mr. Justice Addison, and indeed he seems to have refrained from dealing with it. What he says is that it is clear that a suit lies on a non-conditional acknowledgment as it implies a promise to pay and that after failure of existing consideration owing to non-registration or other causes a suit lies for money advanced. He has, therefore, indicated that as this case was presented to him the principle laid down in 11 All 47 (1), might be applicable but he has not considered the fact which has been found to exist, namely that at the date of the mortgage deed the then existing debt was irrecoverable because it was barred by statute. For these reasons I would uphold the findings of the learned District Judge and dismiss the appeal with costs.

R.M./R.K.

Appeal dismissed.

2. Ganga Prasad v. Ram Dayal, (1901) 23 All 502=1901 A W N 150.

1. Bassu Kuar v. Dhum Singh, (1888) 11 All 47 =15 I A 211 (P C).

A. I. R. 1936 Lahore 166

ADDISON AND BACKET, JJ.

Sohindar Singh—Plaintiff—Appellant.
v.*Shankar Das and others*—Respondents.

First Appeal No. 153 of 1933, Decided on 4th July 1934, from order of Senior Sub-Judge, Gujranwala, D/- 21st November 1932.

Court-fees Act (1870), S. 7 (4) (c) and Sch. 2, Art. 17 (iii).—Mortgage decree and property sold—Suit for declaration by minor son that mortgage-decree and sale are invalid and not binding on him involves consequential relief and suit falls under S. 7 (4) (c).

A suit by a son for a declaration that certain mortgage-decree and sale in execution thereof are invalid and as such not binding on his interest involves a consequential relief and is governed by S. 7 (4) (c), and the fact that the minor has not been personally impleaded in the suit on the mortgage does not make any difference: 1927 P C 56; 1924 All 908; 1929 Pat 741 and 1915 Mad 948, *Ref.* [P 166 C 2]

Chuni Lal Vohra—for Appellant.

Judgment.—The only question to be decided in this appeal is, whether the value of the suit has been properly assessed for the purposes of court-fee. The grandfather of the plaintiff, Ram Das, mortgaged certain property, now alleged to be ancestral. The mortgagee brought a suit on the mortgage, impleading the sons of Ram Das as his legal representatives. The suit was decreed, and the property was sold in execution. The plaintiff, who is still a minor, seeks a declaration that the decree and sale are invalid as the original mortgage-debt was either fictitious or raised for immoral purposes. He claims that this is a suit for a simple declaration without consequential relief, falling under Art. 17 (iii), Sch. 2, attached to the Court-fees Act, for which a fixed court-fee is prescribed. The trial Court held however that it was a suit embodying consequential relief and so falling under S. 7 (4) (c) of the Act itself, in which case the plaintiff must value his relief and pay duty ad valorem thereon. The plaint was accordingly returned for amendment, and the appeal is against this order.

The only authorities laid before us in support of the plaintiff's contention are decisions relating to suits in which a plaintiff seeks a declaration that an alienation of family property is not binding upon him, which is not quite the same as seeking to avoid both a decree for the

sale of the mortgaged property as well as a subsequent sale in execution of the decree. 38 Mad 922 (1) lays down clearly that a suit for a declaration that a mortgage decree is not binding on the plaintiff and for an injunction restraining the defendant from executing the same is a suit for a declaratory decree with consequential relief. The facts were similar to those in the present suit, but the minor plaintiffs had actually been impleaded by name as parties to the suit on the mortgage. In the present instance it does not appear that the minor plaintiff was personally impleaded in the suit brought against his father and uncle, and the question is whether this makes any substantial difference for the purpose of deciding whether the declaration now claimed by the plaintiff involved any consequential relief. In our opinion it does not. When the suit was brought on the mortgage executed by Ram Das, the father of the plaintiff could and should have raised the plea that the mortgage was not binding on the family property, if there was any force in that contention. The plaintiff was a minor at the time and his father was entitled to represent him. In this connection, reference may be made to the decisions cited by the lower Court, 1927 P C 56 (2), 1924 All 908 (3) and 1929 Pat 741 (4). That this was the view taken by the plaintiff himself is shown by the fact that the plaint contained a distinct prayer that the decree should be held to be invalid and that the sale should be held to be void. If the plaintiff seeks these reliefs and cannot merely confine himself to a prayer for a declaration that the decree and the sale are not binding on him as not touching his interest but must seek to have them invalidated, then his suit for a declaration involves consequential relief and the view of the lower Court is correct. For these reasons the appeal is dismissed with costs.

K.S.

Appeal dismissed.

1. Arunachalam Chetty v. Rangasamy Pillai, 1915 Mad 948=28 I C 79=38 Mad 922 (F B).
2. Lingangowda v. Bastangowda, 1927 P C 56=101 I C 44=54 I A 122=51 Bom 450 (P C).
3. Kishun Dayal Sahi v. Ravi Partap Narain Singh, 1924 All 908=78 I C 389=1924 A L J 232.
4. Lal Chand v. Seogobind, 1929 Pat 741=121 I C 330=8 Pat 788.

A. I. R. 1936 Lahore 167

ABDUL RASHID, J.

Lal Mohammad and others—Judgment-debtors—Appellants.

v.

(Firm) Khem Chand-Radha Kishan—Decree-holders—Respondents.

Misc. First Appeal No. 496 of 1935, Decided on 9th December 1935, from order of Senior Sub-Judge, Ferozepore, D/- 20th January 1935.

(a) Custom (Punjab)—Ferozepore District—Riwaj-i-am, answer 32 — Decree obtained against father—Ancestral property in hands of son not liable to attachment or sale.

Answers to question 32 does not show that there is a special custom in the Ferozepore District which makes ancestral property in the hands of sons liable to attachment and sale in the execution of a money decree against their deceased father. [P 168 C 1]

(b) Res judicata—Constructive—Party admitting certain facts in previous case—Line of attack contrary to previous admission is not permissible.

Decree-holder in a previous proceeding admitted that ancestral property was not liable to attachment and sale in execution of their decree. The doctrine of constructive res judicata therefore fully applies. Where the decree-holder takes up a line of attack contrary to his previous admissions, he cannot during the present proceedings adopt a line of attack which was not adopted during the earlier execution proceedings, and which, if taken, was given up. [P 168 C 1]

Barkat Ali—for Appellants.

Achhru Ram—for Respondents.

Judgment.—One Abdul Karim died, leaving him surviving three minor sons, namely Lal Muhammad, Muhammad Munir and Gauhar Ali. The firm Khem Chand-Radha Kishan instituted a suit for recovery of Rs. 10,788 against the three minor sons of Abdul Karim on 21st October 1924. On 29th April 1925, the firm Khem Chand-Radha Kishan was granted a decree against the minor sons. The decree-sheet contains the following words :

Digri bazumawari jaidad Abdul Karim mut-waffi ke di jati hai. Muda Alaihim ki eati zumawari nahin hogi.

On 26th May 1925, the decree-holders presented an application for execution of their decree by attachment of certain immoveable properties. The judgment-debtors filed objections on 4th July 1925, to the effect that properties marked A, B, C and D were ancestral and could not be attached under the decree. On 6th August it was stated on behalf of the

decree-holders that none of the properties were ancestral. The executing Court thereupon framed two issues, one of which was in the following terms :

Whether the houses in dispute were ancestral qua the judgment-debtors, and hence not attachable and saleable in execution of the decree.

On 1st February 1927, the counsel for the decree-holders made the following statement :

Main taslim karta hum kih makanat A, B, C one-third D ki teh zamin jaddi hai. Unka malba nilam hona chahiye. Un men siraf madyunan ki rihai hai. Main yih bhi taslim karta hun ki un men paidawar wagaira bhi rakhte hain.

The executing Court held houses, A, B, C and one-third of D to be ancestral and released them from attachment. It also held that these houses were used for residential purposes and for purposes subservient to agriculture, and that they were not liable to attachment and sale on that ground also. Properties E, F, G and H were held to be self-acquired properties of Abdul Karim, and were therefore sold in execution of the decree. Both the decree-holders and the judgment-debtors appealed to this Court. Both of these appeals were however dismissed. On 1st November 1932, the decree-holders presented another application for the execution of their decree, and this has given rise to the present appeal. They sought execution of their decree by bringing to sale the land in dispute which is admittedly the ancestral property of Abdul Karim. It was stated that there was a special custom in the Ferozepore District whereby ancestral property in the hands of the sons of the debtor was liable for the debts of their father, and that 4 P R 1913 (1) was therefore not applicable to the present case. The executing Court has held that it has been established that there is a special custom in the Ferozepore District which makes ancestral property in the hands of the sons of the debtor liable to attachment and sale in execution of a simple money decree against their deceased father. The judgment-debtors have come up in appeal to this Court. The lower Court has based its judgment mainly on the Answer to Question 32 in the Customary law of the Ferozepore District which runs in the following terms :

1. Jagdip Singh v. Narayan Singh, (1913) 4 P R 1913=15 I C 866=173 P L R 1912=160 P W R 1912.

Question No. 32: Is a minor whose father is dead and who has inherited the father's estate liable for the father's debt? If such debts are not payable till the minor comes of age, can the property inherited be alienated in the interval?

Answer: All tribes admit that the minor is liable. His liability is of course limited to the estate he inherits.

This identical question occurs in the Customary law of Shahpur District also. It was held by a Division Bench of this Court in Civil Appeal No. 24 of 1935 (2), that all that the answer to question No. 32 means is that the guardian of a minor can, just as the minor can when he attains majority, pay his father's debts and sell the ancestral land which came to him through his father in order to do so. This answer does not imply that he succeeds his father as his legal representative. It merely implies that the guardian has the same power in the matter of alienation of property as the son has when he attains majority. Question No. 32 forms part of the Chapter dealing with guardianship and minority. I am therefore in respectful agreement with the observations made by the Division Bench referred to above and hold that the answer to question 32 does not show that there is a special custom in the Ferozepore District which makes ancestral property in the hands of sons liable to attachment and sale in the execution of a money decree against their deceased father. During the execution proceedings which took place in the year 1925, it was not asserted by the decree-holders that there was a special custom in the Ferozepore District which made ancestral property liable to attachment and sale in execution of their decree. In fact the statement of the counsel of the decree-holders dated 1st February 1927, shows that the decree-holders at that time admitted that ancestral property was not liable to attachment and sale in execution of their decree. The doctrine of constructive res judicata therefore fully applies to the facts of the present case, and the decree-holders cannot during the present proceedings adopt a line of attack which was not adopted during the earlier execution proceedings, and which, if taken, was given up. It was contended by the learned counsel for the respondents that as the houses A, B, C and D were bound to be released

from attachment under S. 60, Civil P. C., during the previous execution proceedings it was not necessary for the decree-holders to plead a special custom. It must however be remembered that a separate issue was framed:

Whether the houses in dispute were ancestral, and hence not attachable and saleable in execution of the decree.

The houses were released from attachment because they were ancestral and not merely because they were used for agricultural purposes. For the reasons given above, I hold that the land in dispute being ancestral is not liable to attachment and sale in execution of the decree of the respondents against the appellants. I therefore set aside the order of the executing Court dated 20th January 1935 and accept this appeal with costs throughout.

B.D./R.K.

Appeal allowed.

**** A. I. R. 1936 Lahore 168**

TEK CHAND AND DIN MOHAMMAD, JJ.

Hira Lal and others—Defendants—Appellants.

v.

Khizar Hayat Khan — Plaintiff and others—Defendants—Respondents.

First Appeal No. 344 of 1928, Decided on 18th July 1934, from decree of Sub-Judge, 1st Class, Sargodha, D/- 18th June 1927.

(a) Limitation Act (1908), S. 5—Appeal lying to High Court filed in District Court—Lower Court decree also not beyond doubt—Respondent also first filing his appeal in District Court—Time during which appeal remained in District Court held should be excluded.

The decree, as framed by the lower Court, was not clearly worded and its exact meaning and significance was by no means beyond doubt. The respondent himself was misled in choosing the wrong forum and it was he who was the first to file his appeal in the District Court instead of the High Court and it was only subsequently that appellant filed his appeal in the District Court within time:

Held: that the provisions of S. 5 were applicable and the period during which the appeal remained pending in the District Court should be excluded. [P 170 C 1]

(b) Mortgage — Redemption—Person purchasing equity of redemption with full knowledge of mortgage in which term of redemption is fixed as 25 years—Term by itself is not clog on equity of redemption.

Where the plaintiff purchases the equity of redemption with full knowledge of the defendants' mortgage, the mere fact that the term of redemption fixed in the deed in favour of the defendant is a long one is by itself not a suffi-

cient ground for supposing that this condition is a clog and should be relieved against.

[P 170 C 2]

* (c) Interest—Mortgage—Part of principal money payable to another by mortgagee forthwith paid only subsequently owing to unexpected events—Such money cannot be deemed to have been paid on date of mortgage to mortgagor nor can mortgagee be considered as agent of mortgagor—Interest on such money accrues only from date of actual payment and not from date of mortgage.

Where the part of the mortgage money is made under the deed payable forthwith to another by the mortgagee, but the payment is made only subsequently owing to the unexpected events, such money cannot be deemed to have been paid to the mortgagor at the time of the execution of the mortgage nor can the mortgagee be considered as the agent of the mortgagor in respect of payment of such money to another, and as such the mortgagee cannot claim interest on such amount from date of mortgage but only from date of actual payment by him: 1925 *Lah* 174, *Expl.*; 1919 *Mad* 367, and 1930 *Mad* 382, *Disting.*; *Case law Ref.*

[P 173 C 1, P 174 C 1]

(d) Mortgage—Redemption—Part of principal money made payable by mortgagee to another forthwith and mortgagor entitled to redeem within 20 years—Actual payment made subsequently and not forthwith—Mortgagor is entitled to redeem within 20 years from date of payment.

Where part of the principal money is made payable by the mortgagee to another forthwith and the mortgagor is entitled to redeem within 20 years, but owing to unexpected events the payment by the mortgagee is made only subsequently, the right to redeem accrues only 20 years from date of actual payment and not from date of mortgage.

[P 174 C 1]

(e) Practice—Pleading—Party cannot approbate and reprobate—Two inter-dependent conditions in deed—They become operative from same date.

A person cannot be allowed to approbate and reprobate in the same breath. He cannot pick and choose that which is beneficial to him and reject what is detrimental. Where there are two conditions inter-dependent and inextricably mixed up, both of them become operative on same date.

[P 174 C 2]

* (f) Contract—Tender—Tender must be made in current coin—But objection as to form can be waived—If it is rejected on other grounds without making any objection as to its form, such objection must be deemed to have been waived.

A tender to be valid must be made in the current coin of the realm and a tender by cheque is not sufficient. But where a tender is actually made but in a medium different from that required by law, the objection to the form of the tender may be expressly or impliedly waived by the creditor and he will be deemed to have waived the objection, if he rejects the tender on other grounds, without making any objection to its legality in point of quality: 34 *Cal* 805; 1931 *Bom* 118 and 1929 *Mad* 290, *Rel. on.*

[P 175 C 1]

Where no objection was raised at the time when the cheque was returned by the defendants, as to the medium in which the tender was made:

Held: that the tender could not be held to be bad simply because it was made by cheque and not in coin or currency notes. [P 175 C 2]

(g) Contract—Tender under protest is not bad.

A tender under protest is not bad in law.

[P 175 C 2]

(h) Contract—Tender of more than what is due is good.

The tender of more than what is due is, of course, good: *Wade's case*, 77 *E R* 232; *Douglas v. Patrick*, 100 *E R* 802 and 1918 *Mad* 88, *Rel. on.*

[P 175 C 2]

(i) Contract—Tender—Offer accompanied by condition which prevents it from being perfect or complete in itself—Tender is not good.

It is of the essence of a valid tender that it should be unconditional. If the offer is accompanied by a condition which prevents it from being perfect or complete in itself, it cannot be regarded as equivalent to payment and the promisee is under no obligation to accept it: 1925 *P C* 347, *Foll.*

[P 175 C 2, P 176 C 1]

Where plaintiff sent a single cheque for two items, only one of which was due at the time, and the other was not to be payable for some years to come:

Held: that the cheque being one and indivisible, could be accepted as a whole or not at all and that the tender of one of the items by that cheque was not a good one and promisee was within his rights in rejecting it. [P 175 C 2]

M. C. Mahajan, Shamair Chand, Arjan Das and Bhagat Ram Kohli—for Appellants.

Achhru Ram, Bhagu Ram, Ghulam Mohy-ud-din, and J. N. Aggarwal—for Respondents.

Tek Chand, J.—This judgment shall dispose of cross-appeals, Civil Appeal Nos. 344 and 625 of 1928, which arise from a suit for redemption and certain alternative reliefs. The suit was partially decreed by the Subordinate Judge, 1st Class, Sargodha, on 18th June 1927, and from this decree both parties lodged appeals in the Court of the District Judge within the period prescribed by law for presentation of appeals in that Court. The appeals came up for hearing before the District Judge on 19th January 1928, when he held that the decree of the Subordinate Judge was appealable to the High Court and not to his Court. He accordingly directed that the memoranda of appeal be returned for presentation in the proper Court. The papers were actually returned to the parties on 26th January 1928; and the defendants pre-

sented their appeal in this Court on 30th January 1928 (Civil Appeal No. 344 of 1928), and the plaintiff presented his appeal (Civil Appeal No. 625 of 1928), on 13th February 1928.

At the commencement of the hearing before us, a preliminary objection was raised by counsel for the respondent in Civil Appeal No. 344 of 1928 that the appeal was barred by time. After examining the relevant portions of the record and considering the arguments of counsel, we overruled the objection and proceeded to hear the case on the merits. It is conceded that according to recent Full Bench decisions the order of the District Judge, holding that the appeals lay to the High Court, was correct and the appeals should have been presented in this Court within ninety days of the date of the Subordinate Judge's decree. A contrary view however had been taken in some earlier rulings, according to which the valuation fixed in the plaint, which in this case was Rs. 3,500, governed the forum of appeal. Further, the decree, as framed by the Subordinate Judge, was not clearly worded and its exact meaning and significance was by no means beyond doubt. Indeed, the plaintiff-respondent himself appears to have been misled in choosing the wrong forum and, as stated already, it was he who was the first to file his appeal in the District Court. In our opinion this is pre-eminently a case to which the provisions of S. 5, Lim. Act, are applicable. It is conceded that if the period during which the appeals remained pending in the District Court is excluded, both appeals are within time. The preliminary objection has no force and is overruled. Coming to the merits, we find that the land in dispute has been the subject of numerous alienations and considerable litigation during the last sixty years, and it is necessary to set out its history in chronological order. (His lordship then dealt with the history in detail and proceeded to consider the appeal on merits.) From this decree the plaintiff as well as defendants 1 to 9 have appealed. The prayer in the plaintiff's appeal is that he should be granted a decree for immediate possession of the land by redemption, while the defendants in their appeal ask for a total dismissal of the suit.

It will be convenient to take up first

the plaintiff's appeal, in which a claim for immediate redemption of the mortgage is made. It is conceded that according to the terms of his mortgage (Ex. P. C.) Maya Das was entitled to remain in actual possession of the entire mortgaged land for twenty-five years or fifty harvests and that this period was to commence from the date when he took possession after redeeming the first mortgagees, Pir Haidar Shah and Malik Sahib Khan, whose term was to expire in June 1895. Before that date, however, Jowala Sahai and Dhera Mal had redeemed the first mortgagees and obtained possession, and according to the conditions of their mortgage they were to remain in possession for a period of twenty years commencing with Rabi 1889. Maya Das, alleging that his deed was of an earlier date than that of Jawala Sahai Dhera Mal, sued to recover possession from them, but the Chief Court in 1893 disallowed his claim, holding that their mortgage had priority over his mortgage, and that Maya Das was not entitled to redeem till the period of twenty years fixed in their deed (Ex. P. D.) had run out. It is no longer denied that these twenty years expired in October 1908. It is clear, therefore that the right of Maya Das to enter into possession did not accrue till that date.

This is admitted in very clear terms in para. 9 of the plaint, and after making a half-hearted attempt to explain away this admission Mr. Jagan Nath frankly conceded that the starting point of the twenty-five years' term of the defendants' mortgage is 25th October 1908. He urged, however, that this condition was a clog on the equity of redemption and should not be enforced. As already stated in the litigation ending with the Chief Court judgment of 1893, one of the issues related to the validity of the conditions of the mortgage (Ex. P. C.) and it was then held that these conditions were valid and legally enforceable, and that no fraud or undue influence of any kind had been practised on the mortgagor. Admittedly the plaintiff purchased the equity of redemption with full knowledge of the defendants' mortgage, and the decision of the Chief Court is binding on him. Moreover, the mere fact that the term of redemption fixed in the deed is a long one is by itself not a sufficient ground for supposing that this condition is a clog and should be relieved against. I hold

therefore that the contention, that the term of twenty-five years is a clog on the equity of redemption, is without substance and must be overruled.

Mr. Jagan Nath next urged that though the claim for redemption was premature at the date of the institution of the suit as well as at the date of the decree of the lower Court, but counting the period from October 1908 twenty-five years have expired on 25th October 1933 during the pendency of the appeal, and this Court should decree redemption now. In reply Mr. Mehr Chand contended that the period of twenty-five years should begin from August 1918 when the defendants were able to obtain actual possession after lengthy litigation with the second mortgagees. It is quite clear that Maya Das was in no way to blame for the litigation of 1913-18 when his claim for redemption was resisted on grounds, most of which were found to be frivolous and unsustainable. He is therefore entitled to an exclusion of the time during which the suit remained pending, i. e. February 1913 to August 1918, or $5\frac{1}{2}$ years. But Mr. Mehr Chand has not been able to give any satisfactory explanation of the inaction of Maya Das from October 1908 to February 1913, when he could have redeemed the second mortgagees. I do not think therefore that his clients are entitled to exclude this period. As a result of this finding, the mortgage (Ex. P. C.) will be redeemable after the expiry of $5\frac{1}{2}$ years from 25th October 1933, i. e., on 25th April 1939. I hold therefore that the claim for redemption is still premature. Accordingly the plaintiff's appeal (Civil Appeal 625 of 1928) fails and must be dismissed with costs.

In the defendants' appeal the controversy mainly centres on the point, whether under the terms of the mortgage the plaintiff is entitled to reduce the mortgage charge by paying forthwith the interest-bearing portion of the principal sum secured together with the interest accrued thereon, though he cannot redeem the mortgage for some years more. The learned Subordinate Judge has found this issue in favour of the plaintiff and has held that the plaintiff could reduce the mortgage charge by paying off Rs. 1,500 plus interest at Re. 1 per cent per mensem with yearly rests from 2nd July 1918 (when this amount was paid by Maya Das to the second mortgagees) to 13th March

1926, (when the plaintiff tendered the amount by cheque to the sons of Maya Das). On this basis he has calculated the total amount due in this account on the date of decree to be Rs. 3,571. In support of this finding, Mr. Jagan Nath Aggarwal for the plaintiff-respondent points out that though the principal sum secured on the mortgage in question was Rs. 3,500 it was made up of three items, for each of which the parties had made separate and distinct stipulations, as is clear from the conditions of the mortgage set out in para. (C) above. The first stipulation in Cl. (1), para. (C) created an immediate charge for Rs. 1,500 on one-half of the right to receive the produce which had been reserved to the mortgagor under the first mortgage (Ex. P. A.) in favour of Pir Haider Shah, etc. Cl. (2), authorised Maya Das to redeem the first mortgage from Pir Haider Shah, etc., on payment of Rs. 500 and after redemption divide the produce of the redeemed land with the mortgagor in certain specified shares. Both these items of Rs. 1,500 and 500 did not carry interest. The third item of the consideration consisted of another sum of Rs. 1,500 relating to which there were separate stipulations which are set out in detail in Cls. (3) to (6) above, and it is with this item that we are concerned in this appeal. Cl. (3) provided that :

The remaining sum of Rs. 1,500, shall carry interest from today at the rate of Re. 1 per cent per mensem, and form a charge on the entire mortgaged property; the account as to interest shall be made every year and the mortgagee shall charge interest on interest, and I shall pay the whole sum to the mortgagee within 20 years.

Clauses (4) to (6) lay down the consequences of non-payment of the amount due in this account on the termination of the 20th, 21st, 22nd, 23rd and 24th years from the date of the execution of the mortgage. Mr. Jagan Nath urges that (1) the sum of Rs. 1,500 referred to in these clauses was the amount which was left with Maya Das, mortgagee for payment to Shankar Das and Thakar Das, the promisees of agreement Ex. P. B., and (2) though it was stipulated that this item would bear interest from "today" (i. e. the date of mortgage) and could be repaid within 20 years from that date, and with certain penalties till the expiry of the 24th year (i. e. on 24th February 1911), but as it was on 2nd July 1918 that Rs. 1,500 was actually paid by Maya

Das to the assignees of Shankar Das and Thakar Das, that date, and not the date of the execution of the mortgage, should be considered to be the starting point for charging interest as well as for computing the period of 24 years, during which repayment could be made by the mortgagor as stipulated.

The contention of Mr. Mehr Chand Mahajan for the defendants-appellants, on the other hand, is that the wording of the deed being clear and explicit and open to but one meaning only, the parties must be held bound by the stipulations contained therein, and it is not competent to the Court to speculate as to their supposed intention, and to substantiate therefor fresh and entirely different covenants. Mr. Mehr Chand also made a faint-hearted attempt to argue that the sum of Rs. 1,500 which was to carry interest was not the amount which was payable to the promisees of the agreement Ex. P. B. After hearing him I have no doubt that this argument is without substance. It is apparent from the terms of the mortgage-deed (Ex. P. C.) that the interest bearing portion of the principal amount secured on foot of the mortgage was the sum of Rs. 1,500 which was payable to Shankar Das and Thakar Das, and indeed this was admitted very clearly by Maya Das himself and his pleader on various occasions in the course of the civil and revenue litigation between the parties in 1889 to 1895 (see pp. 48, 50, 52, 54 and 56 of the paper book). It seems that at the time of the execution of the mortgage-deed in dispute (Ex. P. C.) both the mortgagor (Ahmad Yar) and the mortgagee (Maya Das) were under the impression that Thakar Das and Shankar Das would have no objection to receive forthwith the sum of Rs. 1,500, and on that assumption it was stipulated that Rs. 1,500 would bear interest from "to-day." It is no doubt true that in the agreement (Ex. P. B.) Ahmad Yar had undertaken to execute a regular mortgage in favour of Shankar Das and Thakar Das on their redeeming the first mortgagees, Pir Haidar Shah and Malik Sahib Khan. But as Shankar Das and Thakar Das were unable to come to any arrangement with the prior mortgagees and the term of whose mortgage was not to expire till 1895, all that Shankar Das and Thakar Das were entitled to receive in February 1887 was Rs. 900, which they had lent

to Ahmad Yar in 1882, together with interest thereon, or in all Rs. 1,500 approximately.

This sum of Rs. 1,500 was therefore left in deposit with Maya Das, mortgagee for payment to Shankar Das and Thakar Das and it was expected that they would be paid forthwith, and consequently it was entered in the deed that this "sum of Rs. 1,500 shall carry interest from today." It appears however that Thakar Das and Shankar Das were not willing to accept the money, and soon after transferred their rights under the agreement (Ex. P. B.) to Jowala Sahai and Dhera Mal, who lost no time in getting into touch with Ahmad Yar, and in October 1888 persuaded him to execute a mortgage in their favour for a period of 20 years, authorising them to redeem the first mortgagees, Pir Haidar Shah and Malik Sahib Khan. Accordingly Jowala Sahai and Dhera Mal, with the concurrence of Ahmad Yar, soon came to terms with the first mortgagees, and having redeemed their mortgage seven years before the expiry of its term, entered into possession. In compliance with the stipulations in his deed (Ex. P. C.) Maya Das offered payment of Rs. 1,500 first to Shankar Das and Thakar Das and then to their transferees, Jowala Sahai and Dhera Mal, but neither of them was willing to accept it. Thereupon he put the matter in Court, but the Chief Court found that the mortgage in favour of Jowala Sahai and Dhera Mal, though posterior in date to that of Maya Das, had priority over it, and that the latter could not compel them to receive payment of Rs. 1,500 till 1908. The result therefore was that the contemplated payment of Rs. 1,500 could not be made at the time of the execution of Maya Das's mortgage (Ex. P. C.) or within a reasonable time thereafter, as had been anticipated, and it was not till July 1918, that after further litigation, the amount was actually paid to the representatives of Jowala Sahai and Dhera Mal.

It must be conceded that Maya Das was not to blame for this long delay in paying Rs. 1,500; indeed he had shown his readiness and willingness to pay by repeatedly making offers, both out of and through Court. But the fact remains that this part of the principal mortgage-money was not actually paid till 31 years after 1887, and I cannot see on what grounds, legal or equitable, can Maya Das

or his successors-in-interest claim interest and compound interest on it for that period. It follows therefore that owing to the happening of unexpected events, the stipulation in the deed as to the payment of interest "from today" must be held to have become inoperative and incapable of being enforced according to its literal meaning. Mr. Mehr Chand, however has very ingeniously argued that a mortgage being a transfer of interest in specific immoveable property for the purpose of securing payment of money advanced or to be advanced by way of loan (S. 58, T. P. Act)

the unpaid portion of the mortgage-money must be held to have become the property of the mortgagor, which the mortgagee held as the agent of the mortgagor and which the latter was at liberty to draw at any time. From this he asks the Court to conclude that the sum of Rs. 1,500 should be "deemed to have been paid" at the time of the execution of the mortgage deed, and as such capable of bearing interest from that date, and suggests that the equities between the mortgagor and the mortgagee, arising from the circumstance that the money actually remained with the mortgagee for all these years, be adjusted by allowing the former (but not his assignee) compensation by way of damages for the failure of the agent (mortgagee) to invest the amount during this period so as to mitigate the loss to his principal (mortgagor). In support of this contention Mr. Mehr Chand referred to 49 I C 313 (1), 53 Mad 270 (2), and 78 I C 445 (3). The first two rulings however are clearly distinguishable, as in each of them the transaction in dispute was an out and out sale and not a mortgage as is the case here. That on this point there is substantial difference between a sale and a mortgage was pointed out by the House of Lords in the well-known case of the (1898) A C 309 (4). As observed by Lord Herschell in that case, (p. 315) a contract to lend money on the security of certain property

is not in its nature a contract of purchase; it is an agreement on the one side to lend money for a term of years, and on the other side to give the lender a specified security for his loan. I am at a loss to see how an agreement of this description can create a debt from the lender to the borrower.

It has accordingly been held that a suit to enforce an agreement to lend money on a mortgage is not maintainable, nor is the mortgagor entitled to bring a suit to compel the mortgagee to advance the unpaid balance of the principal sum secured on the mortgage. See 2 Mad 79 (5); 45 I C 161 (6); 47 Mad 698 (7); 43 Cal 59 (8) and 52 All 1037 (9). The last-mentioned case contains the following observations (at p. 1046) which completely dispose of Mr. Mehr Chand's contention:

A contract to lend is not the same thing as a contract of agency. The mortgagees did not hold in their hands any money belonging to the mortgagor.

Similarly a Full Bench of the Bombay High Court held in 33 Bom 426 (10) that:

An agreement to lend money does not create an obligation to pay money * * * It creates no debt, though the breach of it may give rise to a claim for damages.

The headnote of the third case, cited by Mr. Mehr Chand, 78 I C 445 (3) no doubt supports his contention. That was a case decided ex parte on revision by Martineau, J., sitting in Single Bench. The learned Judge held that on the facts of the case (which are not set out in the judgment) there was an implied contract by the mortgagee to pay the whole amount for which the land was mortgaged. He therefore held that the suit by the mortgagor to recover the unpaid balance of the mortgage-money was maintainable. It appears that the decision was based on the peculiar facts of the case, and the head-note is much wider than what was actually decided by the learned Judge. There is no discussion at all of the question in the judgment, and I do not think

1. Komu Kutti v. Kumara Menon, 1919 Mad 367=49 I C 313=35 M L J 692.
2. Subbu Chetti v. Arunachalam Chettiar, 1930 Mad 382=124 I C 55=53 Mad 270=58 M L J 420 (F B).
3. Imam Din v. Dittu, 1925 Lah 174=78 I C 445.
4. South African Territories v. Wellington, (1898) A C 309=67 L J Q B 470=14 T L R 298=46 W R 545=78 L T 426.

5. Anakaran Kasmi v. Saidamadath Avulla, (1878-80) 2 Mad 79.
6. Rajagopala Aiyar v. Davood Rowther, 1918 Mad 364=45 I C 161=84 M L J 342.
7. Yadavendra Bhattu v. Srinivasa Babu, 1925 Mad 62=80 I C 5=47 Mad 698=47 M L J 435.
8. Sheikh Galim v. Sadarjan Bibi, 1916 Cal 530=29 I C 621=48 Cal 59=21 C L J 592=19 C W N 1932.
9. Narain Prasad v. Narain Singh, 1931 All 40=131 I C 599=52 All 1037=1930 A L J 1577.
10. Hitwardhak Cotton Mills Co. v. Sorabji, (1909) 33 Bom 426=2 I C 432.

that that case can be accepted as an authority for the broad proposition urged by the appellants' learned counsel. After carefully considering Mr. Mehr Chand's arguments on this point, I find that there is no force in them and I hold, in agreement with the lower Court, that defendants 1 to 9 are not entitled to charge interest on the sum of Rs. 1,500 from the date of the execution of the mortgage, but that this sum carried interest and compound interest at the stipulated rate from the date on which it was actually paid, i. e. 2nd July 1918.

It necessarily follows from the finding in the preceding paragraph that the period of 20 years mentioned in Cl. (ii) of para. (C) above, within which the mortgagor was allowed to pay off the interest-bearing portion of the mortgage and thus reduce the debt pro tanto is to be computed from 2nd July 1918, and that as that period has not yet expired it is open to the plaintiff, as the successor-in-interest of the mortgagor, to repay, if he so chooses, that amount (Rs. 1,500) together with interest and compound interest at the stipulated rate, even though he is not yet entitled to redeem the mortgage. Mr. Mehr Chand contended that according to the plain reading of the deed this term of 20 years was to run from the date of the mortgage and that in accordance with the conditions in Cls. (4) to (6), para. (C), this right became extinct at the expiry of the 24th year in 1911. It is no doubt true, that this is what was within the contemplation of the parties at the time of entering into the bargain, but, as has been stated above, certain unforeseen circumstances supervened, with the result that it was not till 2nd July 1918 that the mortgagee was able to advance this part of the principal mortgage-money, and it was from that date that interest thereon became chargeable.

The right of the mortgagor to repay this amount therefore could not possibly accrue before 2nd July 1918. It cannot be denied that the provision in the deed permitting the mortgagor to lighten his burden by piecemeal repayments had been made for his benefit and was a necessary complement to the stipulation that this part of the principal mortgage-money was to bear interest and compound interest at certain specified rates. The intention clearly was that the two

provisions were to be enforced simultaneously, one for the benefit of the mortgagee and the other for that of the mortgagor; and it would be absurd to hold that in the changed circumstances one of these provisions became operative from 1918, while the other had been extinguished seven years before it could be given effect to. The contention of the appellants, if accepted, would reserve to the mortgagee the right to charge interest and compound interest on Rs. 1,500 from the date of the advance, but would deny to the mortgagor the concession expressly given to him to reduce his liability by repaying the amount due within 20 years unconditionally and in the succeeding four years with certain penalties which are set out in great detail in the deed. It is quite clear that the appellants wish to approbate and reprobate in the same breath; they wish to pick and choose that which is beneficial to them and reject what is detrimental. This obviously they cannot be allowed to do. There is no doubt that the two conditions are inter-dependent and are inextricably mixed up, and both of them became operative on the date on which the mortgagee actually paid the principal sum. I therefore hold in agreement with the learned Subordinate Judge, that the terminus a quo of the term of 20 years mentioned in Cl. (3) of para. (C) above is 2nd July 1918 and that it is open to the mortgagor or the plaintiff as his successor-in-interest, to take advantage of the concession allowed to him.

The learned Subordinate Judge has held however that interest on this part of the mortgage-money ceased to run on 13th March 1926, when the plaintiff, through his pleader, sent to defendants 1 to 9 a cheque for Rs. 7,872 with the forwarding letter, Ex. D.3. He has held that having regard to the stipulation in Cl. (3), para. (C) above, this was a valid "tender" of the amount due on the interest-bearing portion of the mortgage-money, and as the defendants rejected it without any lawful excuse, the plaintiff is exonerated from liability for payment of interest and compound interest on Rs. 1,500 from that date. A perusal of the forwarding letter shows that the sum of Rs. 7,872 for which the cheque was sent, consisted of two items: (1) Rupees 6,037 being the amount which the plaintiff then believed to be due on account

of the interest-bearing portion of the mortgage, and (2) Rs. 1,835 which the defendants-appellants had paid to the second mortgagees, Jowala Sahai and Dhera Mal, in accordance with the decree of the Chief Court passed in 1918, as the cost of improvements which the latter had effected during the currency of their mortgage. Before considering the legality of the "tender" it is necessary to clear the ground by referring to two matters on which there is no dispute between the parties. It is common ground that the amount actually due on 13th March 1926 on account of the first item was Rs. 3,571 only and not Rs. 6,037, as seems to have been erroneously supposed by the plaintiff and his advisers, who had calculated interest from 1914 instead of 2nd July 1918, when the prior mortgagees were actually paid off. Therefore, so far as this item is concerned, the plaintiff had tendered a larger sum than was really due. As regards the second item both counsel are agreed that the tender was premature. It is conceded by Mr. Jagan Nath that the cost of improvements was payable to the mortgagee at the time of redemption of the mortgage, and as the mortgage had not become redeemable in 1926 the defendants were not bound to accept that amount at the time. It is also to be noted that for payment of the amount, believed to be due on both these items, the plaintiff sent to the defendants a single cheque. On these facts the question arises whether the defendants were justified in rejecting the tender, because

(a) it was made by cheque and not in "current coin;" (b) the amount tendered for the first item was larger than what was really due; and (c) a single cheque was sent for the aggregate amount of both items, only one of which was due, and the other the defendants were not bound to accept.

It is no doubt true that a tender to be valid "must be made in the current coin of the realm" and a tender by cheque is not sufficient. It is however well settled now that where a tender is actually made but in a medium different from that required by law, the objection to the form of the tender may be expressly or impliedly waived by the creditor, and it has been held that he will be deemed to have waived the objection, if he rejects the tender on other grounds, without making any objection to its legality in point of quality. See 34 Cal 305 (11) at p. 310.

11. Jagat Tarini v. Noba Gopal, (1907) 34 Cal 305.

where the English and Indian authorities are collected: see also 55 Bom 525 (12) at p. 533, 56 M L J 255 (13) at p. 260 and Halsbury's Laws of England, Vol. VII, p. 420. In the case before us, no objection was raised at the time when the cheque was returned by the defendants, as to the medium in which the tender was made, and therefore the tender cannot be held to be bad simply because it was made by cheque and not in coin or currency notes. Nor is there any force in objection (b), as the amount actually offered for the first item was nearly double of what was really due on the date on which the cheque was sent. The forwarding letter, Ex. D. 3, makes it clear that the offer was made subject to accounts being taken at a later stage. It is true that this letter is a long-winded document and contains some statements which the defendants did not and could not accept, but after making full allowances for this circumstance, it is quite clear that so far as this item is concerned the tender was really one made "under protest" and such a tender is not bad in law. The calculations were, of course, incorrect, but the mistake was in favour of the appellants and not against them, and they can have no reasonable grievance on this score. The tender of more than what is due is, of course good, and if any authority is required for this self-evident proposition, reference may be made to 77 E R 232 (14), 100 E R 802 (15) and 45 I C 638 (16).

The third objection, however, is more serious. As stated already, the plaintiff sent a single cheque for two items, only one of which was due at the time, and the other was not to be payable for some years to come. The cheque, being one and indivisible, could be accepted as a whole or not at all. It is clear, therefore, that for this reason the tender was not unconditional and the defendants were within their rights in rejecting it. It is of the essence of a valid tender that

12. Ismail Issac v. Abdulla Haji, 1931 Bom 118 =129 I C 748=55 Bom 525=32 Bom L R 1660.

13. Venkatarama Aiyar v. Gopalakrishna Pillai, 1929 Mad 230=116 I C 844=52 Mad 322=56 M L J 255.

14. Wade's case, 77 E R 232.

15. Douglas v. Patrick, (1790) 100 E R 802.

16. Subramania Aiyar v. Narayanaswami Vandyar, 1918 Mad 88=45 I C 638=34 M L J 439.

it should be "unconditional." If the offer is accompanied by a condition which prevents it from being perfect or complete in itself, it cannot be regarded as equivalent to payment, and the promisee is under no obligation to accept it (S. 38, Contract Act, and 69 I C 273 (17)). I am, therefore, constrained to hold that the finding of the learned Subordinate Judge on this point is incorrect and that interest on this part of the consideration did not cease on 13th March 1926. But, as already stated, it is still open to the plaintiff to pay the amount due on this part of the mortgage-money in accordance with the provisions of Cls. (iii) to (vi) of para. (C) and reduce the charge accordingly.

The result of the foregoing discussion is that the only relief to which the plaintiff is entitled in this suit is a declaration that he is entitled to reduce the mortgage charge by paying off the interest-bearing portion of the mortgage-money within the period prescribed in the deed, as computed from 2nd July 1918. I would accordingly accept the defendants' appeal (Civil Appeal No. 344 of 1928), set aside the judgment and decree of the lower Court, and in lieu thereof pass a decree in favour of the plaintiff declaring that he is entitled to pay off the interest-bearing portion of the mortgage-money (Rs. 1,500) with interest at Re. 1 per cent per mensem and compound interest with yearly rests, calculated from 2nd July 1918, within a period of 20 years from that date and, failing that, within the succeeding four years in the manner and on the conditions mentioned in the mortgage-deed (Ex. P. C.). The rest of the plaintiff's claim is dismissed. Having regard to all the circumstances and particularly the fact, that the appellants had put forward an untenable claim for interest from 1887 to 1918, I would leave the parties to bear their own costs of this appeal. The costs of the suit shall be borne by the parties as ordered by the trial Court.

Din Mohammed, J.—I agree.

K.S. *Appeal 625 of 1928 dismissed;*
Appeal 344 of 1928 accepted.

17. Narain Das v. Abinash Chander, 1922 P C 347=69 I C 273 (P C).

A. I. R. 1936 Lahore 176

AGHA HAIDAR, J.

Muni Lal and others—Appellants.

v.

Bari Doab Bank, Ltd., Hoshiarpur—Respondent.

Civil Misc. Appeal No. 610 of 1935, Decided on 10th October 1935, from decree of Dist. Judge, Hoshiarpur, D/- 29th January 1935.

Insolvency—Practice—Intention is to be inferred from circumstances of each case—Person carrying on extensive business disappearing in an unaccountable manner—Intention to defeat creditors, within the meaning of S. 6 (d), Provincial Insolvency Act, is clear.

The question of intention is always a difficult one for Courts to decide and direct evidence in proof of intention is well nigh impossible. Intention is a question of fact and has to be inferred from the facts and circumstances of each case. [P 177 C 1]

In the case of the debtors carrying on at one time a fairly extensive business, to close their place of business and leaving the locality in an unaccountable manner and taking up residence within the territories of a Native State are clear indications of an intention to defeat or delay creditors within the meaning of S. 6 (d), Provincial Insolvency Act. [P 177 C 1]

Qabul Chand—for Appellant.

Achhru Ram—for Respondent.

Judgment.—A petition was made originally by the Bari Doab Bank, Limited, Hoshiarpur, against Muni Lal and others for their adjudication as insolvents. There were other creditors, who were impleaded as parties in that application. The Bank entered into a compromise with the debtors and obtained a transfer of some house property in their favour. They did not press the application. Other creditors however applied to carry on the insolvency proceedings against the debtors. A number of points were raised and formed the subject-matter of a long bead-roll of issues. The District Judge recorded findings on these issues and came to the conclusion that the petitioning creditors had made out a case for an order of adjudication. He therefore allowed the application and made an order of adjudication and passed other incidental orders. The debtors have come up to this Court in appeal and their learned counsel has challenged the findings of the Court below on issue 1 (v) and (vi). His argument is that, having regard to the evidence on the record, there was no proof of any intent to

defeat or delay the creditors within the meaning of S. 6 (d) (ii) and (iii), Provincial Insolvency Act.

The question of intention is always a difficult one for Courts to decide and direct evidence in proof of intention is well nigh impossible. Intention is a question of fact and has to be inferred from the facts and circumstances of each case. The debtors appear to have been carrying on at one time a fairly extensive business. For such people to close their place of business and leaving the locality in an unaccountable manner and taking residence within the territories of a Native State are clear indications of an intention to defeat or delay creditors within the meaning of S. 6 (d), Provincial Insolvency Act. No other point has been argued by the learned counsel for the appellants. The appeal therefore fails and is dismissed with costs.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 177

BACKET, J.

Municipal Committee, Amritsar — Defendant—Petitioner.

v.

Nanak Chand — Plaintiff — Opposite Party.

Civil Revn. No. 303 of 1935, Decided on 17th July 1935, from decree of Judge, Small Cause Court, Amritsar, D/- 5th March 1935.

Punjab Municipal (Executive Officer) Act (1931), S. 6 (2), (4) — Contract for putting up poster on wall affects immovable property — Poster affixed to wall is not moveable encroachment—Executive Officer cannot enter into such contract without sanction of Committee.

A contract for the use of a wall for the purpose of affixing poster thereto is one which affects immovable property. The Committee cannot, for example, demolish the wall without breaking the contract or use it for the same purpose itself. A poster fixed to a wall cannot be regarded as a moveable encroachment. S. 173 (1) (a), Punjab Municipal Act, deals with moveable encroachments in the street which would continue to remain as they are even when the wall is pulled down. The Executive Officer has no legal right to lease out a wall space belonging to the Committee for the purpose of affixing posters without the sanction of the Committee.

[P 177 C 2]

Shamair Chand and Sham Das—for Petitioner.

Dev Raj Sawhney—for Opposite Party.

Order. — The plaintiff entered into a contract with the Executive Officer of the Municipal Committee at Amritsar for

1936 L/29 & 24

the use of a wall of a building belonging to the Committee for the purpose of affixing posters thereto. The contract was cancelled and the plaintiff sues the Committee for damages. The only question which calls for decision is whether a contract of this nature is a contract affecting the immovable property so as to bring it within the scope of S. 6 (2) and (4), Punjab Municipal (Executive Officer) Act, 1931. If it is a contract affecting immovable property it must be sanctioned by the Committee, drawn up in writing, and sealed with the common seal of the Committee. No sanction was obtained in the present case, either before or after the contract was made by the Executive Officer so that the contract will not be binding upon the Committee if it is one affecting immovable property.

The learned Judge of the Small Cause Court has taken the view that the contract is not one affecting immovable property and has granted the plaintiff a decree. The question is merely one of interpretation, and it seems to me that the contract for the use of a wall for the purpose of affixing posters thereto is one which affects immovable property. The Committee could not, for example, demolish the wall without breaking the contract or use it for the same purpose itself. A suggestion has been made that the affixing of posters is an act which falls under S. 173 (1) (a), Punjab Municipal Act, 1911, which deals with the grant of permission to place moveable encroachments in a public street. But I do not think that a poster affixed to a wall can be regarded as a moveable encroachment. S. 173 (1) (a) deals with moveable encroachments in the street which would continue to remain as they are even when the wall had been pulled down. For these reasons I am of opinion, that the Executive Officer had no legal right to lease out a wall space belonging to the Committee for the purpose of affixing posters without the sanction of the Committee and that the contract on which the suit is based is not one by which the Committee is bound. I accept the petition for revision and dismiss the suit. In the peculiar circumstances of the case the parties are left to bear their own costs.

B.D./R.K.

Petition accepted.

A. I. R. 1936 Lahore 178

BHIDE AND CURRIE, JJ.

Lachhman Das—Defendant — Appellant.

v.

Amrik Singh—Plaintiff—Respondent.

Second Appeal No. 24 of 1932, Decided on 28th October 1935, from decree of Dist. Judge, Gurdaspur, D/- 24th August 1931.

Custom (Punjab)—Succession — Randhawa Jat—Village Khunda, District Gurdaspur—Son formally adopted can succeed collaterally.

An adopted son of a childless Randhawa Jat of village Khunda, in the Tahsil and District Gurdaspur, who has been formally adopted, can succeed collaterally in the adoptive family: 1922 Lah 105; 84 P R 1887 and 181 P R 1889, *Ref.* [P 178 C 1]

Badri Das and Vishnu Dutt—for Appellant.

Mehr Chand Mahajan and Yesh Pal Gandhi—for Respondent.

Bhide, J.—The only point for decision in this second appeal is:

Whether an adopted son of a childless Randhawa Jat of village Khunda, in the Tahsil and District of Gurdaspur, who has been formally adopted, can succeed collaterally in the adoptive family?

The learned District Judge decided this point in the affirmative, but has granted a certificate under S. 41, Punjab Courts Act, on the above point for the purpose of this appeal. In view of the wording of the certificate and the findings of fact of the learned District Judge it must, I think, be assumed for the purpose of this appeal that there has been a "formal" adoption in this case. The learned counsel for the appellants urged that the custom governing the parties does not permit any formal adoption and that it is not open to an individual to change the effect of an adoption merely by making the adoption 'formal.' But this position does not appear to have been specifically taken up in the Court below (*vide issues*), and there is besides no certificate on the question of the existence of the custom. Although customary appointment of an heir is the usual form of adoption in the Punjab there are reported cases in which it has been found that the adoption was of a formal character, i.e., the relationship created was not merely personal, but it was intended that the adopted son should be transplanted into the adoptive family as in the case of an adoption under Hindu

law. It was held in 3 Lah 17 (1) that the main test of a 'formal adoption' under custom is the intention to take out the boy out of his natural family and introduce him into the adoptor's family as his natural son. In the present case the will of Kirpal Singh in pursuance of which the plaintiff was adopted shows that this was the intention and this is also the finding of the learned District Judge which must be taken as final. In 84 P R 1887 (2) it was held that where the intention to make a complete change of family is manifested, the right of collateral succession may be presumed to exist till the contrary is shown. To the same effect is the rule as stated in para 49, Rattigan's Digest of Customary Law.

On the findings arrived at by the learned District Judge, therefore, the presumption was in favour of the existence of the right of the adopted son to succeed collaterally. The *riwaj-i-am* does not deal with the question specifically but so far as it goes it seems to be in favour of the plaintiff-respondent who claims to be the adopted son. It appears that at the time of the preparation of the latest Customary law of the Gurdaspur District no direct question as regards the right of an adopted son to succeed collaterally was asked, but the author has noted 15 mutations of collateral succession which were discovered, while none was found in which an adopted son was superceded as regards collateral succession (*vide p. 44 of the Customary law of the Gurdaspur District, 1913*). The mutations relate to different tribes of the district, including Hindu Jats. In the present case four other instances have been produced on behalf of the adopted son. One of these instances relates to Jats. As against these instances the appellants have relied only on one instance, viz., the case reported as 181 P R 1889 (3).

These instances appear to be cases of ordinary customary appointment of an heir. When, however, collateral succession has been allowed even in the case of such adoption in the district, the presumption in favour of such succession in the case of a 'formal' adoption would be still stronger. On the material on the

1. Waryaman v. Kanshi Ram 1922 Lah 105=66 I C 309=3 Lah 17.

2. Uttam Singh v. Wazir Singh (1887) 84 P R 1887.

3. Bir Singh v. Lana Singh (1889) 181 P R 1889.

present record, I see no good reason to dissent from the conclusion reached by the learned District Judge and would dismiss the appeal with costs.

Currie, J.—I agree.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 179

ADDISON AND ABDUL RASHID, JJ.

Fazal Ahmad and others — Defendants
— Appellants.

v.

Tola Ram Singh — Plaintiff and others
— Defendants—Respondents.

First Appeal No. 2144 of 1934, Decided on 11th October 1935, from preliminary decree of Sub-Judge, First Class, Campbellpur, D/- 30th July 1934.

Court-fees—Appeal against mortgage decree—Appellant praying for declaration that he is agriculturist—Appeal cannot be against one finding but should be against whole decree—Court-fee stamp on memorandum of appeal should be under Art. 1, Sch. 1, Court-fees Act.

A mortgage decree under O. 34, R. 4, was passed against the defendant who was held to be a non-agriculturist. The defendant claimed that he belonged to an agricultural tribe. Court held against such contention. Defendant appealed against the decision claiming that he be declared an agriculturist. On the appeal he paid a Court-fee stamp of Rs. 10 only. It was contended that he should be made to pay ad valorem Court-fee stamp on the appeal:

Held: that the defendant had no right to come up in appeal to the High Court merely to get rid of a finding of the trial Court which did not suit him. It was competent to him to appeal only against a decree. Under these circumstances he should pay Court-fee stamp under Art. 1, Sch. 1, of the Court-fees Act: 1926 *Lah* 408; 30 *Mad* 96 (FB) and 37 *Cal* 914, *Approved*.
[P 179 C 2; P 180 C 2]

Barkat Ali and Mohammad Din Jan—
for Appellants.

Mehr Chand Mahajan and Shamair Chand—for Respondents.

Abdul Rashid, J.—This appeal has arisen out of an action brought by Tola Ram Singh against Fazal Ahmad and others, for recovery of Rs. 11,460-15-0, principal, interest and compound interest, by the sale of 7 kanals and 6½ marlas of land together with the houses and shops standing thereon situate in the town of Campbellpur on foot of certain mortgages executed by Fazal Ahmad, defendant 1, in favour of the plaintiff. It was stated in the plaint that defendant 1 was a Lohar-Tarkhan by caste. Defendant 1 pleaded,

inter alia, that he belonged to a notified agricultural tribe being an Awan by caste, while the plaintiff was a non-agriculturist; that the plaintiff was not entitled to get a decree for the sale of the mortgaged land under O. 34, R. 4, Civil P. C., but that the defendant had no objection to a money decree for Rs. 6,615 and reasonable interest being passed against him. The trial Court framed eleven issues, but for the purposes of this appeal it is necessary to refer only to two issues which run as follows:

(10) Whether defendant, Fazal Ahmad, is a member of an agricultural tribe and plaintiff cannot, therefore, get a decree for the sale of the land besides the sites of the houses and shops on the land and besides the houses and shops? Onus on defendant Fazal Ahmad.

(11) Whether the houses and shops and the sites underneath them referred to in issue No. 10 fall within the definition of land and plaintiff cannot get a decree for sale as regards them also? Onus on defendants.

The trial Court held that defendant 1, is a Lohar-Tarkhan by caste and that he has failed to prove that he is an Awan, or that he belongs to any other tribe notified as an agricultural tribe in the Campbellpur District. It was further held that the land under the houses and the shops could not be regarded as land within the purview of the Alienation of Land Act. As a result of this finding the plaintiff was granted a preliminary decree for Rs. 11,460-15-0 together with costs and future interest realisable by the sale of the mortgaged property under O. 34, R. 4, Civil P. C. Against this decree defendant 1 and his two brothers have preferred an appeal to this Court. The memorandum of appeal presented by Mr. Barkat Ali contains the following prayer:

It may be declared that the appellants are Awans and that, therefore, the lands cannot be sold in execution. It is also prayed that Rs. 1,350 out of interest may be disallowed.

A Court-fee of Rs. 10 was paid so far as the prayer for being declared Awans was concerned, and ad valorem Court-fee was paid on Rs. 1,350 so far as the prayer for the disallowance of interest was concerned. At the hearing a preliminary objection was taken on behalf of the respondent that there has been no proper presentation of this appeal which ought to bear an ad valorem Court-fee stamp on the total decretal amount or, if the value of the mortgaged property is less than the decretal amount, then ad valorem Court-fee stamp on the value of the pro-

perty. It was argued by the learned counsel for the respondent that the object of the appeal was to save the hypothecated property from being sold in execution of the decree, and that it was not competent to the appellant in appeal merely to ask for a finding that he be declared to be an Awan. Reference was made in this connexion to a Division Bench ruling of this Court reported as 7 Lah 215 (1). In that case the plaintiff sued his original vendees and subsequent transferees for the balance of the price of a house and shop which he had sold, and obtained a decree under which he was entitled to realise a portion of the decretal amount by sale of the shop of which defendant A was the last transferee. A appealed against so much of the decree as rendered his principal liable and sought that he should be released from the decree. It was held in that case that the proper stamp for the purposes of Court-fee on the appeal was one ad valorem on the value of the decree not exceeding however the value of the shop. It was held in a Full Bench ruling of the Madras High Court reported as 30 Mad 96 (2), that where the appellant in an appeal against a mortgage decree does not dispute the amount decreed but raises the question of the liability of certain properties for the decretal amount, the value of the appeal for the purposes of court-fee under Art. 1, Sch. 1, Court-fees Act, is the value of such property when such value is less than the amount decreed, and when such value exceeds the amount decreed, such decretal amount. The Calcutta High Court in 37 Cal 914 (3) held that where the appellant in an appeal against a mortgage decree does not dispute the amount decreed but raises the question of the liability of certain properties, the value of the appeal for the purposes of Court-fee is the value of such property. Sch. 2, Art. 17, Cl. (6), Court-fees Act has no application to such a case. The Patna High Court and the Court of the Judicial Commissioner at Nagpur have also taken the same view.

The learned counsel for the appellants

1. Atma Singh v. Nathu mal, 1926 Lah 408=96 I C 473=7 Lah 215=27 P L R 412.
2. Ram Krishna Reddy v. Kotta Reddy, (1907) 30 Mad 96=16 M L J 458 (F B).
3. Jugal Pershad Singh v. Parbhu Narain, 37 Cal 914=8 I C 1145.

contended that his main object in appeal was to get a finding from this Court that he was a member of a notified agricultural tribe, being an Awan, and that if he succeeded in getting this finding or a declaration to this effect his land would not be liable to be sold in execution of the mortgage decree in view of the provisions of S. 16, Alienation of Land Act. The learned counsel submitted that he could ignore the mortgage decree if he succeeded in establishing in appeal that he was a member of an agricultural tribe. Reliance was placed by him on a Division Bench ruling of this Court reported as 34 P L R 523 (4), where it was held that under S. 16, Punjab Alienation of Land Act, the land belonging to a member of an agricultural tribe could not be sold in execution even though a decree had been obtained by the mortgagee for sale of such land on the foot of a mortgage. It was further urged that the prayer of the appellant to the effect that the lands cannot be sold in execution was a mere surplusage and that the effective portion of the prayer was that a finding may be given that the appellant was an Awan. Reference was made in this connexion to 3 Pat 795 (5) and 32 P L R 854 (6).

It appears to me that the authorities relied upon by the appellant's counsel are of no assistance in this case. The appellant has no right to come up in appeal to this Court merely to get rid of a finding of the trial Court which does not suit him. It is competent to him to appeal only against a decree, and the decree makes the mortgaged property liable to sale. In substance therefore he is challenging the mortgage decree and praying that a simple money decree might be passed against him. Under these circumstances the authorities relied upon by the learned counsel for the respondent are fully applicable to the facts of the present case. I would therefore hold that apart from the appeal relating to interest there is no proper appeal before this Court. The decretal amount of Rupees 11,460-15-0 consists of Rs. 7,000 on account of principal and Rs. 4,460-15-0 on account of interest. The prayer of the

4. Thakar Das v. Roshan Din, 1933 Lah 397=141 I C 634=34 P L R 523.
5. Mahabir Prasad v. Shyam Behari Singh, 1925 Pat 44=80 I C 655=3 Pat 795=6 P L T 82.
6. Jaidayal v. Narain Das, 1932 Lah 127=136 I C 270=32 P L R 854.

appellant is that the amount of interest may be reduced by Rs. 1,350. He has paid ad valorem Court-fee on this amount. The learned counsel for the respondent has agreed to give up interest to the extent of Rs. 1,350. The decretal amount will therefore be reduced by the sum of Rs. 1,350. The cross-objections with respect to future interest have also been given up by the learned counsel for the respondent. For the reasons given above, I would accept the appeal only in so far as to reduce the decretal amount by Rupees 1,350, and dismiss the appeal in all other respects. The cross-objections will also stand dismissed without costs. I would award the respondent half of his appellate costs in this Court.

Addison, J.—I agree.

B.D./R.K. *Order accordingly.*

A. I. R. 1936 Lahore 181

JAI LAL, J.

Roshan Lal—Decree-holder—Appellant.

v.

Shiv Das Mal—Judgment-debtor and another Decree-holder—Respondents.

Misc. First Appeal No. 945 of 1935, Decided on 14th November 1935, from order of Sub-Judge, 1st Class, Lahore, D/- 8th April 1935.

Rateable Distribution—Decree-holder purchaser—Entire decree satisfied by bid and excess paid by him in Court—Another decree-holder of same judgment-debtor applying for rateable distribution after auction but before excess deposited—Court holding him entitled to share—Order held passed under S. 73 and not under S. 47, Civil P. C., hence not appealable.

A decree-holder purchased the property of his judgment-debtor in execution of his decree. By the amount of his bid the entire amount of his decree was satisfied and he paid into Court the excess of the bid over the decretal amount. After the auction but before the excess amount was deposited in Court or the auction sale confirmed, another decree-holder of the same judgment-debtor made an application for a rateable share in the assets to be realised in execution of the decree of the first decree-holder. The Court held that he was entitled to a rateable share in the full price :

Held : that the order of the Court must be deemed to have been passed only under S. 73, Civil P. C., and not under S. 47 of the Code and consequently no appeal lay : 1935 Lah 302, *Disting.* [P 181 C.2]

Achhru Ram—for Appellant.

Tirath Ram—for Respondents.

Judgment.—The dispute in this case is between two rival decree-holders against the same judgment-debtor. The appellant in execution of his decree applied for the attachment and sale of the property of the judgment-debtor and purchased the property himself at a Court auction. By the amount of his bid the entire decree in his favour was satisfied and he paid in Court only the excess over the decretal amount, i. e., the difference between the decretal amount and the amount of his bid. In the meantime however after the auction had taken place but before the amount had been paid in Court or the auction-sale had been confirmed, the respondent made an application for a rateable share in the assets to be realised in execution of the decree of the appellant. On the above facts the Court below has held that the respondent is entitled to a rateable share. This order was passed under S. 73, Civil P. C. An objection is taken on appeal by the respondent that no appeal lies. It is conceded by the appellant's counsel that no appeal lies from an order passed under S. 73, Civil P. C., but he contends, relying upon 1935 Lah 302 (1), that in the present case the order must be deemed to have been passed also under S. 47, Civil P. C. The facts of 1935 Lah 302 (1), however, are distinguishable.

In that case the decree of the decree-holder, who had first attached and purchased the property in execution of his decree had been recorded as satisfied and it was after this that an application was made by a rival decree-holder for a rateable share and the first decree-holder was directed to refund the money in Court. It was held that in such a case the judgment-debtor is interested as he is materially affected by the order and therefore an appeal lies. I hold therefore that the order in the present case must be deemed to have been passed only under S. 73 and consequently no appeal lies. The legal point involved is not so clear and is arguable. I am not therefore prepared to treat the memorandum of appeal as an application for revision in the present case. The parties must settle their dispute in a regular suit, if so advised. I dismiss this appeal with costs.

S.R./R.K.

Appeal dismissed.

1. *Bishan Das v. Tulshi Shah & Sons*, 1935 Lah 302=156 I C 845.

A. I. R. 1936 Lahore 182

BACKET, J.

Municipal Committee, Amritsar—Defendant—Appellant.

v.

Mt. Gujri—Plaintiff—Respondent.

Second appeal No. 804 of 1935, Decided on 19th July 1935, from decree of Senior Sub-Judge, Amritsar, D/- 1st February 1935.

Punjab Municipal Act (1911), S. 172—Municipality entitled to remove encroachment built without permission—No applicability of Art. 146-A, Limitation Act, to acts of removing encroachment—Aggrieved party can bring suit for damages and not for injunction.

Section 172, Punjab Municipal Act, gives a statutory right to Municipal Committees in the Punjab to remove any encroachment erected without permission, and there is no limitation, in point of time, except that compensation must be paid if the structure is more than three years old. The exercise of a Committee's right under this section is not the same as the institution of a suit for possession; and operation of Art. 146-A, Limitation Act, is limited to such suits. The remedy of an aggrieved party for the unlawful removal of a projection by a local authority is a suit for compensation and not a suit for injunction: 1922 Bom 111, *Dissent.*; 1925 Mad 64 and 4 I C 828, *Foll.*; 1919 Cal 807, *Disting.* [P 183 C 1]

Shamair Chand and Sham Das—for Appellant.

G. R. Khanna—for Respondent.

Judgment.—A thara for some years past existed outside the plaintiff's house in Amritsar. The Municipal Committee, for the purpose of constructing a drain along the side of the street has removed this thara without the consent of the plaintiff. The plaintiff sues for an injunction to compel the Municipal Committee to restore the thara, alleging that she had been the owner of the site under the thara for the last 100 years. The Committee relies on the fact that the structure projects beyond the building line of the street and that the Committee has a statutory power to remove encroachments on the street either under S. 172 or 175 Municipal Act, subject to payment of compensation. The trial Court dismissed the plaintiff's suit, holding that the plaintiff had failed to prove that she was the owner of the site under the thara. On appeal, the Senior Subordinate Judge held that the plaintiff had acquired a prescriptive right in the thara which had existed at least since 1896 and that the Committee had lost the statutory right

of removal, even if it was in fact the owner of the site. The plaintiff's suit has been decreed, and the Committee has instituted a second appeal. There is no proof that the plaintiff ever acquired any title in the site under the thara, otherwise than by prescription, and no projection is shown in a plan of 1883, which has been produced from Municipal records and was prepared by the City Engineer of that time. The first indication of the existence of the thara occurs in 1896. Many Municipal records were destroyed by fire in 1919, so that it is impossible to say whether the thara was built with the permission of the Committee or not.

For the plaintiff's prescriptive title reliance is placed on Art. 146-A, Indian Limitation Act. This provides that a suit by a local authority for the possession of any part of a public street from which it has been dispossessed must be brought within 30 years from the date of dispossession. The trial Court took the view that the mere erection of a thara or a small platform at the side of the street does not amount to dispossession of the Committee, and I am not sure that this view is not the correct one. It is notorious that house-holders and shop-keepers in this part of the country regard themselves as entitled to make use of public streets for the purpose of improving the means of access to their houses or shops. Sometimes the consent of the local authority is obtained and sometimes it is taken for granted; but in either case it is doubtful whether the erection of a small projection on the street, without enclosure or roof, is intended as an assertion of ownership over the site or is meant to oust the Committee from its right of constructing drains along the side of the street or to prevent it from performing the various duties which the maintenance of the public streets entails. It is unnecessary to pursue this question further however since it has been held that the Municipal Committee does not lose its statutory right of removing encroachments from the site of the streets through the acquisition of prescriptive right to resist a suit of the class mentioned under Art. 146-A. It is true that a different view was taken in 46 Bom 335 (1), but

1. *Abaji Ragho v. Municipality of Jalgaon* 1922 Bom 111=64 I C 202=46 Bom 335=23 Bom L R 1028.

this decision merely followed an earlier judgment of the same Court, which was considered to be binding, and one of the judgments delivered in that case gives reasons for doubting the correctness of the earlier judgment.

The view that a Municipal Committee does not necessarily lose its statutory right owing to the provisions of Art. 146-A was taken in 81 I C 894 (2) in which a number of earlier decisions were discussed, and with this decision I respectfully agree. S. 172, Punjab Municipal Act, gives a statutory right to Municipal Committees in the Punjab to remove any encroachment erected without permission, and there is no limitation in point of time, except that compensation must be paid if the structure is more than three years old. The exercise of a Committee's right under this section is not the same as the institution of a suit for possession and the operation of Art. 146-A is limited to such suits. 49 I C 93 (3) has been cited on behalf of the plaintiff, but it is not of assistance, since it was held that the Local Municipal Act did not apply to the structure in dispute. It has been further held in 4 I C 828 (4) that the remedy of an aggrieved party for the unlawful removal of a projection by a local authority is a suit for compensation and not a suit for injunction and this rule appears applicable in the present case, as it does not appear that the Municipal Committee made any tender of compensation before the structure was removed. Under O. 41, R. 25, Civil P. C., I remand the suit to the trial Court for the assessment of the compensation to which the plaintiff is entitled. Return to be made in four months; ten days for objections.

B.D./R.K.

Case remanded.

2. Public Prosecutor v. Varadarajulu Naidu, 1925 Mad 64=81 I C 894=25 Cr L J 1070=47 Mad 716=47 M L J 470.
3. Ashutosh Sadukhan v. Corporation of Calcutta, 1919 Cal 807=49 I C 93=28 O L J 494.
4. Mothe Achayya Garu v. Municipal Council of Ellore, (1903) 4 I C 828.

A. I. R. 1936 Lahore 183

TEK CHAND AND AGHA HAIDAR, JJ.

Mt. Mohammad Sultan Begam—Plaintiff—Appellant.

v.

Saraj-ud-Din Ahmad — Defendant—Respondent.

First Appeal No. 2217 of 1929, Decided on 29th June 1934.

(a) Practice—Evidence — Certain question put to witness objected to by other side—Court should record such question and give its ruling whether it is allowed or disallowed—It cannot allow it subject to objection.

Where the counsel for the plaintiff objected to a certain question being put to the witness by the defendant's counsel and the Judge allowed this question to be put 'subject to objection:'

Held: that the proper course for the Court to follow in such cases was to allow the question to be recorded and then to give its ruling whether such question is allowed or disallowed. [P 185 C 2]

(b) Practice—Evidence—Trial Judge should see that scandalous matters are not introduced into record unless they are relevant for proper decision of case.

The trial Judge is not a mere automaton, but is supposed intelligently to control the conduct of the cases in his Court and it is one of his important functions to see that scandalous matters are not introduced into the record unless they are relevant for the proper decision of the case. [P 185 C 2]

(c) Precedents—Judge is bound to follow Privy Council ruling—He cannot follow ruling of his own High Court in preference to Privy Council ruling even though High Court ruling is given subsequent to Privy Council ruling.

It is open to a Judge not to rely upon the Privy Council case on the ground that it is inapplicable; but he is hopelessly in error when he refuses to follow it because it is of a date anterior to his High Court ruling and that he is bound to follow High Court ruling in preference to the judgment of the Privy Council. [P 186 C 1]

(d) Mahomedan Law — Dower — Onus of proving that dower publicly announced was not intended to be paid lies on person asserting it.

The onus of proving that the amount of dower publicly announced was never intended to be paid and that only the smaller amount settled in private was exigible would of course be on the party making the allegation of the fictitious nature of the dower. [P 186 C 2]

(e) Mahomedan Law — Dower — Settled dower must be paid—That such amount is large or beyond means of husband is no reason for decreeing suit for smaller sum.

The settled dower must be paid and the fact that the bridegroom has neither the present means nor expectations to pay the amount of dower or that the amount is inordinately large is no reason whatsoever for the Courts to decree the suit for a smaller sum: 2 All 573 (F B), and 21 All 17, Rel. on. [P 186 C 2 P 187 C 1]

(f) Evidence Act (1872), S. 92—Suit for dower amount mentioned in kabinnama—Defendant pleading that writing was mere sham and was not agreement between parties—Oral evidence to prove such plea—(Per Agha Haidar, J.)—Is not admissible (Per Tek Chand, J.)—It is admissible.

In a suit for dower the plaintiff relied on a kabin nama in which the dower amount was mentioned but the defendant pleaded that the writing was a mere sham and that the amount

mentioned therein, was nominal and that no effect should be given to it:

Held: Per Agha Haider, J.—Oral evidence to prove such plea was not admissible as S. 92, is a bar: 1933 P C 178 and 22 All 149 (P C), *Rel on*. [P 188 C 2]

Held: Per Tek Chand, J.—S. 92 was no bar as S. 92 operates as a bar only when oral evidence is sought to be led to vary or modify the terms of an agreement, but that oral evidence is admissible to prove that the agreement in writing was not an agreement at all, but was only a sham and was not intended to be operative: 22 All 149 (P C) and 1933 P C 178 *Disting.*; 1927 All 422 *Expl.*; *Case law reviewed*. [P 191 C 1]

(g) Mahomedan Law—Dower—Merely because claim for dower has not formed subject-matter of suit, right to recover cannot be said as not existing.

Though the claim for dower has not formed the subject-matter of a suit in a law Court or the demand for its payment has not been made by the wife in the majority of cases, it does not follow that a right to recover it does not exist: 123 P R 1880, *Disting.*. [P 188 C 2]

(h) Mahomedan Law — Dower — Suit for dower—Mere fact that widow does not go into witness box is not circumstance against her.

If the widow in a suit for dower does not enter into the witness box to prove her dower, this ought not to be treated as a circumstance against her, since Mahomedan ladies are reluctant to give evidence: 19 Cal 689 (P C), *Foll.*. [P 189 C 1]

(i) Practice—Duty of Court—Court must administer law as it stands.

A Court of justice has to administer the law as it stands and if the public are dissatisfied with that law, it is open to them to have it altered by legislation. [P 189 C 2]

Shuja-ud-Din and Mohammad Monier—for Appellant.

Mehr Chand Mahajan and J. L. Kapur—for Respondent.

Agha Haidar, J.—This appeal arises out of an administration suit in which the plaintiff claimed a sum of Rs. 50,000 out of the estate of one Nawab Shuja-uddin Ahmad, deceased, as her dower debt. The Subordinate Judge, First Class, Delhi, decreed the suit to the extent of Rs. 10,000 only and passed the usual decree under O. 20, R. 13, Civil P. C. The plaintiff has preferred the present appeal to this Court in respect of the claim for Rs. 40,000 which has been disallowed. The plaintiff came into the Court on the allegation that she was the widow of Nawab Shuja-uddin Ahmad, the deceased brother of the defendant, who died on 16th April 1928, and that the parties were the heirs of the deceased according to Mahomedan law. After enumerating the properties left by the deceased, the plaintiff alleged that the deceased owed a sum of Rupees 1½ lac to her on account of her dower

debt, but she was suing for a sum of Rs. 50,000 only, as the assets of the deceased were not sufficient to satisfy any larger amount. The plaintiff further alleged that she was in possession of properties (a), (b) and (c) as detailed in para. 2 of the plaint by virtue of her dower debt since the lifetime of the deceased, claiming her lien on the said property, and that the rest of the property was in the possession of the defendant. She also claimed that the plaintiff, as the widow and heir of the deceased, was entitled to one-fourth share of the property left by him, after the payment of the debts. She prayed that a decree for the administration of the property left by the deceased, Nawab Shuja-uddin Ahmad, may be passed in her favour, that the administration may be carried out through or under the instructions of the Court and that a decree for partition of the property to the extent of one-fourth share after the payment of the debts due by the deceased may be passed in her favour against the defendant.

The defendant admitted the factum of the death of Nawab Shuja-uddin Ahmad but denied the rest of the allegations. He controverted the allegations contained in para. 5 of the plaint by raising the plea that the plaintiff, on account of her relationship, came to the residential house of the deceased at the time of his death like other guests and, being in collusion with certain other persons who wanted to misappropriate the property of the deceased, gave herself out as the widow of Nawab Shuja-uddin Ahmad. He further pleaded that he was in lawful possession of the entire property left by the deceased. It would thus appear that in the written statement the defendant merely denied the status of the plaintiff as the widow of his deceased brother, and therefore logically enough, repudiated her claim to the amount of the dower. On 12th December 1928, the defendant's pleader made a statement before the Court emphasizing that the plaintiff was not the widow of Nawab Shuja-uddin Ahmad and that, even if it was held that she was the widow and her dower had been fixed at Rs. 1½ lac, his contention was that it was fictitious and the plaintiff therefore was entitled only to "proper dower" which, under the circumstances, may be fixed at Rs. 1,000. I attach some importance to

the fact that the plea relating to the fictitious nature of dower was not embodied in the written statement proper, which was filed on 9th August 1928, and it was after some four months that this belated plea was taken and that, too, in the statement of the pleader before the settlement of issues without the plaint being even amended. On the same date the pleader for the plaintiff reiterated before the Court that the plaintiff was the widow of Nawab Shujauddin Ahmad and that the dower of Rs. 1½ lac was not fictitious, nor could it be held to be so in Delhi, where no special legislation on the subject of the curtailment of dower was in force, that the controversy in question was a matter of contract and that the proposed dower of Rs. 1,000 was ridiculous as the parties belonged to a rich and influential family of Nawabs. The lower Court framed the following issues :

1. Is plaintiff Nawab Shujauddin's widow? 2. Is plaintiff one of the said Nawab's creditors? 3. What amount was fixed as plaintiff's dower? 4. Was a fictitious sum fixed as dower? If so, what is the proper dower to which plaintiff is entitled? 5. Is defendant not entitled to raise the plea of fictitious dower having been fixed? (The rest are immaterial for the purposes of this appeal.)

6.	*	*	*	*
7.	*	*	*	*
8.	*	*	*	*

The Subordinate Judge found that the plaintiff was the widow of Nawab Shuja-ud-Din Ahmad, deceased, and was also his creditor. He accepted Ex. P-1 and rightly called it the deed of marriage and further admitted that Rs. 1½ lacs was entered in it as the sum "fixed" to be paid as dower. But on the evidence led by the defendant he held that it was never intended to be paid or received in full and that the plaintiff was therefore entitled to Rs. 10,000 only as her customary dower. It would thus appear that, while treating Ex. P-1 as the repository of the contract of marriage and a written record of the amount of dower "fixed" by the parties, he altered one of its terms and reduced the amount of dower, on the evidence produced by the defendant, to Rs. 10,000. I may note that the procedure adopted in the course of the trial by the Court below displays deplo-

able solvency. When the evidence of the defence witnesses began before the Court with Hakim Abdul Ghani, D. W. 1, the learned counsel for the plaintiff objected to a certain question being put to the witness by the defendant's counsel. The learned Judge allowed this extremely scandalous question to be put "subject to objection." The proper course for the trial Court to follow in such cases is to allow the question to be recorded and then to give its ruling whether such question is allowed or disallowed. In the present case the Subordinate Judge allowed the question and its answer to be brought on the record, although no specific plea was raised on behalf of the defence even remotely giving rise to the questions sought to be put in the viva voce examination of the defence witnesses. The mischief therefore has been done through the weakness or ignorance of the Subordinate Judge and a lot of unsavoury matter has been improperly and unnecessarily brought on the record of a Court of justice.

The trial Judge is not a mere automaton, but is supposed intelligently to control the conduct of the cases in his Court and it is one of his important functions to see that scandalous matters are not introduced into the record unless they are relevant for the proper decision of the case. There is not a word in the judgment of the Court below as regards the subject-matter of these questions and in this Court the learned counsel, who appeared before us and argued the case at considerable length had no occasion to refer to the points raised by this particular series of questions and answers. In deciding issue No. 4 the Subordinate Judge showed his utter ignorance of the well-understood rules regarding the citation of authorities and the weight which should be attached to them. He observed in his judgment as follows :

The learned counsel for the plaintiff has produced a number of rulings of the Calcutta, Bombay and Allahabad High Courts, but this Court is bound to follow the Punjab ruling, 804 P L R 1913 (1) at pp. 1021 and 1023 which relates to Khattars of Attock District. 19 Cal 689 (2) is a ruling of 1892, while the said Punjab ruling is of 1913 and is on all fours with the present case.

1. Gauhar Khanum v. Nawab Khan, 1914 Lah 14 = 20 I O 777 = 19 P R 1914 = 804 P L R 1913.
2. Zakeri Begum v. Sakina Begum, (1892) 19 Cal 689 = 19 I A 157 = 6 Sar 213 (PC).

It was open to the Subordinate Judge not to rely upon the Privy Council case on the ground that it was inapplicable, but he was hopelessly in error when he refused to follow it because it was of a date anterior to the Punjab ruling and that he was bound to follow the Punjab ruling in preference to the judgment of the Privy Council. I may further observe in passing that 304 P L R 1913 (1) is a case under the Customary law governing the Khattar tribe of Attock district and has no bearing whatsoever upon the present case the parties to which belong to an old family of the Mughals of Delhi who are admittedly governed by Mohamman Law. Dr. Shuja-ud-Din on behalf of the appellant naturally accepted the finding of the Court below that the plaintiff was the widow of the deceased and that her dower debt was fixed at Rs. 1½ lac as recorded in the kabinnama Ex. P-1. He however strenuously attacked the finding that the sum of Rs. 1½ lac was fictitious and was never intended to be paid or received in its entirety, both on law and facts.

Before discussing the evidence in the case, I may briefly point out that the Mohamman marriage is a pure and simple consensual contract of Roman Law and, while dower is the consideration of the contract, it is also a token of respect for the wife. Dower has important uses which affect the domestic life of the Mohamman. The law-giver of Islam was anxious to safeguard the wife against the arbitrary exercise of the right of divorce by the husband. He accordingly devised the institution of dower to control that right. Dower also gave a weapon in the hands of the wife so as to protect her from the possible ill-treatment by the husband. If she survived her husband and his other heirs ill-treated her, she would not be thrown into the streets but would be able, apart from her legal share, to enforce against them her claim for dower which must be paid out of the heritage before the assets of the husband are distributed among the heirs. This is the keystone of the Muhammadan law of dower in its purity. Latterly, a practice seems to have grown up in some localities and the real dower, usually a modest sum, came to be settled in private, while an extravagantly large and fictitious amount was announced in the

assembly where the marriage had been celebrated, by way of self-glorification (Sma). In such cases the onus of proving that the amount of dower publicly announced was never intended to be paid and that only the smaller amount settled in private was exigible would of course be on the party making the allegation of the fictitious nature of the dower.

In the present case no such practice is proved to have prevailed locally and there is no evidence as to what was the smaller figure privately fixed. On the other hand we have regular kabinnama, Ex. P-1, on the record. It is dated the 21st May 1877, and, after reciting the names of the parties to the marriage contract and the transaction of marriage, it mentions the sum of Rs. 1,25,000 as consideration for the marriage. It is signed by the husband Muhammad Shuja-ud-Din Ahmad with his own hand and is attested and witnessed by no less than 25 persons. The signatures of six of the attesting witnesses have been duly proved and identified by Nawab Sir Amir-ud-Din Ahmad Khan, P. W. 1, Nawab Zia-ud-Din Ahmad Khan was his father's uncle and Nawab Ala-ud-Din Ahmad Khan was his own father. He himself as a young man was present at the time of the marriage ceremony and he further identifies the signatures of Nawab Shuja-ud-Din Ahmad, the bridegroom. We have also the important evidence of Qazi Mohammad Afzal, P. W. 4. He is the son of the scribe Qazi Mohammad Ismail whose signature appears on Ex. P-1. This witness identifies the signature of his father and proves that the document, Ex. P-1, was in his handwriting. The result, therefore, is that apart from the provisions of S. 90, Evidence Act, the kabinnama Ex. P-1, has been amply proved.

It is engrossed on the ornamental paper which was in fashion in those days and there cannot be any doubt as regards its genuineness. The parties are governed by Muhammadan law and, according to that system of law, the settled dower must be paid and the fact that the bridegroom had neither the present means nor expectations to pay the amount of dower or that the amount was inordinately large is no reason whatsoever for the Courts to decree the suit for

a smaller sum. In 2 All 573 (3) it was held that

A Muhammadan widow was entitled to the whole of the dower which her deceased husband had on marriage agreed to give her, whatever it might amount to, and whether or not her husband was comparatively poor when he married, or had not left assets sufficient to pay the dower debt.

The learned counsel for the respondent tried to make a certain amount of capital out of the expression "bona fide" which occurs in the opening portion of the judgment delivered by Turner, J. (p. 581) and argued that the said expression showed that it was only the dower which had been intended to be paid and not the dower which was merely announced. I do not agree with this interpretation. To begin with, the other learned Judges, who constituted the Full Bench, do not use this expression and, according to my reading of the judgment of Turner, J., it really means no more than this: that the dower should not have been fixed at a high figure with the object of defeating the claims of the other creditors of the husband. Again, in 21 All 17 (4), the High Court granted a decree for a sum of one crore of rupees and 25,000 gold mohurs as the plaintiff's dower-debt, though the effect was to deprive the son of the late husband of the plaintiff of all his property. The learned Judges fully realized the hardship resulting from the decree and, regretted that the Courts in the provinces subject to their jurisdiction had not been invested by the Legislature with the discretion which has been conferred upon the Courts in Oudh by S. 5 of Act 18 of 1876, empowering them to award to a Muhammadan lady only so much of the stipulated amount of dower as the Courts considered reasonable with reference to the means of the husband and the status of the wife.

They therefore affirmed the judgment which had been passed in favour of the plaintiff, observing at the same time that they had no alternative but to pass a decree for the amount of the dower contracted for, however extravagant that amount might be. It may be observed that the lady who was the plaintiff as well as her husband in the case noted above belonged to the family of the Nawab of Rampur. In the present case

3. *Sugra Bibi v. Masuma Bibi*, (1878-80) 2 All 573 (FB).

4. *Collector of Moradabad v. Harbans Singh*, (1898) 21 All 17=1898 A W N 183.

also the parties were closely connected with the ruling family of the Nawab of Loharu. Besides there are a number of kabinamas on the record in which the amount of dower had been fixed at Rs. 1½ lac. The dower of the plaintiff's own sister was also Rs. 1½ lac. It must be remembered that the marriage was celebrated at a time when the ancient regime was within the memory of the senior members of this family and of the society in which they lived and moved and, although not exactly rich, the family belonged to the old aristocracy of Delhi and still tried to maintain the traditions of their departed grandeur. Nawab Sir Amir-ud-Din Ahmad Khan, P. W. 1, has clearly stated in his evidence that the dower in his family was generally fixed at Rs. 1½ lac although recently there has been a protest against this practice. It is significant that the husband lived for a period of about 51 years after his marriage, but there is not an iota of evidence on the record to show that he ever demurred to this sum or took any steps open to him under the law to reduce it. It is too late in the day for the defendant to come forward and try to alter one of the terms of a contract which had been solemnly reduced to writing more than 50 years ago and which had been fully accepted by the parties to the marriage during the long period of their wedlock. It was argued by the learned counsel for the appellant that in the present case as the terms of the contract had been reduced to the form of a document, (Ex. P-1) and the said document having been duly proved, no evidence of any oral agreement or statement was admissible as between the parties or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

This contention finds support in the most recent judgment of their Lordships of the Privy Council reported as 35 P L R 1 (5), which came to my notice after arguments in the case had been heard. In that case a mortgage had been executed in favour of A by B. On the same date B executed a lease in favour of A promising to pay an annual sum to A. After the expiry of the term of the lease, A sued B for possession on the basis of his

5. *Feroz Shah v. Sohbat Khan*, 1933 P. C. 173 =143 I C 659=60 I A 273=14 Lah 466=35 P L R 1 (P C).

mortgage which he claimed to be a possessory one. There was no handing over of possession by *B* and no handing back by *A*. It was held by their Lordships that the mortgagee was entitled to possession as S. 92, Evidence Act, forbids the admission or consideration of evidence as to the intention of the parties or to contradict the express terms of the document. The case reported as 22 All 149 (6) was referred to in the above mentioned authority and the learned counsel for the appellant has also quoted it in support of his contention. In this case on the basis of certain documents executed between the parties the question arose whether they constituted a deed of sale out and out or merely a mortgage by conditional sale and therefore redeemable by the executant. Evidence was led and admitted by the Subordinate Judge for the purpose of proving the real intention of the parties. The High Court substantially affirmed the decree of the Subordinate Judge.

It was held by their Lordships that oral evidence of intention was not admissible for the purpose of construing the deed or ascertaining the intention of the parties and that the case must be decided on considerations of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document related to existing facts. In the present case the amount of dower which we may call the consideration of the marriage contract was definitely put down as Rs. 1½ lac, in Ex. P-1, rightly described by the Court below as marriage deed. Therefore evidence to subtract anything from this term of the contract would be excluded under the provisions of S. 92. Furthermore, the extrinsic evidence in the case is that the marriage was duly solemnized in an assembly of friends and relations, and ever since the date of the marriage the spouses have lived as husband and wife until the death of the husband in the year 1928. I do not think that their Lordships of the Privy Council intended that the evidence of any mental reservation contrary to the explicit terms of the written agreement could be given, as it would practically reduce S. 92, Evidence Act, to a nullity. The recent pro-

nouncement of their Lordships of the Privy Council quoted above is quite clear and in my humble judgment correctly interprets the full meaning and import of S. 92, Evidence Act. To hold that it was open to the defendant to lead evidence to prove that the dower which had been fixed was not really payable would virtually have the effect of cancelling one of the essential terms of the contract of marriage, namely the consideration of Rs. 1½ lac.

Assuming for the sake of argument that it was open to the defendant to lead evidence to establish that the dower of Rs. 1½ lac was merely fixed by way of show and that it was never intended to be paid, let us examine the evidence on the record in support of this contention. (His Lordship then examined the evidence and held that the defendant completely failed to prove that the full amount was never intended to be paid. The judgment then proceeded). On the question of dower, he adopted the line of reasoning which found favour with the Subordinate Judge who seems to have been impressed with the idea that, although a number of marriages with dower-debts of Rs. 1½ lac or thereabouts have been quoted, in none of them was the dower paid or a decree of the Court obtained. This, of course, is not quite accurate. Nawab Sir Amir-ud-din Ahmad Khan has quoted at least the cases of his own daughters and of a lady Mt. Akbari Begam, where substantial sums were received by the ladies in settlement of their dower claims. That, the whole amount was not realized is a matter of private arrangement dependent upon various circumstances. Dower is an incident of marriage like divorce and merely because in a certain family there have been no divorces it does not follow that the right to divorce does not exist. In the same manner, though the claim for dower has not formed the subject-matter of a suit in a law Court or the demand for its payment has not been made by the wife in the majority of cases, it does not follow that a right to recover it does not exist. Reliance was placed by the learned counsel for the respondent upon the case reported as 123 P R 1880 (7). In this case the suit was for Rs. 1½ lac as dower

6. *Balkishen Das v. Legge*, (1900) 22 All 149 = 27 1 A 58 = 7 Sar 601 (P C).

7. *Mt. Sahibzadi Begam v. Mt. Said-ul-Nissa Begam* (1880) 123 P R 1880.

debt. A plea was raised on behalf of the defendant that the parties, when they entered into the contract, did not intend that the said contract should be acted upon and that the large amount of dower was only made for show.

The Courts below held that it was proved that the amount of dower was looked upon as no more than a hollow sham and reduced the amount to what the Courts considered to be reasonable. The plaintiff came up in appeal to the Chief Court of the Punjab and the learned Judges held that the Courts below had no jurisdiction to reduce the amount of dower fixed to what they considered a reasonable amount except on proof of custom allowing such reduction, or that the amount fixed was a mere sham and neither party intended that the original contract should be acted upon. If such was the case the proper dower was to be ascertained and awarded to the plaintiff. If the kabinnama was not set aside as wholly invalid, the Court was to decree the whole amount claimed. The case was accordingly remanded. In this case the kabinnama itself was missing and its terms were uncertain. In such a case I cannot understand how any document, which was not before the Court and even the terms of which were uncertain, could be set aside or maintained. There is just a passing reference to S. 92, Evidence Act, in the judgment of Barkley, J., the other Judge being silent on this question. The view of Barkley, J., that evidence was admissible under the first proviso to S. 92, Evidence Act, cannot be accepted as correct in view of the Privy Council judgments of a later date, quoted above. In any view this authority does not affect the present case, for here we have the kabinnama and a mass of evidence in support of its genuineness and binding character and the evidence to the contrary is worthless. It was argued by the counsel for the respondent that the plaintiff herself did not go into the witness box and depose to the amount of dower which was fixed at the time of her marriage. The answer to this criticism is to be found in the case reported as 19 Cal 689 (2), at p. 696 where it is observed that, if the widow does not enter into the witness box to prove her dower, this ought not to be treated as a circumstance against her, since Muhammadan ladies are reluctant to give evidence. Moreover,

in the ordinary course of affairs, the marriage ceremony must have been performed in the portion of the house occupied by the males where a large concourse of wedding guests would be assembled. The plaintiff, who at the time of her marriage was a girl of tender years, could not possibly have any direct knowledge of the proceedings in connection with the settlement of dower which were going on in a different portion of the house to which, according to the well-known custom of the class of people to which she belonged, she could not have any access.

All the probabilities of the case are in favour of the plaintiff and I am not surprised that, contrary to the general practice, she was constrained to take the usual course of bringing a suit in a Court of justice to claim her dower against the defendant who has grossly ill-treated her by denying to her even the status of his deceased brother's widow and by reviling the memory of her deceased husband. The law of dower outside Oudh, where there is special legislation empowering the Courts to curtail its amount in suitable cases, sometimes operates harshly in depriving the other heirs of their shares. At the same time in some cases it protects the widow from the cruel treatment which is sometimes meted out to her by the other heirs of the husband. A Court of justice has to administer the law as it stands, and if the Mahomedan public is dissatisfied with that law it is open to them to have it altered by legislation. For the reasons given above, I would allow this appeal, and modifying the decree of the Court below, decree the plaintiff's suit for the full amount claimed. The case will go back to the Court below for the passing of a preliminary decree under O. 20, R. 13, Civil P. C., and for further proceedings according to law. The plaintiff will get her costs throughout from the defendant.

Tek Chand, J.—I concur in the order proposed by my learned brother. I am in complete agreement with him in the view which he has taken of the evidence produced by the parties in the case and the findings which he has recorded on the questions of fact involved. I have no doubt that the kabinnama (Ex. P.1) contained a genuine and bona fide agreement for the payment of dower between the late Nawab Shuja-ud-Din and the

plaintiff and the mere fact that the amount mentioned was excessive or much beyond the means of the husband either at the time of the marriage or when he died, does not affect the plaintiff's claim. There is however a subsidiary point on which, with the utmost respect, I feel bound to express my dissent. My learned brother is of the opinion that S. 92, Evidence Act, is a bar to the defendant producing evidence to show that the amount of dower entered in the kabinnama was fictitious and was not intended to be paid. That section lays down that, except under certain specified conditions, evidence of an oral agreement is not admissible to contradict, vary, add to, or subtract from, the terms of a written contract. In the present case however it is not for any of these purposes that oral evidence was led at the trial. Here the defendant attempted to prove that there was no real agreement relating to this matter at all, that the writing was from the first a "mere sham," both parties understanding that the amount specified was nominal, and that no effect was to be given to it.

In other words, it was a paper transaction, pure and simple, recorded only for the sake of show, and was not to be acted upon. The distinction between the two classes of cases is well-recognised both in English law as well as under the Indian Evidence Act, and there are numerous decisions of the Courts in India and of the Judicial Committee of the Privy Council bearing on the point. The leading English case on the subject is 6 E & B 370 (8), where Erle, J., observed that:

The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.

In the same case, Lord Campbell observed that:

No addition to, or variation from the terms of a written contract can be made by parol; but in this case the defence was that there never was any agreement entered into. Evidence to that effect was admissible.

For cases under the Evidence Act, reference may be made to 123 P R 1880 (7), 32 Cal 437 (9), at p. 441, 95 I C 512 (10),

8. Pym v. Campbell, (1856) 106 E R 632=6 E & B 370=25 L J Q B 277=4 W R 528=2 Jur (N S) 641.

9. Beni Madhab Das v. Sadasook Kotary, (1905) 32 Cal 437=1 C L J 155=9 C W N 305 (F B).

10. Abdul v. Arlin, 1926 Rang 94=95 I C 512.

1926 Pat 156 (11), 3 Rang 106 (12), at p. 125, 63 M L J 707=141 I C 456 (458) (13), 1933 Lah 222 (14) and 72 P R 1901 (15) and Ameer Ali and Woodroffe's Law of Evidence, 9th Edn., p. 638.

The Privy Council decisions, 22 All 149 (6) and 35 P L R 1 (5), to which my learned brother has referred, are distinguishable and, if I may say so with all respect, do not touch the question. In the first of these cases the question was whether the transaction in dispute was a mortgage by conditional sale, as described in the deed, admittedly executed by and binding on the parties, or whether it was a sale out and out, as was sought to be proved by one of them. Their Lordships held that oral evidence could not be produced to prove in contradiction of the clear terms of the document that it was a sale. In the second case the transaction was described in the deed to be a possessory mortgage, but an attempt was made to prove by oral evidence that it was really intended to be a simple mortgage, and their Lordships ruled that S. 92 was a bar to the production of such evidence. In 3 Rang 106 (12), at p. 125, Sir Lawrence Jenkins, after referring to 22 All 149 (6), brought out the distinction very clearly. He observed that:

As between the parties to an agreement oral evidence of intention was not admissible for the purpose, either of construing deeds or proving the intention of the parties. . . .

But

S. 92 does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances.

Their Lordships held evidence of such "surrounding circumstances" admissible, and after examining it, recorded their finding on the true nature and import of the transaction. The question has been discussed at great length by the Madras High Court in 141 I C 456 (13) (458 *et seq*) and by the Oudh Chief Court in 136 I C 642 (16), at p. 691-4, and in both

11. Ramdhani Singh v. Kewal Mani Bibi, 1926 Pat 156=90 I C 929=7 P L T 145.

12. Baijnath Singh v. Hajee Vally Mohammad Hajee Abba, 1925 P C 75=86 I C 332=3 Rang 106 (P C).

13. Thiagaraja v. Vedathanni, 1933 Mad 48=141 I C 456=63 M L J 707.

14. Ram Lal v. Dhian Singh, 1933 Lah 222=145 I C 689.

15. Abdul Ghafur Khan v. Abdul Kadir, (1901) 72 P R 1901=114 P L R 1901.

16. Mohammad Azim v. Mohammad Saadat Ali, 1931 Oudh 177=136 I C 642=8 O W N 349.

these cases, after a review of the authorities it has been held that S. 92 operates as a bar only when oral evidence is sought to be led to vary or modify the terms of an agreement, but that oral evidence is admissible to prove that the agreement in writing was not an agreement at all but was only a sham and was not intended to be operative. The only Indian case, of which I am aware, in which a contrary view has been expressed is 49 All 680 (17) where Ashworth, J., adversely criticised the dictum of Ameer Ali and Woodroffe, J.J., at p. 638 of their book, referred to above. The remark was however obiter and the judgment of the other member of the Bench, Mukerji, J., is silent on the point. Ashworth, J.'s observations have been examined at length and dissented from (and if I may say so rightly) in the Madras and Oudh cases cited above. I am therefore of opinion that notwithstanding the recitals in Ex. P-1, evidence was admissible to prove that no binding and operative agreement had been entered into at all between the parties to pay and receive the amount of dower mentioned therein. As already stated however I agree with my learned brother that the evidence produced by the defendant on this point was worthless, and that the plea has not been established in fact.

K.S.

Appeal allowed.

17. Lachman Das v. Ram Prasad, 1927 All 422
=100 I C 1029=49 All 690=25 A L J 349.

A. I. R. 1936 Lahore 191

JAI LAL, J.

Abdul Rahim—Decree-holder—Petitioner.

v

Abdul Haq—Judgment-debtor—Respondent.

Civil Revn. No. 378 of 1935. Decided on 16th October 1935, from order of Senior Sub-Judge, Amritsar, D/- 27th February 1935.

Execution sale—Property sold but sale not confirmed—Confirmation cannot be refused on any other ground except as provided in Civil P. C.—Fact that after sale but before confirmation, judgment-debtor declared to be agriculturist whose property could not be sold held, no ground for not confirming sale.

Once a sale has taken place the Court has no jurisdiction to refuse to confirm it unless the specified objections are taken and sustained. Sale in execution of a decree cannot be set aside merely on the ground that after the date

of the sale in fact more than thirty days after the date of the sale but before its confirmation the judgment-debtor was declared to be a member of an agricultural tribe whose land cannot be sold: 1931 P C 33 and 1933 Lah 99, *Rel. on.* [P 192 C 1]

Ghulam Rasul—for Petitioner.

Fayaz Hassan Shah—for Respondent.

Order—In execution of a money decree the judgment-debtor's land was sold by auction by the Court. It does not appear that any objections under O. 21, R. 90, Civil P. C., were raised to the confirmation of the sale within the prescribed time; but the sale was not confirmed nor was the decree satisfied. On the other hand the question of confirmation was postponed because in the meantime a suit had been brought by a third person to establish his right in the land sold. After the disposal of that suit the case came up before the executing Court for the confirmation of the sale many months after it had taken place, but in the meantime that is to say, a few days before the case was taken up by the executing Court on the question of confirmation of the sale, the tribe to which the judgment-debtor belongs was declared to be an agricultural tribe under the provisions of the Punjab Alienation of Land Act. An objection was, therefore, taken by the judgment-debtor that, under the circumstances, his land could not be sold and the sale should not, therefore, be confirmed. The executing Court refused to confirm the sale and the learned Senior Subordinate Judge on appeal has concurred in this view.

The decree-holder applies to this Court in revision and it is contended on his behalf that once a sale has taken place it can be set aside only under the provisions of the Civil Procedure Code, such as O. 21, R. 89, on the application of the judgment-debtor accompanied by a deposit of the decretal amount and a percentage for payment to the auction purchaser, or on objection under O. 21, R. 90, Civil P. C., on the ground of material irregularity in publishing or conducting the sale and consequential loss to the person concerned; and that a sale cannot be set aside on any other ground except those specified in the Code. Title of the auction purchaser in the property sold vests from the date of the sale and not from the date of the confirmation of the sale, therefore, though

an objection to the confirmation of the sale can be made within thirty days of the sale, the Court cannot refuse to confirm the sale if the objection is made after the expiry of thirty days or does not come within the purview of the specified provisions of the Civil Procedure Code and is sustained by the executing Court. As observed by their Lordships of the Privy Council in 1931 P. C. 33 (1) once a sale has taken place the Court has no jurisdiction to refuse to confirm it unless the specified objections are taken and sustained. The same view was taken in 13 Lah. 761(2). In my opinion the sale in this case could not be set aside merely on the ground that after the date of the sale, in fact more than thirty days after the date of the sale but before its confirmation the judgment-debtor was declared to be a member of an agricultural tribe. It was contended on behalf of the respondent, the judgment-debtor, that there were objections raised by the decree-holder to the confirmation of the sale on the ground of material irregularity, but the decree-holder has expressly withdrawn these objections before me.

I consequently accept this petition and setting aside the order of the Court below direct the executing Court to confirm the sale and then to proceed with the further proceedings in accordance with law. I leave the parties to bear their own costs of these proceedings.

B.D./R.K.

Petition accepted.

1. Nanbelal v. Umrao Singh, 1931 P C 33=130 I C 686=58 I A 50=27 N L R 95 (P C).
2. Ganda Mal v. Taj Din, 1933 Lah 99=142 I C 686=13 Lah 761=34 P L R 70.

A. I. R. 1936 Lahore 192

TEK CHAND AND ABDUL RASHID, JJ.

Makhan Singh—Plaintiff—Appellant.

v.

Mt. Mango and others—Defendants—Respondents.

First Appeal No. 685 of 1934, Decided on 18th June 1935, from decree of Sub-Judge, First Class, Lyallpur, D/- 7th March 1934.

(a) Custom (Punjab) — Alienation — Non-ancestral property — Mother of last male holder gifting property with consent of next heir—Collateral cannot challenge alienation.

Where mother of the last male-holder gifts away the non-ancestral property of the last male-holder, with the bona fide consent of the

next heir, a collateral has no right to challenge the alienation : 1931 Lah 495 and 1923 Lah 353, *Approved*. [P 192 C 2; P 193 C 1]

(b) Practice—Mixed question of law and fact cannot be raised in appeal for first time.

A mixed question of fact and law cannot be allowed to be raised for the first time in appeal. [P 193 C 1]

Mehr Chand Mahajan and Harnam Singh—for Appellant.

Badri Das, Bal Kishen Mehra for Din Dayal Khanna, Vishnu Datta and Din Dayal Khanna—for Respondents.

Tek Chand, J.—In order to understand the facts of this case it is necessary to refer to the following pedigree table :

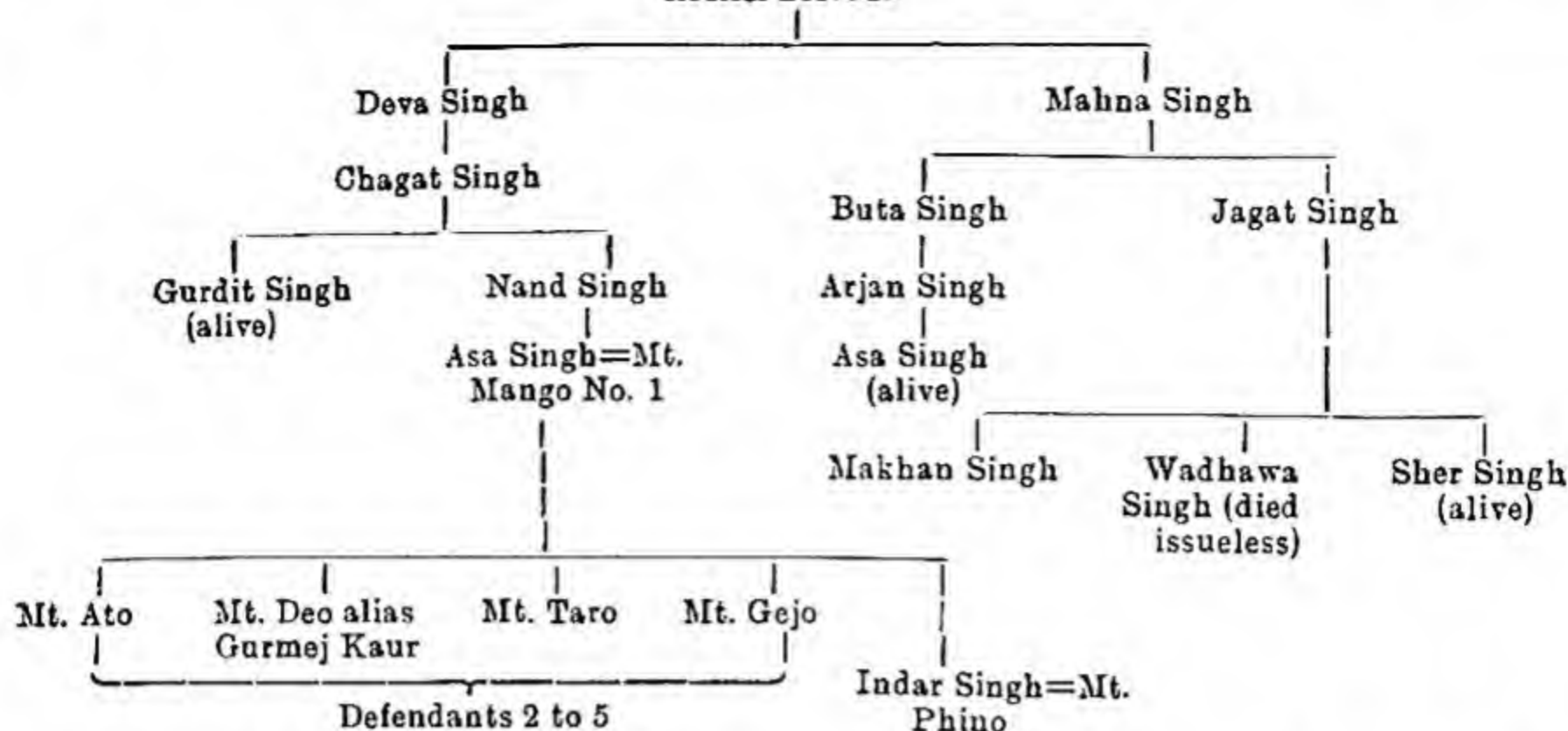
See table on page 193.

The property in suit was acquired by Nand Singh who died in 1922 and was succeeded by Indar Singh, son of his pre-deceased son, Asa Singh. Indar Singh died childless in 1931 leaving (1) a widow Mt. Phino (who was ten years of age at that time), (2) his mother Mt. Mango, defendant 1 and (3) four sisters, defendants 2 to 5. As it was thought that the child-widow would re-marry soon, the mutation of the estate was effected in the name of Mt. Mango, mother of the deceased. In May 1933, Mt. Mango gifted the property to her daughters, defendants 2 to 5. The next living reversioner was Gurdit Singh, brother of Nand Singh, and it is common ground between the parties that he consented to the gift.

Makhan Singh, who is a collateral of Indar Singh in the 6th degree, brought the present suit for a declaration that the gift was invalid as against his reversionary rights. The Subordinate Judge held that, as the property was admittedly non-ancestral of the plaintiff and the last male-holder, the plaintiff had no right to contest the alienation made by Mt. Mango, with the bona fide consent of the next heir. In coming to this conclusion the Judge followed a decision of a Division Bench of this Court, reported as 13 Lah 180 (1). The plaintiff has appealed and on his behalf Mr. Mehr Chand Mahajan has contended that 13 Lah 180 (1) and the earlier Division Bench ruling, 5 Lah 212 (2) which it followed, were both wrongly decided. After hearing

1. Roshan v. Wadhawa, 1931 Lah 495=134 I C 197=13 Lah 180.
2. Jaswant Kaur v. Wasawa Singh, 1923 Lah 353=76 I C 592=5 Lah 212.

AMAR SINGH



the counsel at length and giving careful consideration to his arguments I see no reason to hold that the view taken in these rulings was erroneous. Mr. Mehr Chand Mahajan further argued that the gift was, in any case, invalid, as it had not been established that by this gift Mt. Mango had transferred to the donees the entire estate which she had inherited from her husband. But this point was not taken in the Court below, nor is it mentioned in the grounds of appeal presented in this Court. The question is a mixed question of fact and law and cannot be allowed to be raised for the first time at this stage. As the necessary facts have not been established, no opinion need be expressed as to whether the contention of the learned counsel is legally sound. The appeal fails and I would dismiss it with costs.

Abdul Rashid, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1936 Lahore 193

AGHA HAIDER, J.

Panna Lal and another—Judgment-debtors—Appellants.

v.

Rama Nand and another—Decree-holders and another—Judgment-debtor—Respondents.

Second Appeal No. 1747 of 1934, Decided on 11th October 1935, from order of Dist. Judge, Ambala, D/- 9th July 1934.

Hindu Law—Debts—Father's pre-partition debt—Decree—Decree-holder can proceed against son's shares in execution—Regular suit to enforce his right is not necessary.

Where a decree has been passed against the father for a pre-partition debt, the decree-holder can proceed in execution of the decree

1936 L/25 & 26

against the shares allotted to the sons, in the course of the execution proceedings, and need not proceed by way of a regular suit to enforce his right against the sons: 1928 *Mad* 657 (FB); 19 *Cal* 633 (PC) and 1933 *Lah* 116, *Rel. on.*

[P 194 O 1, 2; P 195 C 1]

Achhru Ram and Indar Dev Dua—for Appellants.

Dev Raj Sawhney and S. N. Bali—for Respondents.

Judgment.—This appeal arises out of certain execution proceedings. Baldeo Das had three sons, Shamair Chand, Sundar Lal and Panna Lal. On 23rd September 1926, Baldeo Das executed a mortgage of a certain shop which we would call X in favour of the present plaintiffs-decree-holders. On the day following the mortgage, Baldeo Das executed a rent-deed in respect of shop X in favour of the mortgagees. On 20th July 1928, a partition was effected between Baldeo Das and his sons in which the property, which forms the subject-matter of the present dispute, was allotted to his two sons, Panna Lal and Sundar Lal. We are not concerned with the property which was allotted to the father and the third son, Shamair Chand. On 26th February 1929, the present plaintiffs, decree-holders, Rama Nand and another, sued Baldeo Das and his sons for a sum of Rs. 680 as arrears of rent of the shop X on the allegation that the rent-deed dated 24th September 1926 was executed by Baldeo Das not only for himself but also for and on behalf of his sons. On 23rd June 1930, this suit was decreed against Baldeo Das alone and dismissed against his sons on the ground that there was no privity of contract between them and the plaintiffs.

The Court observed that it was not necessary to go into the plea taken by defendants 2 and 3 that the shop in suit had fallen to their share in partition and that they did not form a Hindu joint family with Baldeo Das. The decree, however, was not for the full amount, Rs. 680, but for a sum of Rs. 550 being the rent which had accrued due up to the date of partition. The decree-holders took proceedings in execution and the property which on partition between the father and the sons had fallen to the share of the sons was attached. It may be noted here that shop X was not included in the property which was attached. The sons filed objections and two issues were framed: (1) as to the factum of partition and (2) if there was partition whether the shops which had fallen to the share of the sons were liable. The Court held that there was a bona fide partition and further that the property which was allotted to the sons on partition continued to be liable for pre-partition debts incurred by the father. The result, therefore, was that the Court held that the shops were liable only for the debts of the father which had accrued up to the date of partition. Sundar Lal and Panna Lal, defendants 2 and 3, went up in appeal to the District Judge, who in a very unsatisfactory judgment, disposed of the matter by merely referring to the judgment of the trial Court for the discussion of the important question of law raised in the case. Sundar Lal and Panna Lal, objectors, defendants 2 and 3, have come up to this Court in second appeal.

Mr. Achhru Ram very fairly conceded that the property allotted to the sons on partition of joint family property continued to be liable for pre-partition debts of the father. He, however, disputed the propriety of the orders of the Courts below that the decree-holders could proceed against the property which had been allotted to the sons, in execution of the decree against their father in the course of the execution proceedings. He urged that the proper remedy of the decree-holders was to proceed by way of regular suit against the sons and enforce their rights under the Hindu Law up to the extent of the property which had fallen to their share on partition. There cannot be any manner of doubt that, so far as the Punjab is concerned, the law has been definitely laid down that property

which has fallen to the share of a son on partition is liable for the debts incurred by the father before the partition, vide 1933 Lah 116 (1). This case contains a reference to a Full Bench decision of the Madras High Court, 51 Mad 361 (2). This is a decision by five learned Judges, Coutts Trotter, C. J. and Srinivasa Ayyangar, J., being the dissenting Judges. The majority laid down that a simple creditor of a father is entitled to recover the debt from the shares of the sons after a bona fide partition between the father and the sons. Mr. Achhru Ram, the learned counsel for the appellant, has tried to argue that the Lahore ruling as well as the Full Bench decision of the Madras High Court dealt with cases which come to the High Court on regular appeals from decrees and not from appeals which were preferred against the orders of the Courts below in execution proceedings. This is true. But Waller, J. who was one of the majority Judges, had this point in his mind and at p. 369 of the report observed:

The other view is that the only difference partition makes is that a creditor cannot, after it, on a decree against the father alone, proceed against the sons' shares in execution. On principle, I can see no reason why a partition should exempt a son's share from liability for a pre-partition debt for which it was liable before partition.

Apart from the other obiter dictum of this learned Judge, the principle which has been followed for many years in this country and which has been approved of on more than one occasion by their Lordships of the Privy Council, is that so far as possible all matters relating to the execution, discharge or satisfaction of a decree should be disposed of in the course of execution proceedings wherein matters can be decided in a cheaper and more expeditious manner. This was laid down as long ago as 19 Cal 683 (3), at p. 689. The following classical passage is worth quoting:

It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of S. 244.

1. Jawahar Singh v. Parduman Singh, 1933 Lah 116=141 I C 424=14 Lah 399=34 P L R 291.
2. Subramania Ayyar v. Sabapathy Ayyar, 1928 Mad 657=110 I C 141=54 M L J 726=51 Mad 361 (FB).
3. Prosunno Kumar Sanyal v. Kalidas Sanyal, (1892) 19 Cal 683=19 I A 166=6 Sar 209 (PC).

The present appellants were parties to the suit in which the decree was passed and the question which is now raised by them was left open by the learned Judge who decided the case. I do not see any reason why the plaintiffs-decree-holders should be relegated to a regular suit when the question which was left open by the Judge who decided the case can be raised and disposed of in the course of execution proceedings. I, therefore, affirm the orders passed by the two Courts below and dismiss the appeal with costs.

S.R./R.K.

*Appeal dismissed.***A. I. R. 1936 Lahore 195**

ABDUL RASHID, J.

Nawab and others—Defendants—Appellants.

v.

Charagh—Plaintiff and others—Defendants—Respondents.

Second Appeal No. 381 of 1934, Decided on 16th July 1934, from decree of Dist. Judge, Hoshiarpur, D/- 10th January 1934.

(a) Practice—Appeal — Technical defect—Presenting of appeal amounts to acting on behalf of appellant—Person presenting appeal must be duly authorized.

The presenting or the filing of the appeal amounts to acting on behalf of the appellant, and on the day that the appeal is presented the person presenting the appeal must be duly authorised to act on behalf of the appellant: 1920 Pat 581 and 11 I C 387, *Rel. on.*

[P 196 C 1]

(b) Practice—Appeal — Technical defect—Presentation of appeal by clerk—Pleader must have signed it and authorized his clerk to present it—It amounts to presentation by himself—Person cannot be clerk or agent when he only signs memorandum of appeal.

The presentation of an appeal petition by the clerk of the pleader is equivalent to a presentation by the pleader himself when it is signed by him and the clerk is duly authorised.

[P 196 C 1,2]

Where the appeal was not presented by J's clerk but by T who had duly signed the memorandum of appeal, it could not be held that T was merely an agent of J. By signing the memorandum of appeal he acted independently of J and presentation of the appeal by him could not be held to be a presentation by an agent or clerk of J: 20 Mad 87, *Rel. on.*

[P 196 C 2]

*Achhru Ram—for Appellants.**Hem Raj Mahajan for M. C. Mahajan and M. C. Mahajan—for Respondents.*

Judgment.—This appeal arises out of a suit instituted by one Chiragh, a proprietor of Mirpur, against 18 other proprietors of the same village for ejectment,

on the ground that the defendants had taken forcible possession of a part of the Shamilat Deh and that thereby they had reduced the area that was reserved for use for common purposes. The suit was brought by Chiragh in a representative capacity on behalf of all the proprietors of the village. The trial Court dismissed the plaintiff's suit on 25th August 1933. The plaintiff preferred an appeal to the learned District Judge on 6th November 1933. A vakalatnama signed by Lala Jagan Nath and Pandit Ram Nath, advocates was filed with the memorandum of appeal. The memorandum of appeal had been signed by Lala Jagan Nath and Lala Tara Chand, advocates. The appeal was actually presented by Lala Tara Chand. On the hearing of the appeal a preliminary objection was raised on behalf of the respondents that the appeal had not been validly presented and could not be entertained on the ground that Lala Tara Chand had never been authorised to sign the appeal or to present it. The learned District Judge by his order dated 5th January 1934, held that the preliminary objection had no force and that the appeal had been validly presented. By his judgment dated 10th January 1934, the learned District Judge accepted the appeal and passed a decree in favour of the plaintiff. The defendants have preferred a second appeal to this Court. It was strenuously urged on behalf of the appellant that the appeal before the learned District Judge was not validly presented either by the appellant or his pleader or by any duly authorised agent of his, and that, therefore, in effect there was no appeal before the learned District Judge. The learned District Judge has relied on O. 41, R. 1, in holding that the appeal was validly presented. O. 41, R. 1, runs in the following terms:

Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf.

It was urged by the learned counsel for the appellant that the provisions of O. 41, R. 1, must be read subject to the provisions of O. 3, R. 1, which lays down that:

Any appearance, application or act in or to any Court required or authorised by law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent,

or by a pleader appearing, applying or acting on his behalf.

It was maintained that the presentation of an appeal amounts to acting on behalf of the appellant and that under the provisions of O. 41, R. 1 read with O. 3, R. 1, Lala Tara Chand could not act on behalf of the appellant. It is true that Lala Tara Chand had signed the memorandum of appeal but no vakalatnama of Lala Tara Chand was ever placed on the record either before or after the presentation of the appeal. In a case reported as 11 I C 387 (1) a pleader filed an appeal in time, but without a vakalatnama, and subsequently, after the period for filing the appeal had expired, a vakalatnama was filed. It was held that the filing of the vakalatnama could not be treated as referring back to the date on which the appeal was filed and that therefore the appeal was barred. The ratio decidendi of the judgment is that the presenting or the filing of the appeal amounts to acting on behalf of the appellant, and on the day that the appeal is presented the person presenting the appeal must be duly authorised to act on behalf of the appellant. In a case reported as 55 I C 271 (2), it was held by a Division Bench of the Patna High Court that the presentation of a memorandum of appeal by a Vakil without any authority in the shape of a vakalatnama is not a valid presentation. In the present case not only was the appeal filed by Lala Tara Chand without any vakalatnama but no vakalatnama in favour of Lala Tara Chand was ever placed on the record even after the filing of the appeal. The learned District Judge has relied on the wording of O. 41, R. 1 and has held that the appeal can be presented to the Court by any person, and that it is not necessary that he should be duly authorized to present the appeal. The language of O. 41, R. 1, however, does not appear to me to be susceptible of this interpretation.

On behalf of the respondents reference was made to 20 Mad 87 (3) and 1932 Lah 373 (4). 20 Mad 87 (3) lays down that the presentation of an appeal petition by the

clerk of the appellants' pleader is equivalent to a presentation by the pleader himself when it is signed by him and he is duly authorised. That case is of no assistance to the respondents as it deals with a criminal appeal. Moreover in the present case the appeal was not presented by Lala Jagan Nath's or Pandit Ram Nath's clerk, but by Lala Tara Chand who had duly signed the memorandum of appeal. In these circumstances it cannot be held that Lala Tara Chand, Advocate, was merely an agent of Lala Jagan Nath. By signing the memorandum of appeal he acted independently of Lala Jagan Nath and presentation of the appeal by him cannot be held to be a presentation by an agent or clerk of Lala Jagan Nath. It is unnecessary to consider 1932 Lah 373 (4) as that case has no bearing at all. The learned counsel for the respondents urged that the time for the presentation of the appeal may be extended under S. 5, Lim. Act. This prayer cannot be granted by this Court, as it was for the lower appellate Court to decide whether there was sufficient cause for extending the time for the presentation of the appeal. For the reasons given above, I hold that no appeal was duly and validly presented to the learned District Judge on behalf of the appellant at any time. In these circumstances the judgments of the learned District Judge, dated 5th January 1934, and 10th January 1934, and the decree based thereon must be set aside. I therefore accept this appeal, set aside the decree of the learned District Judge, and order that the memorandum of appeal filed in the Court of the learned District Judge be returned to the respondent for such action as he may be advised to take. The parties shall bear their own costs throughout.

R.W./V.V.

Appeal accepted.

*** A. I. R. 1936 Lahore 196**

BHIDE AND CURRIE, JJ.

Sardar Khan—Defendant—Appellant.

v.

(Hindu Joint Family Firm) Ram Mal Barkat Shah — Plaintiff and another—Defendant—Respondents.

First Appeal No. 1912 of 1934, Decided on 31st October 1935, from decree of Sub-Judge, 1st Class, Lyallpur, D/- 30th August 1934.

*** Actionable claim—Mortgagor executing usufructuary mortgage and putting mortgagee in possession—Mortgagee not paying con-**

1. Chandan Bhuya v. Haroo Sehri, (1911) 11 I C 387.

2. Sheikh Palat v. Sarwan Sahu, 1920 Pat 581 = 55 I C 271.

3. Queen-Empress v. Karuppa Udayan, (1896) 20 Mad 87.

4. Amir Shah v. Abdul Aziz, 1932 Lah 373 = 136 I C 712 = 13 Lah 775 = 33 P L R 388.

sideration — Mortgagor's right to recover consideration is transferable.

Where the mortgagor completes his part of the contract by executing a usufructuary mortgage and by putting the mortgagee in possession and the mortgagee fails to discharge the consideration, the mortgagor has a transferable claim and his assignee is entitled to sue the mortgagee for the amount: 1931 *All 95, Foli.*

[P 198 C 1]

M. A. Majid—for Appellant.

J. L. Kapur, Vishnu Datta for Badri Das and Asad Ullah Khan—for Respondents.

Currie, J.—Two brothers Sardar Khan and Faujdar Khan alias Ghulam Qadir, owned certain property in Lyallpur, Sardar Khan holding two-thirds and Faujdar Khan one-third. On 14th July 1931 Faujdar Khan executed a registered deed of mortgage in favour of his brother Sardar Khan for Rs. 6,000. The mortgage was with possession and it was provided that interest and rent should counter-balance each other, the mortgagee being at liberty to lease the property in any manner he liked. Of the consideration Rs. 4,000 were left in trust with the mortgagee, without adjustment of account to pay off the debt due from the mortgagor to the firm of Barkat Shah-Ram Mal. It was further provided that from the date of the mortgage the mortgagee should be responsible for the interest on the amount due to Barkat Shah. On 27th July 1932 the firm sent a notice to Sardar Khan. No written reply was sent, but it is alleged that Sardar Khan made evasive promises. Eventually he apparently informed the firm that he had received legal advice to the effect that they could not enforce the claim. On 26th September 1933 Sardar Khan gave notice to Faujdar Khan that he had appropriated the money on account due to him. On 30th October 1933 the firm obtained a deed of assignment of Rs. 4,000 from Faujdar Khan conveying to them the right to recover the amount due from Sardar Khan. It was mentioned that interest would be recoverable. On the same day they served a notice on Sardar Khan and on 3rd February 1934 Sardar Khan replied to the effect that the money had been paid to Faujdar Khan. On 2nd February, however, the firm had instituted the present suit. The learned Subordinate Judge, first class, granted the plaintiffs a decree for Rupees 5,220-10-6 with costs against Sardar Khan. Sardar Khan has appealed.

The learned counsel for the appellant

has abandoned the defence that the money had been paid to Faujdar Khan. His principal contention is that the plaintiffs were not entitled to sue under the provisions of the Transfer of Property Act on the ground that what Faujdar Khan had assigned to them was a mere right to sue and not an actionable claim. He further contended that no personal decree could be given against Sardar Khan and that the decree should have been against the property. Finally, it was urged that the interest could not be calculated. As regards the first point, counsel argues that the principles of Ss. 3, 6 (e) and 130 T. P. Act, have been held applicable to this province, and cites 106 P R 1914 (1) which supports his contention. He argues that Faujdar Khan could not have sued for Rs. 4,000 as a debt but could merely have sued for damages for breach of the contract and that therefore he merely possessed the right to sue which could not be transferred by assignment. In support of this argument reference is made to 1925 Lah 548 (2) in which it was held that the right to recover damages for breach of a contract is not transferable. The real question however is whether in the present case Faujdar Khan was merely entitled to sue for damages or whether he could have claimed the payment of the sum of Rs. 4,000. Mr. Majid has cited 47 Mad 698 (3), 43 Cal 59 (4) and 1930 Lah 100 (5). The latter ruling related to a case in which it was sought to recover unpaid balance of consideration in respect of a bond executed by the plaintiff in favour of the creditors and is thus not directly in point. In 43 Cal 59 (4) it was held that a suit for specific performance of a contract to lend or borrow money is not maintainable. In 47 Mad 698 (3), it was held that though it is open to the mortgagor to sue the mortgagee for breach of the agreement to lend money, a right to obtain damages cannot be transferred under S. 6 (e), T. P. Act. Consequently an assignee from the mortgagor of a part

1. *Jangli Mal v. Pioneer Flour Mills*, 1914 Lah 510=27 I C 115=106 P R 1914.
2. *Jaichand Jai Ram v. Narain Das-Ram Kishan*, 1925 Lah 548=86 I C 960.
3. *Yadavendra Bhatta v. Srinivasa Babhu*, 1925 Mad 62=80 I C 5=47 Mad 698=47 M L J 435.
4. *Shaik Galim v. Sadarijan Bibi*, (1916) Cal 530=29 I C 621=43 Cal 59=21 O L J 532=19 C W N 1382.
5. *Gulam Shah v. Hakam Rai*, 1930 Lah 100=120 I C 790.

of the consideration due for a mortgage, which was not paid by the mortgagee, is not entitled to recover it in a suit against the mortgagee. These two rulings at first sight support the contention of the learned counsel for the appellants. They were both, however, as far as can be seen, cases of simple mortgage and not of usufructuary mortgage. For the respondents Mr. Kapur urges that a usufructuary mortgage stands on a different footing and amounts to a conveyance of interest in land and is not a mere contract to lend money. He contends that in such a case the unpaid consideration is recoverable and the mortgagor is not merely confined to a suit for damages for breach of the contract. In support of this contention he refers to 52 All 761 (6), 1931 Nag 89 (7) and 57 Mad 1074 (8). The two latter rulings are not in point, the Nagpur case relating to a sale, while the Madras case appears to me to be entirely irrelevant. In 52 All 761 (6), the learned Judges remarked at p. 765 :

It has been held in several cases that a right to lend money cannot be specifically enforced. The case of usufructuary mortgage, however, must stand on a different footing, particularly when the possession has been delivered and the stipulation is that the profits are to be set off against the interest. The suit is not really one for the specific performance of a mere contract to lend money but to compel the defendants to perform their part of the contract when they have obtained delivery of possession of the property.

This decision appears to me to be directly in point. The mortgagor in the present case had completed his part of the contract and the mortgagee had failed to discharge the consideration. In my judgment, therefore, the mortgagor had a transferable claim and his assignee was entitled to sue the mortgagee for the amount. Mr. Kapur further argued for the respondents that in any case they were entitled to sue on their own behalf. He relied on 61 Cal 841 (9), but the view taken in that ruling is opposed to that expressed in 16 Lah 118 (10), in which it was held that where no trust had been

created in favour of the plaintiff and he was not a party to the contract, the general rule applies, viz. that the contract affects only the parties to it and cannot be enforced by or against the person who is not a party even if the contract is made for his benefit. I see no ground for dissenting from the view expressed in that ruling. In any case the plaintiff never based his suit on that ground. It is clear from the plaint that he based his suit solely on the deed of assignment executed in his favour by Faujdar Khan as in para. 5 of the plaint he stated that the cause of action accrued on 30th October 1933, the date of the sale-deed. It is therefore unnecessary to discuss the matter further.

As regards the appellant's personal liability, it was suggested that the amount was chargeable on the property. Reference was made to 54 P R 1902 (11), but the facts of that case were totally different. They related to a case in which it was held that an agreement by a purchaser of an equity of redemption with his vendor to pay the mortgage (to which the mortgagee was no party) does not create a personal liability on the part of the purchaser, so as to entitle the mortgagee to obtain a personal decree against the purchaser, nor does such an agreement establish an express trust in favour of the mortgagee. Counsel's contention, therefore, in my opinion, is without force. As regards the question of interest, it was argued that this could not be calculated and should not be allowed. The mortgage executed by Faujdar Khan in favour of Sardar Khan, as already noted, clearly provided that the mortgagee would be responsible for the interest due on the debt with effect from the date of the mortgage. The interest claimed is at the rate of 1 per cent per mensem and it is admitted by Faujdar Khan in paragraph 6 of his pleas that that was the agreed rate. Sardar Khan merely denied any liability to pay interest and did not contest the question of the rate. The rate in itself is not unreasonable and I can see no ground for holding that the appellant is not liable to pay interest. In view of the above findings I would dismiss the appeal with costs.

Bhide, J.—I agree.

B.D.

Appeal dismissed.

11. Mahomed Sadiq v. Mt. Saheb Bibi, (1902)
54 P R 1902=64 P L R 1902.

6. Sheopati Singh v. Jagdeo Singh, 1931 All 95 =124 I C 764=52 All 761=1930 A L J 1141.

7. Nathu Mali v. Bansaji, 1931 Nag 89=132 I C 455=27 N L R 288.

8. Mathu v. Achu, 1934 Mad 461=151 I C 353 =57 Mad 1074=67 M L J 158.

9. Khired Behari Dutt v. Man Gobinda, 1934 Cal 682=152 I C 351=61 Cal 841=38 C W N 682.

10. Ganesh Das v. Mt. Banto, 1935 Lah 354=158 I C 387=16 Lah 118=37 P L R 552.

A. I. R. 1936 Lahore 199

COLDSTREAM AND BHIDE, JJ.

Ramzan and others—Petitioners.

v.

Gopal Das and others—Respondents.

Civil Misc. No. 143 of 1935, Decided on 29th October 1935, from order of Coldstream and Bhide, JJ., D/- 27th November 1934.

(a) Lahore High Court Rules and Orders, Vol. 5, Ch. 6-B—Pleader cannot act for any person unless they are empowered under O. 3, R. 4, Civil P. C.—Pleader can plead without power of attorney but must file memorandum of appearance.

The rules framed by the Lahore High Court in their Rules and Orders, Vol. 5, Ch. 6-B, "Powers and Duties of Advocates and Vakils," reproduce generally the provisions of the Code of Civil Procedure. They forbid any Advocate or Vakil to act for any person in any Court unless he has been appointed by an instrument in writing as required by O. 3, R. 4, Civil P. C. But they do not forbid an Advocate or Vakil to plead on behalf of any person without a power of attorney. An Advocate or Vakil engaged for the purpose of pleading only must, according to these rules, file in Court a memorandum of appearance. [P 199 C 2; P 200 C 1]

(b) Legal Practitioner—Power to compromise is inherent in Advocates in India—Pleader only authorized to appear can compromise—Power of attorney is not necessary.

The power to compromise an appeal is an implied power inherent in the position of an Advocate in India and therefore no power of attorney is necessary to empower a counsel to agree to a valid and binding compromise. The power to compromise may be validly exercised by an Advocate who has been authorised only to appear: 1930 P C 158, *Foll.* [P 200 C 1]

Mohammed Alam—for Petitioner.

Achhru Ram and Indar Dev—for Respondents.

Order.—This is a petition submitted by four persons through Mr. Mohammad Alam for review of the judgment of this Court in First Appeal No. 791 of 1930 delivered on 27th November 1934, modifying a decree passed in favour of those four persons by the Senior Sub-Judge at Multan. The four petitioners were the plaintiffs in the suit in which the decree was passed by the Senior Sub-Judge. That decree had ordered that a certain entry in the record of rights of the village to which the parties belong should be amended by the substitution of the words 'abadi deh' for the words 'abadi chah' in the revenue records. Against that decree the defendants in the suit appealed to this Court on 24th April 1930. After an adjournment had been

granted on the understanding that there was some chance of a compromise, the counsel appeared before us on 27th November 1934 and declared that the dispute had been compromised and that the parties were agreed that a decree should be passed declaring that the entry in the land revenue records 'abadi chah' which replaced the earlier entry "abadi deh" would not affect the rights of the plaintiffs, whatever those rights were before the new entry was made.

In view of this declaration this Bench accepted the appeal and passed a decree in the terms of the compromise as described to us. It is necessary to notice here that the four petitioners had conducted the suit in the Court of the Senior Sub-Judge as representing a large body of residents of the village Kothe-wala. It is contended before us by Mr. Mohammad Alam on the petitioner's behalf that our judgment of 27th November 1934 should be reviewed on the ground that the petitioners' counsel, Mr. Ghulam Mohy-ud-Din had not been authorised by them in writing to compromise on the terms stated to have been agreed upon and incorporated in the judgment of this Court. There is upon the record no instrument in writing authorising Mr. Ghulam Mohy-ud-Din to act or appear in the suit or appeal. There is however no doubt that he was the counsel for the petitioners, on whose behalf he had submitted the list of documents which they desired to have printed for the purpose of the appeal, and on whose behalf he appeared before us at least on two occasions. It is not denied that Mr. Ghulam Mohy-ud-Din was the petitioners' counsel, and indeed the petition itself refers to him as such. In support of this contention that the absence of any instrument in writing is an error apparent on the face of the record justifying interference in review, Mr. Mohammad Alam has referred us to O. 3, R. 4, Civil P. C., and to the rules framed by the High Court in their Rules and Orders, Vol. 5, Ch. 6-B, "Powers and Duties of Advocates and Vakils."

These rules reproduce generally the provisions of the Code of Civil Procedure. They forbid any Advocate or Vakil to act for any person in any Court unless he has been appointed by an instrument in writing as required by O. 3, R. 4, Civil P. C. But they do not forbid

an Advocate or Vakil to plead on behalf of any person without a power of attorney. An Advocate or Vakil engaged for the purpose of pleading only must, according to these rules, file in Court a memorandum of appearance. On behalf of the respondents it is argued by Mr. Achhru Ram that the power to compromise an appeal is an implied power inherent in the position of an Advocate in India and therefore no power of attorney is necessary to empower a counsel to agree to a valid and binding compromise. In support of this argument he has referred to 57 Cal 1311 (1) at p. 1317 where the Privy Council has discussed the question at some length and given cogent reasons for laying down this proposition. In face of this judgment it must, I think, be held that the power to compromise may be validly exercised by an Advocate who has been authorised only to appear. It follows that Mr. Ghulam Mohy-ud-Din was competent to enter into a valid compromise on behalf of his clients even in the absence of a power of attorney. The absence of a power of attorney in such circumstances would be no more than an irregularity which would not affect the validity of the compromise and the decree passed upon it. We dismiss this petition accordingly with costs.

B.D./R.K.

Petition dismissed.

1. Sourendranath Mitra v. Tarubala Dasi, 1930 P C 158=123 I C 545=57 I A 133=57 Cal 1311 (P C).

A. I. R. 1936 Lahore 200

AGHA HAIDAR, J.

Rura Mal—Plaintiff—Appellant.

v.

Ram Chand and others—Defendants—Respondents.

Second Appeal No. 1891 of 1933, Decided on 12th March 1935, from decree of Dist. Judge, Jullundur, D/- 1st July 1933.

(a) Limitation Act (1908), S. 5—Delay in Copying Department due to wrong practice—Copying Department is not agent of applicant—Delay in filing appeal due to delay in Copying Department—There is sufficient cause within S. 5.

It is true that the Copying Department is directly paid from a fund which represents the receipts from the copying fees, but that is all. But the relationship of principal and agent cannot be established by this mode of payment. The Copying Department is a department un-

der the control of the Deputy Commissioner and is a branch of the Deputy Commissioner's office. Once this position is established, it follows that no person can be damnified on account of the laches, ignorance or negligence of any official attached to a department connected with the administration of justice. [P 201 C 1, 2]

Where an appeal was not filed in time because of an erroneous practice prevailing in the Copying Department :

Held : that there was sufficient reason within S. 5, Lim. Act, for not filing the appeal in time: 1928 Lah 16; 35 P L R 713 and 9 I C 381, Dissent. [P 201 C 2]

(b) Limitation Act (1908), S. 5—High Court does not interfere with discretion of trial Court.

Once a discretion has been exercised in the matter under S. 5, Lim. Act, by the lower appellate Court, the High Court should not interfere : *Case law Ref.* [P 201 C 2]

Jagan Nath Aggarwal—for Appellant.*Indar Dev Dua*—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for possession of a certain site measuring 342 3/16 square feet described in the plaint in detail. The trial Court decreed the suit and the defendants went up in appeal. The learned District Judge set aside the decree of the trial Court and dismissed the plaintiff's suit with costs. The plaintiff has come up to this Court in second appeal. The case for the plaintiff was that he had purchased a certain area of land and that the defendants had encroached upon this area. The learned Judge went into the question very minutely and has arrived at the finding which is to the following effect :

In these circumstances it is impossible to hold that the defendants have in their possession any land belonging to the plaintiff, the more so as by no action of his has the plaintiff up to the institution of this suit given any indication of his belief to that effect except in his application to the Committee admitting encroachment and that it is nullified by his subsequent admissions in the plans Exs. D. 8/A, D. 2 and D. 3.

This is a finding of fact and is binding upon this Court in second appeal. The learned counsel for the appellant had however laid emphasis upon the fact that the appeal in the lower appellate Court had been filed beyond limitation and that although the matter had been raised before that Court, no finding has been recorded on the question of limitation. I had remitted the matter to the lower appellate Court to record a finding on the question of limitation thus raised. It was also suggested that, if the appeal were really filed beyond the prescribed

period of limitation, the Judge should consider whether the appellants before him could ask for the benefit of S. 5, Lim. Act. The learned Judge has returned the finding which is in favour of the defendants-respondents. The judgment of the trial Court was pronounced on 11th April 1932 and the application for copies was filed on the same day but no deposit was made. He was called upon to deposit a sum of Rs. 10 on 29th April 1932. The money was deposited at once and the copies were delivered on 4th May. The appeal was filed on 31st May 1932. The learned Judge has rightly observed that, for any delay in making payment of the advance fee, it is the Copying Agency which is to blame and not the applicant and that therefore the application should have been held to have been duly made on 11th April 1932. It appears that a wrong practice prevails in the Jullundur District and the litigants do not deposit the necessary sum of Rs. 5 along with the application. In fact it is stated that the money is not accepted by the Copying Agent at that stage. The finding of the learned Judge is attacked by the learned counsel for the appellant by the argument that the Copying Department is the agent of the applicant and therefore if the agent is remiss, the applicant should suffer. There is support for this view in two single Bench cases reported as 104 I C 586 (1) and 35 P L R 713(2). There is also a Division Bench case of the Punjab Chief Court in 9 I C 381 (3).

Mr. Jagan Nath Aggarwal has invited my attention to the rules framed by the High Court as well as by the Financial Commissioners. I have not been able to trace anything in those rules which would lend support to the proposition that the Copying Department is the agent of the applicant. It is true that the Copying Department is directly paid from a fund which represents the receipts from the copying fees, but that is all. I dare say there are other departments of administration which are financed in a similar way, but I cannot understand how the relationship of principal and agent can be established by this

mode of payment. A copyist is appointed by the Deputy Commissioner and I suppose he is dismissed by the Deputy Commissioner also. The number of copyists in a particular District is determined by the Commissioner and the qualifications for the post of copyist are laid down by the same authority. I do not see how the applicants for copies, who are a fluctuating body, can be treated as principals and what control can they exercise over the Copying Department, its supposed agent.

With due respect I am not prepared to accept the view laid down in the three cases quoted above, that the Copying Department is the agent of the applicant for copies. In my humble judgment the Copying Department is a department under the control of the Deputy Commissioner and is a branch of the Deputy Commissioner's office. Once this position is established, it follows that no person can be damnified on account of the laches, ignorance or negligence of any official attached to a department connected with the administration of justice. In my opinion the learned Judge has given good and valid reasons for holding that the appeal was within time. The learned Judge has further fortified his decision by giving the benefit of S. 5, Lim. Act, to the defendants-respondents. Now, there are a number of decisions both of this Court as well as of the Allahabad High Court in which it is laid down that, when once a discretion has been exercised in the matter under S. 5, Lim. Act, by the lower appellate Court, the High Court would not interfere. The following cases are typical of the rule, though there are numerous other decisions too, to the same effect. The Lahore cases are 95 I C 565 (4) and 123 I C 83 (5). The Allahabad cases are 111 I C 816 (6), 91 I C 865 (7) and 74 I C 1039 (8). The leading cases, however, of the Allahabad High Court are

1. Abdul Rahim v. Chet Ram-Amar Nath, 1928 Lah 16=104 I C 586=28 P L R 605.
2. Mehr Ali Beg v. Sarwan, (1934) 85 P L R 713.
3. Ashiq Hussain v. Ali Bakhsh, (1911) 9 I C 381.

4. Bur Singh v. Jodha Ram, 1926 Lah 542=95 I C 565.
5. District Board, Sargodha v. Shamas Din, (1930) 123 I C 83.
6. Ram Charan Lal v. Ghafoor, 1929 All 31=111 I C 816.
7. Ram Rup Agrahri v. Naik Ram, 1926 All 252=91 I C 865.
8. Ahmad Hussain v. Muhammad Fasiullah, 1929 All 455=74 I C 1039=45 All 432=21 A L J 319.

25 All 71 (9) and 26 All 327 (10), both followed in 102 I C 615 (11).

In my judgment the finding of the Court below, that the defendants-respondents had sufficient cause for not filing the appeal within the period of limitation on account of the erroneous practice prevailing in this District is correct, and must be upheld. I therefore find that the appeal before the lower appellate Court was filed within limitation. On the merits the lower appellate Court has disposed of the case by a finding of fact which is binding upon this Court in second appeal. The appeal is dismissed with costs.

B.D./R. K.

Appeal dismissed.

9. Tulsi Kanwar v. Gajraj Singh, (1902) 25 All 71=1902 A W N 203.
10. Hamid Ali v. Gaya Din, (1904) 26 All 327.
11. Gursaran Das v. District Board, Jullundur, 1927 Lah 884=102 I C 615=28 P L R 338.

A. I. R. 1936 Lahore 202

ADDISON, AG. C. J. AND DIN MOHAMMAD, J.

Shah Mohammad—Appellant.

v.

Mt. Pairi and others—Respondents.

Letters Patent Appeal No. 34 of 1935, Decided on 18th June 1935, from decree of Monroe, J., High Court, Lahore, D/- 8th January 1935.

(a) **Pre-emption — Owner of agricultural estate—Conversion of agricultural land into building site—Owner is deprived of all privileges which he previously enjoyed.**

The term "owner of the estate" as used in S. 15, Punjab Pre-emption Act imports ownership of agricultural land only and as soon as an area of land, which was admittedly agricultural before, is converted into a building site, it at once ceases to be a part of the estate and its owner, therefore, is deprived of all those privileges which he could otherwise enjoy under the law: *Case law discussed.*

[P 202 C 2; P 205 C 1]

(b) **Punjab Pre-emption Act (1 of 1913), Ss. 15, 16—Law of pre-emption deals with three kinds of immoveable property—Right of pre-emption differs in respect of them—It indicates that urban immoveable property is placed on different basis than other two.**

The law of pre-emption deals with three kinds of immoveable property, viz. agricultural land, village immoveable property and urban immoveable property. S. 15 provides the right of pre-emption in respect of the former two and S. 16 deals with this right in respect of urban immoveable property. The difference in the treatment of both the groups indicates that urban immoveable property was placed on a different basis from the other two classes of property so far as pre-emption was concerned. [P 205 C 2]

(c) **Punjab Pre-emption Act (1 of 1913), S. 16—Owner of urban immoveable property is**

not entitled to pre-empt the sale of agricultural land within limits of Multan town.

Where a person is owner of an urban immoveable property, he is not entitled to pre-empt the sale of agricultural land within the limits of Multan Town. [P 205 C 1, 2]

Gulam Mohi-ud-Din and Shabbir Ahmad—for Appellant.

Mehr Chand Mahajan and Nazir Ahmad—for Respondents.

Din Mohammad, J.—This is a Letters Patent appeal from the judgment of Monroe, J. The sole question for determination in this case is, whether an owner of a plot of land which was once agricultural land situated within the municipal limits of a town and was afterwards built upon, can still be deemed to be an "owner of the estate" within the meaning of S. 15 (c), thirdly, of the Pre-emption Act, so as to be entitled to pre-empt the sale of agricultural land situated within the same limits. The trial Judge found that the plaintiff could not pre-empt in these circumstances, and both the District Judge and the learned Judge of this Court have concurred in this finding. The answer to this question is not so easy as it appears to be at first sight. It is contended on behalf of the appellant that by merely building upon a piece of land which used to be agricultural land before, but which, in spite of the building, is still assessed to land revenue and is shown in the revenue papers as bearing a separate khasra number, its owner does not cease to be an owner of the estate, even though the land itself ceases to be agricultural land and assumes the character of "urban immoveable property." The respondent on the other hand maintains that the term "owner of the estate" as used in S. 15, Pre-emption Act imports ownership of agricultural land only and as soon as an area of land, which was admittedly agricultural before, is converted into a building site, it at once ceases to be a part of the estate and its owner, therefore, is deprived of all those privileges which he could otherwise enjoy under the law. On behalf of the appellant, reliance has been placed on 30 P L R 1918 (1), 1933 Lah 213 (2) and 1933 Pesh 33 (3).

1. Salamat Rai v. Kanshi Ram, 1918 Lah 334=45 I C 887=30 P L R 1918.
2. Chanan Din v. Chanan Din, 1933 Lah 213=141 I C 363=34 P L R 227.
3. Faqir Mahomed v. Kala Khan, 1933 Pesh 33=141 I C 643.

In 30 P L R 1918 (1), the land in suit was situated within municipal limits but still remained a part of the estate known as Premgarh village. It was found that the town itself had not extended so far. It was held by a single Judge of the Chief Court that the locality in question still remained a part of the village and did not become a part of the town. It was on this basis that it was further held that the plaintiff who had purchased a small plot of land assessed to revenue must be regarded as an "owner of the estate" within the meaning of the Pre-emption Act. This authority, therefore, is clearly distinguishable inasmuch as in the present case it is not denied that the land on the basis of which pre-emption is claimed is a part of the town. In 1933 Lah 213 (2), the land on the basis of which pre-emption was resisted was situated within the area of Mozang. The plot though described as Qabil tamir (suitable for building) had not yet been built upon. It was also assessed to land revenue. Tapp, J., held that:

The determining factor in such cases was whether the area in question was or was not assessed to land revenue. Its extent, situation and the purpose for which it was brought or to which it may be devoted were absolutely immaterial.

With all respect, we consider that this is too general a proposition of law to enunciate, as in all such cases it will be necessary to determine where the land on the basis of which the right of pre-emption is claimed or resisted, is situated and to which purpose it has been devoted. Even apart from this, as the plot of land dealt with in that case had not been built upon and had, consequently, not assumed the character of 'urban immoveable property', this authority will be of no use to us here.

In 1933 Pesh 33 (3) the land purchased was admittedly situated in a village and so was the land on the basis of which the suit for pre-emption was resisted. That precedent also does not help the appellant. The respondent, on the other hand, has grounded his contention on the following authorities: 73 I C 200 (4), 73 I C 855 (5), 87 P R 1890 (6),

4. Sher Ali v. Kalandar Khan, (1923) 73 I C 200.
5. Mahomed Ali Khan v. Makhan Singh, (1923) 73 I C 855.
6. Kishan Dayal v. Ali Rakhsh, (1890) 87 P R 1890.

42 P R 1906 (7), 57 P R 1906 (8), 90 P R 1907 (9), 84 P R 1910 (10), 109 P L R 1908 (11), 106 P R 1913 (12), 60 I C 580 (13), 1924 Lah 662 (14), 1927 Lah 799 (15) and 1929 Lah 164 (16). The cases of 73 I C 200 (4) and 73 I C 855 (5) are from Peshawar, and were both decided by Mr. Pison, J. C. In both it was held that any portion of an agricultural village may lose its character as such and become, by the force of circumstances, a suburb of a town and such a suburb was to be regarded as a sub-division of a town for purposes of pre-emption. This proposition is not denied in the present case. In fact, as stated above, it is admitted that the property on the basis of which pre-emption is claimed has assumed the character of urban immoveable property. But if these judgments intend to lay down that no agricultural land can exist within the limits of a town we are unable to endorse this proposition, as this will clearly go against the definition of urban immoveable property as given in S. 3, Pre-emption Act.

In 87 P R 1890 (6) the property in dispute consisting of shops and a chaubara was situated in a bazaar in the suburbs of Batala. Plaintiffs claimed pre-emption on the ground that they were co-sharers in Mauza Faizpur within the boundaries of which the land had been entered at the settlement that had taken place sometime before. It was found that the bazaar was built about 1868 on a site which was previously a graveyard adjoining one of the gates of Batala. In these circumstances, it was held by a Division Bench of the Punjab Chief Court that the property should be regarded as situated in a town. The character of the land in suit before us is clearly different from that of the

7. Adula v. Pannu Ram, (1906) 42 P R 1906.
8. Gulam Murtaza v. Rupa Mal, (1906) 57 P R 1906=100 P L R 1906.
9. Mahomed Din v. Shah Din, (1907) 90 P R 1907.
10. Allah Ditta v. Mahomed Nazir, (1910) 84 P R 1910=102 P W R 1910=7 I C 716.
11. Sham Sundar v. Sodhi Harbans Singh, (1908) 109 P L R 1908=78 P W R 1908.
12. Narain Singh v. Bhupal Singh, (1913) 106 P R 1913=20 I C 2.
13. Mahomed Said v. Shah Nawaz, (1921) 60 I C 580.
14. Diwan Chand v. Nizam Din, 1924 Lah 662=78 I C 991.
15. Mt. Kapuri v. Kanshi Ram, 1927 Lah 799=99 I C 1008.
16. Uttam Chand v. Khodaya, 1929 Lah 164=115 I C 417=80 P L R 516.

land in the reported case and this authority, therefore, cannot serve as a guide in the determination of the question at issue in the present case. Both 42 P R 1906 (7) and 57 P R 1906 (8) relate to Multan to which place the present suit belongs. In the former case, the subject of consideration was a suburb of Multan City known as "Taraf Ravi", and in the latter, was Mohalla Gidarpur which was a part of Bairum Pak Darwaza, admittedly a sub-division of the city of Multan. Beyond proving that certain suburbs had lately sprung up outside the walled limits of Multan, these authorities do not lay anything which can help us in the disposal of the present case.

In 90 P R 1907 (9), it was conceded that the quarter known as Killa Gujar Singh even to that day constituted a village and contained a village community. It was also found that within its boundaries there existed a fairly large area of agricultural land which was assessed to land revenue and there were also the ordinary village abadi, the ordinary village proprietary body, the ordinary village officers, a record-of-rights, etc.

It also admitted that Killa Gujar Singh in part retained its former character as a village community. It was however held that the land then in suit had for some time past become part and parcel of Lahore city and had lost its character of agricultural land. This judgment does help the respondents to some extent inasmuch as it lays down that even if agricultural land exists in an estate, it is possible for some part of that estate to lose that character or to assume that of urban immoveable property. In 84 P R 1910 (10), the abadi under consideration was the abadi jadid of the old village of Garhi Awan, a suburb of Hafizabad. It was held in that case that the abadi jadid must be looked upon as a subdivision within the meaning of the Punjab Pre-emption Act. It is not clear from the judgment however whether the site sold was assessed to land revenue or not. This authority, therefore, cannot serve as a good precedent in the case before us.

Similarly in 109 P L R 1908 (11), which was considered in 1933 Lah 213 (2), the land on which the claim was based was not assessed to revenue. In 106 P R 1913 (12) the pre-emption suit was in respect of house property in a village. Neither the vendor nor the vendee was

a member of the village proprietary body or had any status in the village otherwise than as a house-holder. The pre-emptor was a Jat proprietor and his claim was resisted on the ground that the vendee was an owner of the estate and in these circumstances, his right was equal to that of the pre-emptor. The claim was however decreed. On appeal a Division Bench of the Chief Court made the following observations:

It appears to us quite impossible to give strained interpretation to the term 'owner of the estate' as including owners of houses in the abadi, merely because the abadi may be technically part of the estate. We entertain no doubt that the law was intended to exclude mere house-holders, and we do not even think that a pedantically literal construction of the words 'owner of the estate' would justify an extension or application of the term in a manner which is so clearly opposed to the whole principle upon which the Pre-emption Act is based. To justify such construction we should have to read the words 'owner of the estate' as synonymous with the words 'owner in the estate' and we have no authority for doing so. We think that the proper view is to take the words used in their generally accepted meaning, as understood in Revenue literature and as connoting exclusively what is usually described as the proprietary body of the village.

We are in respectful agreement with this view and these observations will apply with much greater force to the case before us, as here the land on the basis of which the right of pre-emption is claimed, is not even village immoveable property, but urban immoveable property. In 60 I C 580 (13), a single Judge of this Court held that the mere fact that a plot of land is assessed to land revenue would not make it agricultural land, unless it is proved that the plot is occupied or let for agricultural purposes or for purposes subservient to agriculture. To the same effect is 1929 Lah 164 (16). This proposition, as has been remarked above, is not denied by the appellant. In 1924 Lah 662 (14), a Division Bench of this Court held that the expression 'village' connotes ordinarily an area occupied by a body of men mainly dependent upon agriculture or occupations subservient thereto. It was further observed that the reported cases contained many instances of rural areas in the vicinity of a town which had ceased to be rural and grown into a suburb of the town, and that such areas had been held to be governed by rules applying to urban properties. These remarks were quoted with approval in 1927 Lah 799 (15), but in

neither of the two cases it is clear that the land in suit was assessed to land revenue. We may remark in connection with these judgments that in excluding the possibility of the existence of agricultural land within the limits of towns they go beyond the scope of the Pre-emption Act.

The above analysis of the authorities cited on either side indicates that the trend of authority is in favour of the respondents. Even under the general scheme of the Act, the position maintained by them appears to us to be sound in law. The law of pre-emption deals with three kinds of immoveable property, viz., agricultural land, village immoveable property and urban immoveable property. These terms have been defined in S. 3, Pre-emption Act. 'Urban immoveable property' means immoveable property within the limits of a town, other than agricultural land. 'Village immoveable property' means immoveable property within the limits of a village, other than agricultural land. 'Agricultural land' means land as defined in the Punjab Alienation of Land Act, 1900. While dealing with the Pre-emption Act, therefore, we are concerned with these kinds of immoveable property only, namely, (a) immoveable property situated in a town, (b) immoveable property situated in a village and (c) agricultural land wherever it may be situated. S. 15, provides for the right of pre-emption in respect of agricultural land and village immoveable property, and S. 16 deals with this right in respect of urban immoveable property. This separate treatment of urban immoveable property indicates to some extent that it was intended by the Legislature to be placed on a different basis from the other two classes of property. Moreover, the word 'estate' as defined in the Punjab Land Revenue Act, in our opinion, applies to agricultural lands only and does not include any other class of property. As soon as agricultural land is converted into building sites, whether in a village or in a town, its owner so to say walks out of the estate and ceases to have any connection with it any longer. He establishes a new character for his possession and is, therefore, to be treated on that basis. To hold otherwise will be to go against the spirit of the Pre-emption Act. In these circumstances, we hold that the plaintiff being an owner of urban

immoveable property was not entitled to pre-empt the sale of the agricultural land within the limits of the Multan town. We, therefore, affirm the decision of the learned Judge of this Court and dismiss this appeal. In view of the peculiar circumstances of the case, we make no order as to costs before us.

R.W./V.V.

Appeal dismissed.

A. I. R. 1936 Lahore 205

ADDISON AND ABDUL RASHID, JJ.

Mt. Begum Bibi and another—Plaintiffs—Appellants.

v.

Raja and another—Defendants—Respondents.

First Appeal No. 101 of 1932, Decided on 4th November 1935, from decree of Sub-Judge, 1st Class, Sargodha, D/- 15th October 1931.

Custom (Punjab)—Succession—Ranjhas of Bhalwal Tahsil, Shahpur District — Self-acquired property of father—Married daughters do not exclude 3rd degree collaterals.

There is no custom among the Ranjhas of Tahsil Bhalwal of Shahpur District entitling married daughters to succeed to the self-acquired property of their father in preference to the collaterals of the third degree: 1920 *Lah* 9 and 1921 *Lah* 378, *Disting.* [P 205 C 2; P 206 C 2]

Khurshid Zaman—for Appellants.

S. R. Sawhney and Inder Deva—for Respondents.

Judgment.—The facts of the case, which have given rise to the present appeal, have been given in great detail in the remand order of this Court dated 13th November 1934, and it is unnecessary to repeat them here. The parties are Ranjhas by caste and belong to village Midh Ranjah, Tahsil Bhalwal, in the Shahpur district. The only question for determination in this appeal is, whether, according to the custom prevailing among the parties, the appellants, who are the married daughters of Ziada deceased, are entitled to succeed to his self-acquired property to the exclusion of his collaterals in the third degree. The Customary Law of the Shahpur district prepared by Sir James Wilson in 1896, contains the following provisions regarding the rights of daughters and their issue:

Q.—Under what circumstances are daughters entitled to inherit? Are they excluded by the sons or by the widow, or by the near male kindred of the deceased? If they are excluded by the near male kindred, is there any fixed limit

of relationship within which such near kindred must stand towards the deceased in order to exclude his daughters?

A.—All Musalmans.

A married daughter in no case inherits her father's estate or any share in it. An unmarried daughter succeeds to no share in presence of agnate descendants of the deceased, or of her own mother; but if there be no agnate descendants and no sonless widow, the unmarried daughters succeed in equal shares to the whole of their father's property, moveable and immoveable, till their marriage, when it reverts to the agnate heirs.

In view of the entries in the *riwaj-i-am* it was for the appellants to establish that they were entitled to succeed to the property in dispute to the exclusion of the respondents who are collaterals of the last male holder in the third degree. Reliance was placed by the learned counsel for the appellants on four instances which may be examined in detail :

1. Ex. P-7. Mt. Sahiban, a daughter of Mohammad Hayat, caste Jaurah, of Ghazni, Tahsil Shahpur, was given a decree by Sheikh Rukn-ud-Din, Subordinate Judge, 1st Class, on 31st May 1921, to the effect that she was entitled to succeed to the self-acquired property of her father in preference to the collaterals. The case was decided in favour of the daughter on the ground that, according to Art. 23 of Rattigan's Digest of Customary Law, the general custom in the province was that a daughter was preferred to the collaterals as regards the self-acquired property of her father. Reliance was also placed on 1 Lah 365 (1) wherein it was held that by custom a daughter was generally preferred to collaterals in succession to "self-acquired" property of her father. This ruling was also based on Art. 23, Rattigan's Digest of Customary Law. The provisions of the *riwaj-i-am* were not considered by the learned subordinate Judge nor was any attention paid to the observations of their Lordships of the Privy Council in 45 P R 1917 (2) to the effect that the entries in the *riwaj-i-am* were a strong piece of evidence, and it was for the party alleging a custom contrary to that contained in the *riwaj-i-am* to prove such custom.

2. Ex. P-8. This is a copy of an extract from the register of mutations relating to Mauza Sad Rahman in Tahsil Shahpur. It shows that a son-in-law of Amir Ali

Shah was allowed by the collaterals to retain possession of the property of Amir Ali Shah on the ground that he was a near relative of the collaterals and the deceased, and had been placed in possession of the property during the lifetime of Ghulam Fatima, the widow of the last male holder. In the present case it has not been alleged or established that the plaintiffs have been married to near relatives, or that any collaterals have consented that they should retain possession of their fathers' property. 3. Ex. P-4. In this case also the daughter of the last male holder was married to a first cousin of hers and her husband was, therefore, allowed an extra share, and the collaterals do not seem to have raised any objection to this arrangement. 4. It was held in 1 Lah 284 (3), that amongst the Sipras of Miana Hazaro, Tahsil Bhera, district Shahpur, a daughter was entitled to succeed to the self-acquired property of her father in preference to collaterals of the third degree. The decision was, however, based on para. 23 of Rattigan's Digest of Customary Law and it was stated that the general custom of the province was that daughters were preferred to collaterals. This decision is not of much assistance to the appellants as it is well settled now that a party cannot rely on the existence of an alleged general custom to discharge the onus cast upon it in view of the entries in the *riwaj-i-am*. The above mentioned four instances were the only instances relied upon by the learned counsel for the appellants. We, therefore, hold that the appellant, the married daughters of the last male holder, have failed to establish that they are entitled to succeed to the self-acquired property of their father in preference to the respondents. We, therefore, dismiss their appeal. Parties will bear their own costs in this Court.

S.R./R.K.

Appeal dismissed.

3. Ghulam Muhammad v. Gauhar Bibi, 1920 Lah 9=54 I C 419=1 Lah 284=10 P L R 1920.

A. I. R. 1936 Lahore 206

JAI LAL, J.

Jiram and others—Appellants.

v.

Lokram and others—Respondents.

Second Appeal No. 1543 of 1934, Decided on 25th October 1935.

1. Jainan v. Nur Mahomed, 1921 Lah 378=58 I C 793=1 Lah 365.

2. Beg v. Allah Ditta, 1916 P C 129=38 I C 354=44 I A 89=45 P R 1917 (PC).

Custom (Punjab) — Succession — Jats of Hissar District—Daughters are preferred to collaterals.

With respect to the self-acquired property among the Jats of Hissar District daughters are preferred as heirs to collaterals. [P207 C 1]

Jiwan Lal Kapoor—for Appellants.

N. C. Pandit, Shamair Chand, and Qabul Chand Mital—for Respondents.

Judgment.—The parties are Jats of village Jugan in the District of Hissar and the question for decision in this appeal is whether in respect of the self-acquired property of a male proprietor daughters are preferential heirs to collaterals. The learned District Judge has held that the daughters have a preferential right to succeed to such property but has granted a certificate under S. 41, Punjab Courts Act, to the appellants. In reply to question No. 57 proprietors of different tribes including the Jats stated that daughters had no right to succeed in preference to collaterals either in the case of self-acquired or of ancestral land. The compiler of the *riwaj-i-am*, however, was of opinion that this reply represented more the wish of the proprietors than actual facts. He gave instances of succession of daughters to the self-acquired property and could find no instance to the contrary in favour of the collaterals. There have been two subsequent cases in the subordinate Courts in which daughters have been preferred to collaterals, and a Division Bench of this Court in 9 Lah 496 (1) did not accept as correct the entry in the *riwaj-i-am* in the case of Rajput Mussalmans of Hissar. It is significant that the entry relied upon by the appellants is to be found only in the *wajib-ul-arz* prepared at the settlement of 1863 and though there have been two subsequent settlements the entry has not been repeated in the *wajib-ul-arz* prepared on those occasions. In view of what has been stated above, I have no hesitation in agreeing with the learned Additional District Judge that with respect to the self-acquired property among the Jats of Hissar District daughters are preferred as heirs to collaterals. I dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

1. *Kaman v. Ghafoor Ali*, 1928 Lah 280=109 I C 590=9 Lah 496=29 P L R 620.

A. I. R. 1936 Lahore 207

BACKET, J.

G. P. Sonawala—Plaintiff—Petitioner.
v.

Lahore Electric Supply Co. Ltd., Lahore
—Defendant—Opposite Party.

Civil Revn. No. 278 of 1935, Decided on 8th July 1935, from decree of Sm. C. C. Judge, Lahore, D/- 27th February 1935.

Company—Slight delay in according sanction for transfer of share—Company is not justified in paying dividends to non-members—Company is not liable for damages.

A slight delay in according sanction to a transfer of shares will not justify a payment of dividends to a person not yet entered as a member on the books of the company and such a delay will not make the company liable to an action for damages. [P 208 C 1].

Pratap Singh—for Petitioner.

Basant Krishan—for Opposite Party.

Order.—The petitioner purchased certain shares in the Lahore Electric Supply Company and applied for sanction to their transfer on 22nd and 23rd June, and 4th and 29th July 1933. His applications came up before a meeting of the Directors on 5th August 1933, and were accepted. In the meantime, the company had declared a bonus of Rs. 2, on each share on 29th July and this was paid out to the members, whose names appeared on the books of the Company on that date. The petitioner claims that the bonus should have been paid to him as the transfers had actually taken place before the bonus was declared. He sues the company for recovery of the amount thus calculated as due to him, less the amount that he has been able to recover from one of the transferors, or, in the alternative, for damages for the negligence of the company in failing to register the transfers as promptly as might have been done. The Judge of the Small Cause Court has dismissed the suit holding that the money was properly paid to the members whose names appeared on the books of the Company at the time the bonus was declared and that there was no unreasonable delay in having the transfers registered. The petitioner has applied for revision.

There was one meeting of the Directors which took place after the first three applications had been received. This was on 15th July. Apparently the papers came up before the Chairman on that

date, but he called for further particulars with the result that the applications were not laid before the other Directors until the next meeting. Counsel for the petitioners has cited a number of authorities to show that the failure to lay an apparently unobjectionable application for transfer before the next meeting may be considered undue delay for the purpose of admitting an application for rectification of the registers of a Company under S. 38, Companies Act. But he has not been able to put forward any authority for the proposition that a slight delay in according sanction to a transfer of shares would justify a payment of dividends to a person not yet entered as a member on the books of the Company, or that such a delay would make the Company liable to an action for damages. It is to be observed that the transferors have not been made parties to the suit. I do not think that there is any justification for interfering with the decision of the Small Cause Court, and I dismiss the application for revision with costs.

B.D./R.K. *Application dismissed.*

* A. I. R. 1936 Lahore 208

TEK CHAND AND DALIP SINGH, JJ.

Sher Mohammad Shahbaz Khan and others—Defendants—Appellants.

v.

Sher Mohammad Banne Khan and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 76 of 1935, Decided on 25th October 1935, from decree of Abdul Rashid, J., D/- 23rd March 1935.

* (a) Adverse Possession—Burden of proof—Plaintiff alleging dispossession—Defendant not bound to prove adverse possession.

It is not correct to say that in every suit for possession, where the plaintiff had established his title, it lies on the defendant to prove his adverse possession, even though the plaintiff had come into Court alleging his possession and dispossession: 1916 P C 21, *Explained*.

[P 209 C 1]

* (b) Adverse Possession—Vacant sites—Possession follows title—In vacant sites trespasser can get title only to area actually trespassed—Constructive possession of owner to unoccupied area is not affected—As regards area built upon, it must be shown that it was vacant within twelve years and then constructive possession will be presumed.

In cases relating to vacant sites, possession follows title and the mere fact that a trespasser has taken possession of a portion of a vacant site cannot affect the constructive possession of the real owner on the portion not trespassed

upon. In such cases, the wrong-doer can by lapse of time gain title only to the area actually possessed by him, and in suits governed by Art. 142, Limitation Act, it is only with regard to the portion of the site actually in possession of the trespasser that the plaintiff will be required to prove his possession within twelve years. As regards the portion actually built upon by the trespasser, the plaintiffs must show that this portion was a vacant site within twelve years of the suit, and if they succeed in proving this fact, their constructive possession within the statutory period will be presumed.

[P 209 C 1,2]

*Dwarka Nath Aggarwal—*for Appellants.

*Indar Dev for Achhru Ram—*for Respondents.

Tek Chand, J.—The plaintiffs brought a suit for possession of a vacant site situate in the abadi of Mauza Rurki Khas, about 9 marlas in area, alleging that they were the owners of the site but that the defendants had forcibly built a chhappar (or kotha) and a khurli about six months before the suit and had also planted a manure-heap there. The defendants denied the plaintiffs' title and alleged that they had been in possession for over 40 years. The Subordinate Judge found that the plaintiffs were the owners of the site, but dismissed the suit on the ground that they had failed to prove their possession within 12 years of the institution of the suit. On appeal by the plaintiffs the learned District Judge upheld the finding of the trial Court that title was with the plaintiffs, but holding that the defendants had failed to prove adverse possession, as the chhappar in dispute had been constructed seven years before the suit and the khurli was an unsubstantial structure, accepted the appeal and decreed the suit. The defendants preferred a second appeal to this Court but it was dismissed by Abdul Rashid, J., sitting in Single Bench. The learned Judge, following 1930 Lah 608 (1) and 1933 Lah 722 (2), held that on the facts found by the District Judge the case was governed by Art. 144. He however granted a certificate for a further appeal under the Letters Patent.

That the title in the site in dispute is with the plaintiffs has been concurrently found by the Courts below and is no

1. Daulu Mal v. Rawal Baksh, 1930 Lah 608=122 I C 81=31 P L R 231.
2. Ganpat Rai v. Har Dial, 1933 Lah 722=146 I C 725=34 P L R 1007.

longer disputed. It appears that there was litigation between the parties in 1892 when the question of title was raised and decided in favour of the plaintiffs. A decree for possession was accordingly passed in their favour and it was duly executed, and a dakhnama filed. It has been contended on behalf of the appellants, however, that as in the plaint the plaintiffs had alleged possession and dispossession within twelve years, mere proof of anterior title is not sufficient and that the plaintiffs must further prove that they had been in possession within twelve years of the suit. It has also been pointed out that the cases relied on by the learned Judge in Chambers have since been disapproved by a Full Bench of this Court in 16 Lah 442 (3). This is no doubt true. It was held by the Full Bench that in the two cases cited, the ruling of their Lordships of the Privy Council in 39 Mad 617 (4) had been given a much wider meaning than was warranted by the actual decision in that case, and that it is not correct to say that in every suit for possession, where the plaintiff had established his title, it lies on the defendant to prove his adverse possession, even though the plaintiff had come into Court alleging his possession and dispossession. The property in dispute in the case before the Full Bench was a residential house which was found to be in possession of the defendant and it was held that it lay on the plaintiff to establish his possession within twelve years of the suit. It must be held therefore that the present suit is governed by Art. 142 and not 144.

In the case before us however, the property in dispute was a taur, the major portion of which is still a vacant site. It is conceded by the plaintiffs' learned counsel, that in cases relating to vacant sites possession follows title. It is also well-settled that in such cases the mere fact that a trespasser has taken possession of a portion of a vacant site cannot affect the constructive possession of the real owner on the portion not trespassed upon. In such cases, the wrong-doer can by lapse of time gain title only to the area actually possessed by him, and

in suits governed by Art. 142, it is only with regard to the portion of the site actually in possession of the defendant that the plaintiff will be required to prove his possession within twelve years. It must be held therefore that qua the portion of the site which is still vacant, the suit has been rightly decreed. As regards the portion actually built upon by the defendants, the plaintiffs must show that this portion was a vacant site within twelve years of the suit, and if they succeed in proving this fact, their constructive possession within the statutory period will be presumed. Whether or not this has been proved in a particular case is a question of fact to be decided on the evidence. In the case before us, the lower Courts have given no finding on the point, but we do not think it necessary to remand the case for this purpose. We have allowed counsel to read to us the evidence, and after hearing him and taking into consideration the nature of the structures and their situation, have come to the conclusion that this portion of the site was vacant and unoccupied until about seven years before the institution of the suit, when the defendants constructed the kotha (or chhappar) on it. Therefore the plaintiffs' possession within twelve years of the suit on this portion also must be held proved.

I would accordingly hold that the suit is not barred by Art. 142 and has been rightly decreed. The appeal fails and is dismissed with costs.

Dalip Singh—I agree.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 209

AGHA HAIDAR, J.

Anant Ram—Plaintiff—Appellant.

v.

Ram Saran Das and others—Defendants—Respondents.

Misc. Appeal No. 2194 of 1934, 'Decided on 10th October 1935, from order of Dist. Judge, Gujranwala, D/- 13th August 1934.

Appeal — Dismissal for default — Judge sending notices of hearing of appeal to party and counsel—Counsel endorsing inability of attendance—Party not served—Appeal should not be dismissed for default.

When the Judge takes it upon himself to give notice of the hearing of appeal not only to the counsel but also to the party, he ought to, in ordinary fairness, wait until the notice is duly served upon the party, especially in view

8. Behari Lal v. Narain Das, 1935 Lah 475=157 I C 686=16 Lah 442 (F B).

4. Secy of State v. Chelikani Rama Rao, 1916 P C 21=35 I C 902=48 I A 192=39 Mad 617 (P C).

of the fact that his counsel had noted on the notice issued to him that he is unable to appear. Under the circumstances the Judge ought not to take the drastic step of dismissing the appeal for default and should restore the appeal. [P 210 C 2]

V. N. Sethi—for Appellant.

Shamair Chand—for Respondents.

Judgment.—An appeal before the learned District Judge of Gujranwala, was dismissed for default under O. 41, R. 17, Civil P. C., on 28th June 1934. An application was made by the appellant for the restoration of his appeal, but that application was dismissed on 13th August 1934. The plaintiff has filed an appeal to this Court from the order of 13th August 1934. The District Judge of Gujranwala does his appellate work mostly at the headquarters at Gujranwala but sometimes he goes to Gujrat to hear appeals. There were several postponements of the appeal in question and an order was made on 10th February 1934 fixing 28th June 1934 for the hearing of the appeal by the District Judge at Gujrat and the parties and their counsel were to be informed. On 16th June 1934 there was another order that the appeal would be heard on 28th June 1934 not at Gujrat but at Gujranwala and the parties and their counsel were to be informed by means of notices. By virtue of this order a notice was issued to Mr. Har Gopal, Bar-at-law of Gujrat, counsel for the appellant, whereby he was informed that he should appear on 28th June 1934 at Gujranwala for arguing the appeal. There is an endorsement on this notice by the counsel in these words: "I am engaged only for Sadr Gujrat, dated 23rd June 1934." A similar notice was issued on the same date to the appellant Anant Ram and he was also directed to appear at Gujranwala on 28th June 1934 when arguments were to be heard. The process-server made a report that Anant Ram was not to be found at his house, as he had gone to Jammu and Kashmir on some business and that it was not definitely known when he would come back and, therefore, service could not be effected upon him. The notice was accordingly returned unserved to the Court. This was also on 23rd June 1934. On the date of hearing the appellant was not present either personally or through counsel and, as already stated, the appeal was dismissed for default.

In dealing with the application for res-

toration the learned District Judge completely lost sight of the fact that a notice had been issued on 18th June 1934 not only to the counsel but to the appellant also and that that notice had been returned unserved as the party could not be found. He has disposed of the application for restoration solely on the ground that, because appellant's counsel had been informed and had not put in appearance, the order of dismissal was justified and the appeal could not be restored. In my opinion, when the District Judge took it upon himself to give notice of the hearing not only to the counsel but also to the party, he ought to have, in ordinary fairness, waited until the notice was duly served upon the party, especially in view of the fact that his counsel had noted on the notice issued to him that he was engaged only to argue the appeal at Gujrat. Under the circumstances detailed above, the learned Judge ought not to have taken the drastic step of dismissing the appeal for default and should have restored the appeal on the application of the appellant. After all, the client had done all that he could be reasonably expected to do and if his counsel refused to appear on his behalf, at least he should have been given an opportunity of being heard after notice had been duly served upon him. I therefore allow the appeal, set aside the order of the District Judge refusing to restore the case and remand the case to the Court of the District Judge to re-admit the appeal and to dispose of it according to law. I make no order as to costs.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 210

BHIDE AND CURRIE, JJ.

Amir Husain Shah and another—Plaintiffs—Appellants.

v.

Ghulam Baqir Shah and others—Defendants—Respondents

Second Appeal No. 1890 of 1931, Decided on 16th October 1935, from decree of Dist. Judge, Shahpur, D/- 8th July 1931.

Custom (Punjab)—Will—Wilson's Customary Law, Ss. 8 and 10—Shahpur District—Sayyeds cannot dispose of property by will on daughter's son.

Among the miscellaneous Musalman tribes including Sayyeds of the Shahpur district, there is no general power of devising property by will in favour of daughter's sons: 1921 Lah 210; 1925 Lah 231; 26 P R 1901; 1933 Lah 158 and 1935 Lah 208, Ref. [P 212 C 1].

Ram Chand Manchanda—for Appellants.

L. M. Datta—for Respondents.

Currie, J.—The facts leading to this second appeal may be briefly stated: One Mardan Shah made a gift of part of his land in 1909 to his daughter's sons, and subsequently, on 14th February 1910 executed two wills in their favour bequeathing to them his entire land after the death of his son's widow. The collaterals sued to contest the gift and obtained a decree in August 1913. About five months after the death of Mt. Jind Waddi the daughter's sons of Mardan Shah brought the present suit for a declaration that they were entitled to the entire property of Mardan Shah on the basis of the wills. Their suit was dismissed and the appeal was also dismissed. The only point to be decided in this appeal is the question whether a Sayyed of the Shahpur district can dispose of his ancestral property by will. In Wilson's Customary law of the Shahpur district the question of wills is dealt with in S. 8 at p. 63. All tribes answered that a proprietor could make a disposition of his property to take effect after his death but it must be made before trustworthy witnesses, and should, if possible, be in writing. Mr. Wilson noted that the custom of making wills was an entirely new one and contrary to the whole spirit of the tribal custom. In answer to Question 2 all tribes stated that so far as the power of bequest existed it was subject to numerous limitations and in no case exceeded the power of gift. We have therefore to refer to S. 10 which deals with the powers as to gifts. The answer to Question 11 is given in considerable detail and in the case of miscellaneous Musalmans, among whom Sayyeds would be included, the answer is to the effect that a father, whether having sons or not, can make to a daughter or sister a gift of part of his immovable property, not exceeding the share that would go to her by inheritance according to the Muhammadan law, but he cannot, without the consent of the agnates, make a gift to such relative of a larger share than this or of any part of the immovable property to a daughter's son, or son-in-law. This answer is entirely opposed to the appellant's claim. Counsel, however, argues that the answer to Question 12 is in his favour as in that question miscel-

laneous tribes and Awans stated that a proprietor having no son or son's son, can without the consent of the agnate heirs, make a gift of immovable property, ancestral or acquired, to persons not related to him. The answer to that question however deals with the general proposition while we are concerned with the case of a daughter's son which is dealt with clearly and in detail in the answer to Question 11.

The *riwaj-i-am* is therefore in my opinion definitely opposed to the claim of the appellant, and the question is whether there is any evidence to rebut that presumption. As regards the oral evidence reference was made to P. Ws. 6, 7, 8, 9 and 10. Their evidence is really of no value. The only helpful instances which they mention are instances which are still liable to be challenged in the Courts. While putting forward instances of gifts to daughters none of these witnesses are acquainted with any gift in favour of a daughter's son. Apart from this evidence Mr. Manchanda has referred to certain decided cases with which I will deal *seriatim*. In 26 P R 1901 (1) the parties were Awans and a will in favour of a daughter's son was upheld, the learned Judges quoting with approval Sir William Rattigan's remark:

The Customary law ordinarily recognises no distinction between the power of making verbal or written transfer of property *inter vivos*. Nor, *semble*, where an unrestricted power of transfer is recognised to exist, between a transfer *inter vivos* and one to take effect after death.

In 1921 Lah 210 (2) a gift to a non-relative among Harrals was upheld on the strength of the answer to Question 12 in the absence of any instances. In 1925 Lah 231 (3), a sale among Tiwanas was upheld on the ground that unrestricted power of alienation was mentioned in the *wajib-ul-arz* of three Tiwana villages. In 34 P L R 223 (4) in a very brief judgment a gift by a Bhatti (Nangiana) Rajput in favour of persons whom he alleged to be sons was upheld though the donees were held to have failed to disprove that relationship. In 16 Lah 656 (5) a mortgage

1. *Ali Mahomed v. Dulla*, (1901) 26 P R 1901=65 P L R 1901.
2. *Bahaduri v. Qadu*, 1921 Lah 210=60 I O 526.
3. *Sher Muhammad Khan v. Dost Muhammad Khan*, 1925 Lah 231=78 I O 451.
4. *Ghulam Ali v. Inayat Ali*, 1933 Lah 158=141 I O 389=34 P L R 223.
5. *Ali v. Ziada* 1935 Lah 208=158 I O 412=16 Lah 656=37 P L R 97.

executed by a Vains proprietor was upheld on the ground that as, in view of the answer to Question 12, a proprietor among the miscellaneous Musalman tribes had the power to make a gift he therefore had the power to make a mortgage. In addition in that case the wajib-ul-arz of the village showed that all the proprietors had unrestricted powers of alienation. From the above it will be seen that the only instance dealing with a will is that discussed in 26 P R 1901 (1). That case related not to Sayyeds but to Awans, a tribe who have exceptionally wide powers of alienation. In my opinion that instance cannot be held to apply to Sayyeds, especially as in the answer to Question 11, S. 10, miscellaneous Musalman tribes gave an answer different to that given by the Awans. Apart from the cases cited, the only other documentary evidence is the wajib-ul-arz of 1858 (Ex. D-3), in which it is stated that:

Pichhlags and the sons of an unwedded wife do not get a share, nor can a daughter get her father's property. If a proprietor gives a part or whole of his land to his daughter or adopted son in his lifetime by means of a Sanad and puts her or him in possession, she or he will certainly get it. If a daughter does not want to marry she will come into possession of her father's property. When she marries, her father's collaterals will perform her marriage. Then she will cease to have any concern with the property; the persons performing her marriage shall own it.

This document shows that there were restrictions on the gift to a daughter and no mention whatever is made of gifts to daughter's sons. To sum up, in my opinion there is nothing to rebut the presumption raised by the answer detailing the restrictions on gifts given in answer 11, S. 10, which must be held to apply to wills in lieu of the answer given to Question 2, S. 8. Those sections read together clearly show that, among the miscellaneous Musalman tribes of the Shahpur district, there is no general power of devising property by will in favour of daughter's sons. In my opinion the appeal was rightly dismissed by the learned District Judge and I would dismiss the present appeal with costs.

Bhide J.—I agree.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 212

JAI LAL, J.

Maghi Mal — Decree-holder — Appellant.

v.

L. Ganpat Rai — Judgment-debtor — Respondent.

Second Appeal No. 1060 of 1935, Decided on 14th November 1935, from order of Dist. Judge, Ferozepore, D/- 11th March 1935.

(a) **Appeal — Jurisdiction — Lower Court entertaining appeal though incompetent to hear it—Appeal lies to High Court on point of jurisdiction.**

Where the lower appellate Court has heard an appeal which it was not competent to entertain, it is open to the High Court to set aside the order entertaining the appeal, and therefore an appeal lies to High Court merely on the question of jurisdiction. [P 213 C 1]

(b) **Inherent jurisdiction—Court exercising inherent jurisdiction—No appeal lies.**

So far as Lahore High Court is concerned no appeal lies from an order passed by a Court in exercise of its inherent jurisdiction under S. 151, Civil P. C. [P 213 C 1]

(c) **Landlord and tenant—Refund.— Lessee paying to lessor's decree-holder—Lease failing—Lessee can get refund from decree-holder of lessor.**

Where the lessee pays money to decree-holders of the lessor on the basis of a lease which is subsequently set aside and through no fault of his, the lessee has a right to get a refund of the money from the person to whom he paid the money. [P 213 C 1]

Achhru Ram—for Appellant.

Qabul Chand—for Respondent.

Judgment.—There were three decrees against the same judgment-debtor. They were all being executed and, in the course of the execution proceedings, the judgment-debtor's land was farmed out to the respondent Ganpat Rai who paid the rateable shares to the other decree-holders out of the amount for which the judgment-debtor's land was leased to him. After the death of the judgment-debtor on the suit of a collateral, the lease was set aside having been held to be invalid. Ganpat Rai appealed from the decree of the trial Judge setting aside the lease which had been passed on 17th December 1925. The appeal was dismissed. He presented a second appeal in this Court which also was dismissed on 14th June 1930.

After having failed in all the Courts Ganpat Rai applied for refund to him by the other two decree-holders of the amounts realized by them. This applica-

tion was made admittedly within three years from the decree of this Court but beyond three years from the decree of the trial Judge, dated 17th December 1925. The Sub-Judge dismissed this application on the ground that it was barred by time and that he would not exercise his discretion under S. 151, Civil P. C., in favour of Ganpat Rai. An appeal was preferred to the District Judge before whom an objection was raised that from an order passed under S. 151 no appeal lay but the District Judge held that an appeal lay to him and finally held that the application was not barred by time and directed a refund by the other two decree-holders to Ganpat Rai. One of the decree-holders who has been ordered to make a refund has appealed to this Court and the objection is repeated that no appeal lay to the District Judge from an order passed by the Sub-Judge on an application under S. 151, Civil P. C. The respondent's counsel also has raised an objection that if it be held that no appeal lay to the District Judge it necessarily follows that no appeal lies to this Court, but there is ample authority that where the lower appellate Court has heard an appeal which it was not competent to entertain, as the order appealed against was not appealable, then it is open to this Court to set aside the order entertaining the appeal, and therefore an appeal lies to this Court merely on the question of jurisdiction.

It is true that there are cases decided in other High Courts that an appeal lies from an order passed under S. 151, Civil P. C., but so far as this Court is concerned it has consistently held that from an order passed by a Court in exercise of its inherent jurisdiction under S. 151, Civil P. C., no appeal lies: therefore the appeal before the District Judge was incompetent. The proceedings however are before me and I consider that this is a fit case in which I should set right the injustice done to the respondent Ganpat Rai by the illegal order passed by the trial Judge. It is obvious that Ganpat Rai is entitled to relief. He has paid money to the other decree-holders on the basis of a lease which has subsequently been set aside and through no fault of his. The interests of the three decree-holders in the lease were identical and it is therefore the legal right of Ganpat Rai to obtain refund of the money now that

the consideration has failed. Even if another suit lies it would be unfair to drive him to such a course if relief can otherwise be given to him.

But it is contended by Mr. Achhru Ram for the appellant that the application made to the Subordinate Judge was barred by time. He contends that Art. 181, Sch. 1, Lim. Act, governs the application. This proposition is not denied by the respondent but the question is from what date the time runs for an application made for the refund of the money under the circumstances. The appellant's counsel relies upon a judgment of the Full Bench of the Calcutta High Court reported in 56 Cal 61 (1). That case was however dissented from in 1933 Rang 180 (2). It is not however necessary for me to decide in which of the two cases the correct view has been taken. In my opinion in this case the facts are peculiar as the appeal to the District Judge and to the High Court against the decree setting aside the lease was preferred by Ganpat Rai in the common interest of all the three decree-holders, including the appellant. It must therefore be assumed that all the three decree-holders were trying to maintain the lease up to the decision by the High Court, and it was only when they had failed in attaining that object that the right of Ganpat Rai to obtain refund from the other decree-holders came into existence. In these circumstances this case is distinguishable from 56 Cal 61 (1). In my opinion therefore the application was not barred by time, and I set aside the order of the Subordinate Judge and direct that Maghi Mal do pay Rs. 357-11-0 to Ganpat Rai, and Devi Dayal to pay Rs. 123 to Ganpat Rai. Parties to bear their own costs.

B.D./R.K.

Order accordingly.

1. Hari Mohan v. Parmeshwar Sahu, 1928 Cal 646=117 I C 543=56 Cal 61 (FB).
2. Muthu Karuppan Chettiar v. Annamalai Chettiar, 1933 Rang 180=149 I C 889=11 Rang 275.

A. I. R. 1936 Lahore 213

ADDISON, AG. C. J. AND DIN

MOHAMMAD, J.

Basant Singh—Petitioner—Appellant.

v.

Kartar Singh and others—Objectors—Respondents.

First Appeal No. 1471 of 1933, Decided on 18th June 1935.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 8, 7 (1)—Person describing property as private one and not claiming to be hereditary office-holder is not entitled to file petition under S. 8.

A person claiming a property as his private property and investing it with a sectarian character can under no straining of language be described as an office holder attached thereto, much less a hereditary office holder. Moreover, if a person wishes to claim the benefit of the section, he must expressly assert that the place is a Gurdwara and that he holds any hereditary office attached to it. If he does not do so but describes the property as his own private property and never claims to be an office-holder, he is not competent to file petition under S. 8.

[P 214 C 2]

(b) Practice—Appellate Court—Evidence already on record—Appellate Court can itself weigh and discuss it and need not remand case for finding on such point.

The appellate Court need not send the case back to the lower Court merely for the purpose of obtaining a finding on the evidence that already exists on the record which the appellate Court itself can weigh and discuss. [P 214 C 2]

Bhagat Singh—for Appellant.

Gurcharan Singh—for Respondents.

Din Mohammad, J.—This is an appeal from the order of the Sikh Gurdwaras Tribunal. It has arisen out of a petition presented by one Basant Singh under S. 8, Sikh Gurdwaras Act (8 of 1925). A declaration having been made that the place in dispute is a Sikh Gurdwara, Basant Singh has appealed. A preliminary objection has been taken that neither did the petition lie nor does the appeal, inasmuch as Basant Singh is not a hereditary office holder within the meaning of S. 8, Sikh Gurdwaras Act. Under S. 2 (4) (iv) "hereditary office holder" means the holder of an office, the succession to which, before 1st January 1920, devolved, according to hereditary right or by nomination, upon the office holder for the time being. Under S. 2 (4) (i) "office" means any office by virtue of which the holder thereof participates in the management or performance of public worship in a Gurdwara or in the management or performance of any rituals or ceremonies observed therein. When a notification is published under the provisions of sub-s. (1), S. 7 in respect of any Gurdwara, a petition can be presented under S. 8 either by a hereditary office holder or by any twenty or more worshippers of the Gurdwara. In order to set the law in motion therefore if the worshippers do not move in the matter, the person moving must be the holder of

an office by virtue of which he participates in the management or performance of public worship in a Gurdwara or in the management or performance of any rituals therein and that that office must be one the succession to which before 1st January 1920 devolved, according to hereditary right or by nomination, upon the office holder for the time being.

In the petition presented on 28th October 1921, Basant Singh claimed to be the "owner and possessor" of the Dharamsala. In his statement before the issues, he averred that the place in suit was his residential house and that it was not a Dharamsala. In his statement as a witness for himself the only modification that he introduced was that he asserted that he was a Granthi, but he described the property as the house all the same. It is evident therefore that neither in his pleadings nor in his statement before or after the issues, he claimed to be a hereditary office holder within the meaning of S. 8 read with S. 2 (4). A person claiming a property as his private property and investing it with a sectarian character can under no straining of language be described as an office holder attached thereto; much less a hereditary office holder. Moreover, if a person wishes to claim the benefit of the section, he must expressly assert that the place is a Gurdwara and that he holds any hereditary office attached to it. Not having done so, the plaintiff was not competent to lodge the petition and consequently has no locus standi to present the appeal. Counsel for the appellant has asked for a remand on the ground that the Tribunal has failed to give a finding on this point but, in view of the fact that the petitioner's status was definitely challenged by the objectors on this ground and the parties were represented by counsel before the Tribunal and led evidence on all the points raised, we do not consider it necessary to accede to this request, and send the case back to the lower Court merely for the purpose of obtaining a finding, from the Tribunal, on the evidence that already exists on the record, and which we can ourselves weigh and discuss. We are satisfied that the appellant does not fulfil the requirements of law and accordingly hold that the appeal by him is incompetent.

We dismiss the appeal but, in view of the fact that the Tribunal left that mat-

ter undecided, although it was raised before them, we do not burden the appellant with costs of the respondents before us.

K.S./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 215

AGHA HAIDAR, J.

Lok Nath—Defendant—Appellant.

v.

(Firm) *S. Gopal Singh Hira Singh*—
Plaintiffs—Respondents.

Second Appeal No. 1128 of 1935, Decided on 25th October 1935, from decree of Addl. Dist. Judge, Lahore, D/- 1st April 1935.

Contract—Wager—Nature of transaction—
Court should gather intention of parties from surrounding circumstances besides contract.

In order to determine whether a contract is a wagering contract, the Court will not only look at the terms of the written contract, but also probe among the surrounding circumstance to find out the true intention of the parties. These surrounding circumstances could only be proved by evidence outside the written contract. Courts will have to look behind the form of the contract to the real intention of the parties, which may be gathered from the oral evidence and actual transactions between them: *Universal Stock Exchange Ltd. v. David Strachan*, (1896) A C 166; 1921 Cal 362 and 1917 P C 101, Foll.; 24 Bom 227, Disting. [P 215 C 2]

Shamair Chand and Prakash Chandra
—for Appellants.

Achhru Ram—for Respondents.

Judgment.—This is a defendants' appeal arising out of a suit for the recovery of a sum of Rs. 670. The plaintiffs came into Court alleging that they were pucca arhtias, that they had been making purchases for and on behalf of the defendants and that, as a result of these transactions a sum of Rs. 670 was due by the defendants to the plaintiffs. A number of points were raised by the defendants on which issues were struck and findings were recorded. In the end the plaintiffs' suit was decreed by the trial Court. The defendants went up in appeal to the lower appellate Court and the appeal was dismissed. The defendants have now come up to this Court in second appeal and have sought to challenge the findings of the Court below only on one issue. This issue arose on the plea that the transactions between the parties were of a wagering character and therefore under the provisions of S. 30, Contract Act, no suit was maintainable for re-

covery of the sums due under them. The contract between the parties is embodied in a printed document which prominently provides: "It is distinctly understood and agreed by us that actual delivery is contemplated." The case for the defendants was that this provision did not preclude them from leading evidence to show the real nature of the transactions. The lower appellate Court, however, has held that in the face of this clear provision as regards actual delivery no evidence could be given to show that no actual delivery was intended and that the transactions between the parties were of a wagering character.

In appeal counsel for the defendants has argued in this Court that the lower appellate Court was in error in not permitting them to prove from evidence outside the actual written document what the real transactions between the parties were, and that, on the evidence which they have already given, they could establish that the intention of the parties was that no delivery was to be made and that the transactions in suit were mere badni or wagering transactions. Counsel has relied upon 24 Bom 227 (1). In that case also the terms of the contract were incorporated in a printed form. The learned Judges held that, in order to determine whether a contract is a wagering contract, the Court will not only look at the terms of the written contract, but also probe among the surrounding circumstances to find out the true intention of the parties. These surrounding circumstances could only be proved by evidence outside the written contract. To the same effect is the decision reported as 64 I C 809 (2) at p. 813. That was a Letters Patent appeal from the decree of a Single Judge of the Calcutta High Court sitting on the original side and the Division Bench presided over by Sir Asutosh Mookerjee and Sir Ernest Fletcher, after referring to 42 Bom 373 (3), observed as follows:

We have to look behind the form of the contract to the real intention of the parties, which may be gathered from the oral evidence and the actual transactions between them.

1. *Doshi Talakshi v. Shah Ujamsi Velsi*, (1900) 24 Bom 227=1 Bom L R 786.
2. *Bisseswar Lal Kedia & Co. v. Basir Ali*, 1921 Cal 862=64 I C 809=33 O L J 533.
3. *Bhagwan Das Paras Ram v. Burjorji Rut-tonji Bomanji*, 1917 P C 101=44 I O 264=45 I A 29=42 Bom 878 (P O).

The learned Judges referred to the leading House of Lords case (1896) A C 166 (4). These cases support the contention of the appellants. Reliance was placed on behalf of the respondents on 42 Bom 373 (3). This case, however, is of no assistance to the respondents. In fact their Lordships in this case have observed that certain intentions which the defendant pleaded had not been proved and that it had not been shown that there was any bargain or understanding between the parties, either express or implied, that the goods were not to be delivered. It would thus appear that their Lordships were of the opinion that evidence can be led in order to prove the real nature of the transactions. In my opinion the decision of the Court below on this point was erroneous. I therefore set aside the decision of the lower appellate Court on this point and remand the case to that Court to decide the question as to whether the transactions were wagering or not. The question whether the defendants should be allowed to lead further evidence is left to the Court below to decide : it may take further evidence or decide the case on the evidence already recorded. The plaintiffs shall be allowed to lead relevant evidence in rebuttal. The case shall be disposed of by the Court below according to law. The remand is under S. 151, Civil P. C. Court-fee on the memorandum of appeal shall be refunded. Other costs shall abide the event.

B.D./R.K.

Order accordingly

4. The Universal Stock Exchange Ltd. v. David Strachan, (1896) A C 166=65 L J Q B 428=60 J P 468=44 W R 497=74 L T 468.

A. I. R. 1936 Lahore 216

BHIDE AND CURRIE, JJ.

Santa Singh and others—Objectors—Appellants.

v.

Puran Das and others—Petitioners—Respondents.

First Appeal No. 323 of 1935, Decided on 11th October 1935, from decision of Sikh Gurdwara Tribunal, Lahore, D/- 16th November 1934.

Sikh Gurdwaras Act (8 of 1925), S. 16 (2), (3)—No evidence that institution is established by Sikhs for worship—Grants containing no reference to worship—Fact that Sikhs donated to the institution is not sufficient to establish the institution as Sikh Gurdwara.

Where there is no reliable evidence whatsoever to show that the institution in dispute had been established for public worship by the Sikhs and the grants that were made to the institution were by way of charity and contained no reference to any public worship, it cannot be held to be established that the institution was founded for public worship by the Sikhs. Mere fact that the institution was given grants of land by a Sikh Sardar and Sikh Princess and that it was named after a Nirmala Sadh cannot be held to be sufficient to establish that the institution was founded for public worship by the Sikhs. The grants may very well have been made only for charitable purposes. Such institution cannot be declared as a Sikh Gurdwara. [P 218 C 1]

Jhanda Singh and Bhagat Singh—for Appellants.

Indar Dev and Achhru Ram—for Respondents.

Bhide, J.—Certain Sikh worshippers presented a petition to the Local Government under S. 7, Sikh Gurdwaras Act, for a dharamsala, situated in the town of Jagraon in the Ludhiana district, and known as Dharamsala Nikka Singh, being declared a 'Sikh Gurdwara'. One Puran Das thereupon presented a counter-petition under S. 8 of that Act claiming that the so-called Gurdwara was really an akhara and was used by him for residential purposes. On the matter coming before the Sikh Gurdwaras Tribunal the Sikh objectors contended that Puran Das had no locus standi to present a petition under S. 8 and secondly that the institution was in fact a Sikh Gurdwara. Both these issues were however decided against the objectors by a majority of the Tribunal and from this decision they have preferred the present appeal. As regards the question of the locus standi of the petitioners the contention of the learned counsel for the appellants was that according to the petition of Puran Das himself the Dharamsala in question was used by him for his residential purposes, that in the circumstances he could not be said to be an 'hereditary office-holder' and he was therefore not competent to present any petition under S. 8. It is true that the petition was not happily worded, but it was supplemented by a statement of the Mukhtar of the petitioner in Court in which it was admitted that certain Smadhs were worshipped by the Udasis in the dharamsala and that this had been done by the predecessors of Puran Das also. At the time of the arguments also it appears to have been admitted by the learned counsel for the

objectors that the succession of Mahantship had been from Guru to Chela and this issue was not seriously pressed. In the circumstances, I see no force in this technical objection.

The main issue between the parties was whether the institution in question was a Sikh Gurdwara. The appellants relied on S. 16 (2), (3), Sikh Gurdwaras Act, according to which it was necessary for them to prove that the institution was established for public worship by the Sikhs and was so used right up to the time of the presentation of the petition. There is no direct evidence as regards the establishment of the institution. The earliest documentary evidence relevant for the purposes of this issue is available from the enquiry made at the time of the first settlement of the Ludhiana District in 1847-51. It appears that 25 ghumaons of land in Jagraon and 4 ghumaons of land in a village called Bardeke in that district had been given as muafi to the institution by Sardar Fateh Singh. A patta relating to one of these grants dated Sambat 1874 (1817 A. D.) was produced (vide Ex. O-13) and this shows that 25 ghumaons in Jagraon town were granted as dharamarth (by way of charity) to Bhai Ram Das and the grantee was enjoined to pray for the welfare and prosperity of the donee. There is no reference in the patta to any institution or any public worship. The patta relating to the other grant of land at Bardeke was apparently not forthcoming. In the course of the enquiry Harsaran Das, who was the then Mahant of the Dharamsala, and several other persons were examined. They all stated that the Dharamsala was used as the resting place by travellers and that such travellers were fed from the income of the muafi land. None of the witnesses examined referred to any recital of the Granth Sahib or any other form of public worship at the Dharamsala.

The learned counsel for the appellants urged that this may have been due to the fact that no direct question was put to the witnesses on this point; but this does not appear to be correct, because there were certain questions put to the witnesses in reply to which reference to public worship, if it existed, might have been expected. For instance, the witnesses were asked for what purpose the land was granted as muafi. But that all

that they stated in reply was that it had been granted for charitable purposes: see for example, Exs. P-36, P-37, P-38, etc. In two instances direct questions were apparently put as to what was in the dharamsala, and in those cases the witnesses, namely, Mula, patwari, and Harsaran Das himself stated that there were idols (thakars) in the dharamsala (vide Exs. O-14 and P-30). If the Granth Sahib had been worshipped or recited in the Dharamsala at the time, it seems inconceivable that a reference to it would have been omitted by these witnesses. About the year 1886 Harsaran Das died and enquiry was again made as regards the continuation of the muafi. In the course of this enquiry the witnesses examined, including Puran Das, petitioner, no doubt, stated that Granth Sahib was recited at the Dharamsala; but this was more than thirty years after the enquiry made at the first settlement and it cannot be presumed merely on the basis of the statements of these witnesses that the Granth Sahib had been recited or worshipped at the Dharamsala from the very outset, and that the institution had been established for public worship by the Sikhs.

There was another enquiry made in connection with the Jagir of certain land situated in the village Jalwana in the Patiala State about the same year and during the course of that enquiry also the witnesses stated that the Granth Sahib was being read at the institution. These statements stand on no better footing than those made in the course of the enquiry after the death of Harsaran Das in the Ludhiana District. It may be mentioned however that the pattas relating to the Jagir of land in the Patiala territory, which were produced in the course of this enquiry, also do not show that the institution was originally established for the purposes of public worship. The earliest patta was Ex. P-21, dated 7th Sawan, Sudi 7, Sambat 1842, (corresponding to 1785 A. D.). This merely states that the village Jalwana was given by way of charity to Bawa Sangat Das, Gharib Das (one of the predecessors of Puran Das, petitioner) and Jai Singh, and these grantees were only enjoined to pray for the prosperity of the grantor. The second patta (Ex. O-4) is dated Phagan Badi 5, Sambat 1853 (corresponding to 1796 A. D.).

This refers to the grant of the village Jalwana as well as certain other properties to Bawa Nikka Singh and Nirmala Sadhs. There is no direct reference to Gharib Das or any predecessor of Puran Das in this patta and this document also throws no light on the nature of the institution in dispute at its inception.

Before his death Harsaran Das made a will in the year 1875 by which he appointed Puran Das as his successor. Harsaran Das has given detailed instructions for the guidance of his successor in this will, but there is no reference in it to any recital or worship of the Granth Sahib. If the institution had been established for public worship by the Sikhs, Harsaran Das could not have omitted to refer to the fact in this important document. It will appear from the above that there is no reliable evidence whatsoever to show that the institution in dispute had been established for public worship by the Sikhs. The earliest pattas of land given by way of Muafi or Jagir merely show that these grants that were made to the then incumbents of the institution by way of charity and contain no reference to any public worship. At the time of the enquiry of 1850 also no reference was made by the witnesses to any public worship or recital of the Granth Sahib as already stated. In the circumstances the appellants cannot be held to have established that the institution was founded for public worship by the Sikhs. The learned counsel relied mainly on the fact that the institution was given grants of land by a Sikh Sardar and a Sikh Princess and that it was named after Bawa Nikka Singh who was apparently a Nirmala Sadh; but these facts alone cannot be held to be sufficient to establish that the institution was founded for public worship by the Sikhs. The grants may very well have been made only for charitable purposes as the pattas referred to above indicate, and the reading of the Granth Sahib may have been started by the Mahant in comparatively recent times—possibly with a view to attract worshippers and as a source of income.

It is noteworthy that as a result of the enquiry made in the Ludhiana district at the first settlement, the grant of land in that district was taken to be of a personal character and was limited to the life of the then incumbent only. In

addition to these facts, it must also be remembered that the Dharamsala is situated not in a Sikh village but in Jagraon town, which contains a heterogeneous population with a preponderance of banias and traders, and no inference can therefore be drawn that the Dharamsala must have been meant for the use of the Sikhs. The circumstances of the present case are similar to those in 1934 Lah 277 (1), and in that case also, in spite of the fact that the Granth was being read in the institution since 1880, it was held that it was not established that the place had been originally intended for public worship by Sikhs. In view of the above findings it is unnecessary to refer to the oral evidence, which refers mainly to the recital or worship of the Granth Sahib in the Dharamsala in comparatively recent times and is of no help in arriving at any finding as to the origin of the institution. I agree with the conclusion of the majority of the Tribunal that the institution in dispute has not been proved to be a Sikh Gurdwara and would accordingly dismiss this appeal with costs.

Currie, J.—I agree.

B.D.

Appeal dismissed.

1. Puran Singh v. Mela Singh, 1934 Lah 277 = 150 I C 259.

A. I. R. 1936 Lahore 218

RANGI LAL, J.

(Court of Wards) Guru Amarjit Singh
—Plaintiff—Appellant.

v.

Dharamsala Darwaza Kitni — Defendant—Respondent.

Second Appeal No. 784 of 1934, Decided on 28th February 1935, from order of Dist. Judge, Jullundur, D/- 26th February 1934.

(a) Custom (Punjab) — Adoption — Custom requiring adoptee to be of same got—It can be shown that stranger also could be adopted.

Where the general rule of custom as regards adoption is that a person outside the got of the adopter cannot be adopted, it is open to a person to prove that a stranger could also be adopted under certain circumstances.

[P 219 C 2]

(b) Custom (Punjab) — Adoption — Jats of Jullundur District—Person outside got cannot be adopted.

Among the Jats of Jullundur district, the general rule of custom is that a person outside the got of the adopter cannot be adopted: 50 P R 1893; 1920 Lah 393 and 415; 94 P R 1913; and 1926 Lah 654, Ref. [P 220 C 1]

(c) Custom (Punjab)—Adoption — Right to adopt — Adopter cannot ignore custom by merely adopting Dattaka form of adoption.

A person making an adoption under Hindu law cannot ignore the custom by which he is governed merely by adopting the Dattaka form of adoption. The effect of the ceremony would be to transplant the adoptee into the adoptor's family, but the eligibility of the adoptee would still be governed by Hindu law modified by custom. [P 220 C 1]

Mehr Chand Mahajan, Durga Das and Achhru Ram—for Appellant.

Badri Das—for Respondent.

Judgment.—On 8th November 1905, one Dogar Singh Jat, who was an occupancy tenant under the Guru of Kartarpur, mortgaged an area of 37 kanals 7 marlas out of his tenancy to Dharamsala Kitni Darwaza through Gurditta Mal. On 18th February 1924, Dogar Singh adopted a stranger, named Gurdial Singh as his son in the Dattaka form and executed a deed of adoption which was duly registered. On 5th September 1925 Dogar Singh executed a deed of release in respect of the whole of his tenancy in favour of the landlord. On 16th September 1929, Dogar Singh died. On 10th August 1931, the Court of Wards on behalf of the then Guru of Kartarpur sued for possession of the land mortgaged to Dharamsala Kitni Darwaza on the allegation that the mortgage was extinguished because Dogar Singh had died without leaving any heirs under S. 59, Tenancy Act. The suit was resisted on the allegation that Gurdial Singh, the adopted son of Dogar Singh, was a male lineal descendant within the meaning of S. 59, Tenancy Act. The trial Judge held in favour of the mortgagee and dismissed the suit. On appeal Mr. Marten, District Judge, held that the adoption was invalid and decreed the claim. On further appeal to the High Court it was conceded that a Jat governed by Customary law could make a full Hindu law adoption as distinct from the customary appointment of an heir. The case was, however, remanded because Mr. Marten had not decided whether a Jat could adopt a non-agnate even with full Hindu law ceremonies. The case was then heard by Mr. Cornelius and he held that the adoption was valid according to Hindu law. The result was that the suit was dismissed. The plaintiff has appealed to this Court. The relevant *riwaj-i-am* entry is as follows :

As a general rule the person adopted is selected from collaterals, the nearer collateral being

given preference. The selection is made of a person of the same tribe and got as the adopter.

The learned District Judge held that this rule of Customary law was "not mandatory or invariable but merely of an advisory nature." He further held that the plaintiff was not competent to plead that the adoption was invalid because the person adopted was not a collateral and did not belong to the same got as the adopter and that such a plea could be raised only by a person who considered himself to have a better right to adoption than the person actually adopted. I am clearly of opinion that the view taken by the learned Judge on both these points is erroneous. As for the second point, the mortgagee says that he is entitled to remain in possession because Dogar Singh had left a 'male lineal descendant,' and he is, therefore, bound to prove this allegation. He can succeed only if he establishes that the adoption of Gurdial Singh was valid and that the latter was thereby transplanted into the family of the adopter. The landlord in this case has not sued to challenge the adoption. He comes into Court on the allegation that the tenancy has been extinguished, and there is no bar to such a suit on his part. As regards the eligibility of Gurdial Singh there is no doubt that under Hindu law even a stranger can be adopted, but the question is how far Hindu law has been modified by custom in this case. The custom which governs Dogar Singh in this matter is stated in the *riwaj-i-am* entry mentioned above. This entry cannot be brushed aside with the remark that the rule laid down therein is merely of an advisory nature.

The general rule of custom is stated to be that a person outside the got of the adopter cannot be adopted. It is, of course, open to a person to prove that a stranger could also be adopted under certain circumstances. In the present case no attempt whatever was made to prove such a custom. In 50 P R 1893 (1), which was a case from the Jullundur district, it was held by a Full Bench of the Chief Court that generally—creed, tribe and locality apart—when a sonless man in any land-holding group which recognises a power to adopt, asserts that he is competent to adopt a daughter's son or other non-agnate in presence of near

1. *Ralla v. Budha*, (1893) 50 P R 1893 (FB).

agnates, irrespective of their assent, the presumption at the outset is against the power. In 1 Lah 15 (2) it was held that the adopted son, on whom the onus lay, had failed to prove that by custom among Jats of Mauza Manko, in the Jullundur district, the adoption of a brother's daughter's son is valid. 1 Lah 31 (3) was a case from the Hissar District and it was held that the onus of proving that the adoption of a stranger is valid by custom among Jats of that District rests on the adoptee and that the onus had not been discharged in that case. In 94 P R 1913 (4), it was held that according to the custom of Jats in the Jullundur District the defendant, upon whom the onus lay, had failed to prove that by that custom a daughter's son could be validly adopted. In 8 Lah 48 (5), which was a case from the Hoshiarpur district, where the *riwaj-i-am* was similar to that of the Jullundur district, it was held that a person of a got different to that of the adopter could not be adopted. In *Ratigan's Digest of Customary Law*, para. 35, remark 1, at p. 69, Edn. 10, it is stated that at any rate for the eastern and central districts of the Punjab the general custom is against the adoption of a person of a different got.

In view of all these authorities and the clear provisions of the *riwaj-i-am* and in the absence of any evidence to the contrary it is idle to contend that the adoption of Gurdial Singh was valid. It was not open to Dogar Singh to ignore the custom by which he was governed merely by adopting the Dattaka form of adoption. The effect of that ceremony would be to transplant the adoptee into the adopter's family but the eligibility of the adoptee would still be governed by Hindu law as modified by custom. It has not even been contended that the custom stated in the *riwaj-i-am* did not apply to Dogar Singh. I am, therefore, of opinion that the appeal must succeed and the plaintiff's suit must be decreed. The learned counsel for the appellant also brought to my notice that in another case of the same nature against another

mortgagee Gurdial Singh was impleaded as a defendant and it was held on 28th February 1933, that the adoption was invalid, and that there had been no appeal from that decision. It would appear that this decision was given almost a year before Mr. Cornelius decided the case and still no reference was made to it before him. It is doubtful whether under these circumstances the appellant should be allowed to make use of that decision in this Court. It is unnecessary to consider what the effect of that decision would be on this case. I accept the appeal and decree the claim with costs throughout.

R.W./R.M.

*Appeal accepted.***A. I. R. 1936 Lahore 220**

BACKET, J.

Sadhu Ram—Defendant—Appellant.

v.

Pirthi Singh & Co. — Plaintiffs—Respondents.

Second Appeal No. 319 of 1935, Decided on 19th June 1935, from order of Dist. J., Ambala, D/- 29th November 1934.

(a) **Hindu Law — Guardianship — Joint family—Mother is natural guardian of separate property of minor after father's death—Joint family property can be brought under guardianship in absence of adult member.**

There can be a guardian of the separate property of a minor in the joint Hindu family. After the death of the father, the mother is the natural guardian of the separate property of her minor children; and it is only the minor's share in the coparcenary property which cannot be brought under guardianship so long as there is an adult member of the coparcenary alive. If there is no adult member of the coparcenary even the joint family property can be brought under guardianship. Mother can therefore be the guardian of the property of the minor under certain circumstances.

[P 221 C 1, 2]

(b) **Custom (Punjab)—Special custom—Rajputs of Jagadhri Tahsil of Ambala District—Mother is natural guardian of property of her minor sons.**

Among Rajputs of the Jagadhri Tahsil of the Ambala District, the mother is the natural guardian of the property of the minors, whether she is regarded as such under Hindu law or special custom.

[P 221 C 2]

(c) **Transfer—Partition is transfer.**

Partition is a transfer as defined in the T. P. Act: 1923 *Mad* 577 and 97 *IC* 70, *Rel on*; 54 *I C* 146=1920 *Mad* 20, held overruled [P 222 C 1]

Shamair Chand and Qabul Chand—for Appellant.

Asa Ram Aggarwal—for Respondents.

2. *Jamiat Singh v. Ujagar Singh*, 1920 Lah 393 =55 *I C* 838=1 Lah 15=71 *P L R* 1920.

3. *Moman v. Mt. Dhanni*, 1920 Lah 415=55 *I C* 869=1 Lah 31=72 *P L R* 1920.

4. *Rulia v. Wariam Singh*, (1913) 94 *P R* 1913=20 *I C* 454.

5. *Jholi v. Khazana*, 1926 Lah 654=96 *I C* 749 =8 Lah 48.

Judgment.—The plaintiffs were originally joint owners of the land in dispute along with the defendants or their predecessors. A private partition of this land was carried out during their minority. They now allege that the partition was not to their benefit and seek to have it set aside. Both the lower Courts are agreed that the less valuable part of the land was given to the plaintiffs and that the partition was not for their benefit. The only question which now has to be decided is whether the suit is within time or not; and this depends on whether the partition is to be regarded as a transfer made by a duly constituted or natural guardian on behalf of the plaintiffs. Art. 44, Lim. Act, provides that a suit by a ward, who has attained majority, to set aside a transfer of property by his guardian, must be brought within 3 years of the date of his attaining majority; and there is a finding of fact that both the plaintiffs attained majority more than 3 years before the present suit was brought. The mother of the plaintiffs attended the mutation proceedings and expressed her assent to the partition on their behalf. The trial Court found that the mother was the natural guardian of the plaintiffs under the Customary Law, by which the parties are bound and that the suit was governed by Art. 44. The plaintiff's claim was accordingly dismissed. In first appeal the learned District Judge held that the plaintiffs must be taken as constituting a joint Hindu family, in spite of the fact that they were Rajputs following Customary law, and that there could be no guardian of a joint Hindu family. From this he concluded that the case was not governed by Art. 44. The plaintiffs were accordingly granted a decree against which the defendants have come up in second appeal.

The learned District Judge is in error in supposing that there can be no guardian of the separate property of a minor in a joint Hindu family. After the death of the father, the mother is the natural guardian of the separate property of her minor children; and it is only the minor's share in the coparcenary property which cannot be brought under guardianship so long as there is an adult member of the coparcenary alive. If there is no adult member of the coparcenary, even the joint family property can be brought under guardianship. It is not correct

therefore to suppose that the mother could in no circumstances be the guardian of the property of the minor plaintiffs. Under the Customary Law which they follow, they succeeded to the land in suit as tenants-in-common and not as members of a coparcenary body. Under Hindu law their shares will have to be regarded as their separate property, and their mother would be their guardian in respect of this property. Both the lower Courts have accepted the proposition that the mother of the plaintiffs would also be the guardian of their property under Customary Law. This seems to me doubtful, if we refer to the answer to question 24 in Mr. Whitehead's Digest of the Customary Law of the Ambala District. When questioned in 1887, the tribes generally replied that the mother was the next guardian after the father, both of the person and of the property. At attestation however Rajputs denied this and merely gave the mother a right to be consulted by the male relatives. When further questioned, the Rajputs stated that there was no fixed custom when a widow wanted her own brother to act as guardian and that each case was decided on its own merits when a dispute arose. A custom is supposed to be certain; and it seems to me that there is very little certainty about the reply couched in these terms, which seems rather to refer to the conditions under which a minor's land may be transferred than to an act of guardianship.

If there is no special custom however we must revert to Hindu law under which the mother is the guardian of the property of her minor children; and this is actually in accordance with the custom now recorded in the local *riwaj-i-am* for the Jagadhri Tahsil, where the parties reside. In these circumstances, it appears to me that the mother was the natural guardian of the plaintiffs, whether she be regarded as such under Hindu law or special custom. She must be regarded as the guardian of the plaintiffs, at the time when the mutation took place. It is contended however that a partition cannot be regarded as a transfer. There is some authority for this in 54 I C 146 (1), but this has since been overruled by a Division Bench of the same Court in 72 I C

1. *Indoji Jithaji v. K. Rama Charlu*, 1920 Mad 20=54 I C 146.

978 (2), and again in 97 I C 70 (3) and it seems now to be generally accepted that a partition is a transfer as defined in the Transfer of Property Act. For these reasons I am of opinion that the lower Court was right in holding that the present suit was barred by Art. 44, Lim. Act, as a suit to set aside a transfer made by a guardian. I accept the appeal and dismiss the suit with costs throughout.

R.W./R.M.

Appeal accepted.

2. *Rasa Goundan v. Arunachella Goundan*, 1923 Mad 577=72 I C 978=44 M L J 513.

3. *Ramaswami Chettiar v. Rathamuthu Thevar*, (1926) 97 I C 70.

A. I. R. 1936 Lahore 222

COLDSTREAM AND ABDUL RASHID, JJ.

Mt. Bibo—Defendant—Appellant.

v.

Sampuran Singh — Plaintiff and another—Defendant—Respondents.

First Appeal No. 1942 of 1934, Decided on 4th July 1935, from decree of Senior Sub-Judge, Lyallpur, D/- 30th July 1934.

(a) **Fraudulent Transfer—Suit for declaration that gift by person to his wife is fraudulent and fictitious—Onus of proving that donor was in embarrassed circumstances lies on plaintiff**

In a suit for a declaration that the gift by a person to his wife is fraudulent and fictitious, having been effected to defraud the donor's creditors, the onus of proving that the donor was in debts or in embarrassed circumstances lies on the plaintiff. [P 223 C 2]

(b) **Fraudulent Transfer — Voluntary settlement by person owing no debts in favour of wife or children cannot be set aside merely because some years later it defeats or delays subsequent creditors.**

In a case where debts are actually due to a creditor who challenges the gift at the time of the transfer, the intent to defeat or delay creditors will be presumed; if however there are no debts at the time of the transfer and transferor runs into indebtedness subsequently, the presumption will be regulated by circumstances of each case. A voluntary settlement by a person who owes no doubts at the time, in favour of the children for natural love and affection or in favour of his wife as a provision for her future maintenance cannot be set aside merely because some years afterwards it is proved to have the effect of defeating or delaying subsequent creditors: 1927 *Lah* 420, *Rel. on*; 1924 *Mad* 779; 1930 *All* 610, 1930 *Lah* 217 and 1927 *Mad* 656; *Disting.* [P 224 C 1]

(c) **Fraudulent Transfer — Wife securing gift in her favour as provision for future maintenance — Donor not shown to be in debts or in embarrassed circumstances at time of gift—Transaction does not amount to**

transfer made with intent to defeat or delay creditors.

Where a wife, in order to safeguard herself against the future improvidence of her husband who is a spend-thrift, secures a gift of property in her favour as a provision for her future maintenance and the donor is not shown to be in debt or in embarrassed circumstances at the time of the gift, such a transaction cannot be held to be a transfer made with intent to defeat or delay the creditors of the transferor. 23 *Bom* 146; 2 *All* 809; 26 *Bom* 577 and 1931 *Oudh* 134, *Rel. on*; 1924 *Mad* 779; 1930 *All* 610; 1930 *Lah* 217 and 1927 *Mad* 656, *Disting.* [P 224 C 2]

Charanjiva Lal Aggarwal—for Appellant.

Badri Das and Vishnu Datt—for Respondents.

Abdul Rashid, J.—Ghulam Muhammad, an Arain of Chak 243 in Lyallpur district owned two squares of land, Nos. 107/2 and 40/39, as well as some 12 ghumaons at his original home in Ludhiana. On 12th June 1924, he reported that he had gifted the square No. 107/2 to his wife Mt. Bibo in lieu of her dower. When this gift was to be recorded by mutation in the revenue records objection was taken by one Ahmad Khan, who declared that Ghulam Muhammad had contracted to sell this land to him and his brother Ghulam Muhammad Khan and had actually received Rs. 7,000 of the price, that he was in possession of the land under a written lease for 8 years for an annual rental of Rs. 800, and that the gift had been made to avoid performance of the contract. The Revenue Assistant sanctioned this mutation in favour of Mt. Bibo noting in his order that the objectors should seek their remedy in the civil Court. It is not disputed that this square of land along with the other had been leased to Ahmad Khan and his brother in April 1924, and that Ghulam Muhammad had agreed to sell the land to them. On 21st May 1926, Ghulam Muhammad brought a suit to have the gift declared invalid, and he obtained a declaration to this effect, on 16th November 1926, from the Senior Sub-Judge, Lyallpur. Mt. Bibo appealed to the High Court where, in accordance with a compromise between the parties, Ghulam Muhammad's suit was dismissed on 23rd December 1929. Meanwhile on 31st January 1929, Sampuran Singh the present appellant, had taken square No. 107/2 on a mortgage from Ghulam Muhammad on the strength of the declaration granted by the Sub-Judge. On 1st October 1929

Sampuran Singh sued Ghulam Muhammad to recover a debt of Rs. 1,354-13-0. He was given a decree on 8th March 1930, and in execution of it attached square No. 107/2. The executing Court, however, released the land finding it to be Mt. Bibo's property.

On 9th July 1930 Sampuran Singh sued Ghulam Muhammad and Mt. Bibo in the Senior Sub-Judge's Court for a declaration that the gift of square No. 107/2 by the former to the latter in 1924 was fraudulent and fictitious having been effected to defraud Ghulam Muhammad's creditors. When examined by the Judge Mt. Bibo stated that the gift had been made because otherwise the property could not be saved. Thereupon the Senior Sub-Judge forthwith granted Sampuran Singh the decree he sought. Against this decree Mt. Bibo appealed. The Appeal No. 563 of 1931 was dealt with by a Division Bench of this Court on 24th January 1934, with the result that it was accepted and the case remanded for re-decision after framing the issues arising out of the pleadings. It was pointed out in the judgment that though Mt. Bibo's statement on which the suit had been decreed was somewhat ambiguous it was not inconsistent with her case, that all she meant to say was that her husband was a spendthrift and was wasting his property, and therefore to save the land in dispute it was gifted to the appellant. The Senior Sub-Judge has re-decided the suit in favour of the plaintiff finding that the gift was made with intent to defeat Ghulam Muhammad's creditors. Mt. Bibo has appealed.

The learned Sub-Judge has come to his conclusion that the gift was to defeat Ahmad Khan to whom Ghulam Muhammad owed about Rs. 7,000, that although Ghulam Muhammad may have had property enough to meet his liability at the time, there is a presumption that his object was to defeat future creditors arising from the fact that when he reported the gift to the patwari he was unable to assign any reason for it except that it was in lieu of dower and in order to induce his wife to look after him faithfully (he had some affliction of the eyes), that the gift was stated to be for life only, that possession was never given to Mt. Bibo, that the compromise in the High Court was prompted by Sampuran Singh's suit to recover Rs. 1,354-13-0, that Mt. Bibo's

statement that the gift was in lieu of her dower was untrue, and that Mt. Bibo had admitted that it was to save the property. The first question for decision in this appeal is, whether Ghulam Muhammad owed any debts at the time of making the gift of one square of land in favour of his wife on 12th June 1924. The onus of proving that the donor was in debt or in embarrassed circumstances at the time lay heavily on the plaintiff. In my opinion, he has utterly failed to discharge this onus. Wazir Khan, plaintiff's own witness, stated that Ghulam Muhammad was indebted to his uncle Ghulam Ahmad in an amount of Rs. 6,000 or 7,000 before the gift was made. He however added that before the making of the gift Ghulam Muhammad had leased out his two squares of land to Ghulam Ahmad in lieu of the debt.

It is therefore established by the evidence of the plaintiff that Ghulam Muhammad did not owe any money to Ghulam Ahmad on 12th June 1924. Wazir Khan further states that so far as he knew Ghulam Muhammad did not owe any other debt except the debt of Ghulam Ahmad mentioned above at the time of the gift. It is true that Ghulam Muhammad, in his statement before the issues, admitted that when he made the gift he was under a debt amounting to Rs. 4,000 or Rs. 5,000. It appears however that this merely refers to the alleged debt due to Ghulam Ahmad in lieu of which Ghulam Muhammad had leased out his squares of land to Ghulam Ahmad for a period of eight years. It must also be remembered that at the time of the gift Ghulam Muhammad owned one square of land in addition to the square which forms the subject-matter of the present litigation, and that this square was sold to Wazir Khan on 1st June 1928, for Rs. 14,000. He also owned 12 ghumaons of land in the Ludhiana District, a part of which was subsequently mortgaged for a sum of Rs. 7,500. At the time of making the gift therefore the donor was in fairly affluent circumstances in so far as his property was worth at least Rs. 30,000, and he owed Ghulam Ahmad Rs. 6,000 or 7,000 in lieu whereof he had leased his squares of land for eight years. When in June 1928, Ghulam Muhammad sold one square of land for Rs. 14,000, the entire debt due to Ghulam Ahmad, was deducted from the sale price, and the

square which had been taken on lease by Ghulam Ahmad was relinquished. In 1927-28, therefore, Ghulam Muhammad cannot be said to have been in embarrassed circumstances. The debt due to Sampuran Singh, defendant, was not incurred till the end of 1928 or the beginning of the year 1929. The debt due to Kartar Singh (P. W. 5) was not contracted till December 1927. It appears that for three years after the making of the gift Ghulam Muhammad did not owe any money to any of his creditors so far as the present record is concerned.

It was pointed out by Tek Chand, J. in 8 Lah 544 (1) that in a case where debts were actually due to the creditor who challenged the gift at the time of the transfer, the intent to defeat or delay creditors will be presumed, whereas if there were no debts due at the time of the transfer and the transferor ran into indebtedness subsequently, the presumption will be regulated by the circumstances of each particular case. It was further observed that a voluntary settlement, by a person who owes no debts at the time, in favour of his children for natural love and affection cannot be set aside merely because some years afterwards it is proved to have the effect of defeating or delaying subsequent creditors. The trial Court has relied on 1924 Mad 779 (2), 1930 All 610 (3), 1930 Lah 217 (4) and 1927 Mad 657 (5). The facts of each of these cases were, however, very different from the facts of the present case. In both the Madras cases a suit had already been filed by the creditor before the alienation, which was sought to be impeached, had taken place. In those circumstances it was held that the alienation could be successfully challenged if it had the effect of defeating or delaying creditors. In the Allahabad case also litigation was actually pending at the time of the alienation in question. In 1930 Lah 217 (4) the following observations were made by Jai Lal, J.:

I have no quarrel with the proposition that it

1. Muhammad Ishaq v. Muhammad Yusuf, 1927 Lah 420=101 I C 172=8 Lah 544=29 P L R 114.
2. Rajagopala Chetty v. Sivagami Ammal, 1924 Mad 779=82 I C 945.
3. Ram Das v. Debu, 1930 All 610=128 I C 436=1930 A L J 1278.
4. Bhamba Ram Girdharilal v. Ram Pyara Mal, 1930 Lah 217=116 I C 716.
5. Meenakshi Ammal v. Amman Ammal, 1927 Mad 657=101 I C 610.

is not necessary for a person, who asserts that a transfer is fraudulent, to prove that he was a creditor on the date when the document was executed or the transfer was made, if there were other creditors in existence who were intended to be defrauded by the transfer, but as I have already stated in the present case, there were no creditors except those who were satisfied out of the funds raised by the plaintiff.

This case is, therefore, of no assistance to the plaintiff. The circumstances established on the present record show that at the time of the making of the gift the appellant's object was merely to make a provision for the future maintenance of his wife. If his object had been to defeat or delay creditors, he would not have impeached the gift in favour of his wife in the year 1926. It was realised by Ghulam Muhammad as well as his wife in 1924 that the former was a spendthrift, and it was in order to safeguard herself against the future improvidence of her husband that the wife secured a gift in her favour. Such a transaction cannot be held to be a transfer made with intent to defeat or delay the creditors of the transferor. Reference may be made in this connexion to 23 Bom 146 (6) at p. 156 where the following observations occur:

It appears to me that the lower Court of appeal did not correctly apprehend the true nature of the release transaction. The property sought to be protected by the release was admittedly ancestral property, and Vaman's minor son had a half share in it, of which the minor could at any time claim partition. The release was only intended to protect Vaman's one half share against the consequences of his own improvidence. When all existing debts were paid off and settled, Vaman's right to make a voluntary conveyance of the same in his minor son's interest cannot be questioned. Such conveyances are well known in English law, and there have been cases in India also where Courts have given effect to such voluntary conveyances or gifts by a father to his son: 2 All 809 (7). Such transactions do not become colourable merely because, in their ultimate consequences, they may have the effect of protecting the family property against the prospective extravagance of the settlors, or because no adequate consideration is shown to have been paid by the party benefited.

In 26 Bom 577 (8) at p. 585 it was observed that a transaction in favour of a wife cannot be regarded as fraudulent merely because the wife secures a settlement from her husband for the protec-

6. Sadashiv v. Trimbak, (1899) 23 Bom 146.
7. Ganga Sahai v. Hira Singh, (1878-80) 2 All 809 (F B).
8. Ebrahim v. Fool Bai, (1902) 26 Bom 577=4 Bom L R 180.

tion of the family and for the correction of her husband's evil habits. A dedication by the husband in favour of his wife can be regarded as fraudulent at the instance of subsequent creditors only if the gift was made with the clear object of defeating those creditors by embarking on a course of reckless extravagance or starting a hazardous business soon after the making of the gift. It was held in 1931 Oudh 134 (9), that when a person executes a deed of waqf in favour of his sons and a subsequent creditor brings a suit for a declaration that the deed was executed fraudulently in order to defeat and delay the creditors, the crucial question is one of intention to defraud the creditors for setting aside the deed at the instance of the plaintiff, and the fact that all the creditors existing at the date of the deed had been paid off before the institution of the suit even though it may not be conclusive, affords a very strong evidence negating the intention to defraud. Kartar Singh undoubtedly stated that in 1927 when he advanced Rs. 1,500 to Ghulam Muhammad he was indebted to several other persons. He could not however give the name of a single one of Ghulam Muhammad's creditors and further added that in 1927 he knew that Ghulam Muhammad could pay all his debts by selling one square of land.

The trial Court has rightly held that the gift must be taken to have been completed on 12th June 1924, and that it cannot be held that a new gift was made to the wife on 16th October 1929, when the compromise deed was written for the purpose of the appeal pending in the High Court. In this view of the matter, we have to consider whether the gift made on 12th June 1924, was a transfer made with intent to defeat or delay the creditors of the transferor, and the financial position of the donor in June 1924 has to be taken into consideration in determining whether S. 53, T. P. Act, is applicable to this transaction. For the reasons given above, I would accept this appeal, set aside the judgment and decree of the Court below, and dismiss the plaintiff's suit with costs throughout.

Coldstream, J.—I agree.

R.M./R.K.

Appeal allowed.

9. Zahir Ahmad Khan v. Debi Dayal, 1931 Oudh 184=129 I O 333=6 Luck 397=7 O W N 1115.

A. I. R. 1936 Lahore 225

BHIDE, J.

Gilani Bakhsh—Defendant—Appellant.

v.

Behari Lal and others—Plaintiffs and another Defendant—Respondents.

Second Appeal No. 1734 of 1934, Decided on 20th May 1935, from decree of Dist. Judge, Gujranwala, D/- 11th July 1934.

Punjab Alienation of Land Act (13 of 1900), S. 6—Mortgages existing on property before coming into force of Act—Mortgages carrying no interest—Subsequent deed after Act to same mortgagee purports to create charge but interest payable under it—Third mortgage held to be no fresh mortgage but only additional charge on property and did not contravene provisions of Act.

The land in dispute had already been mortgaged by two deeds before the Act came into force. The third deed was executed after that Act came into force and unlike the prior mortgages, interest was payable under this:

Held: that the mere fact that the third mortgage carried interest was not sufficient to hold that there was any fresh transfer or interest in the land as the terms of the original mortgage by which interest in the land was transferred to the mortgagee were unaffected and a no new relationship has been brought about by the 3rd deed and as such mortgage was not a fresh one but only an additional charge on the same land and did not contravene the provisions of Alienation of Land Act: 1932 *Lah* 465 (F B), *Foll.*; 1921 *Mad* 514, *Appr.* [P 226 C 1, 2]

Har Bhajan Das—for Appellant.

Nawal Kishore—for Respondents.

Judgment.—The plaintiff in this case sued for possession of certain land on the basis of three mortgages executed in his favour on different dates. The first two mortgages were for Rs. 600 and Rs. 400 respectively and were executed in the years 1886 and 1896. These two mortgages are not disputed. The third one was for a sum of Rs. 99 and was executed by a deed dated 4th March 1927. The first two mortgages did not carry interest but the third carried interest at Rs. 2 per cent per mensem. Part of the property was sold on 13th July 1927 for Rs. 5,000 and a sum of Rs. 1,500 was deposited with the vendee for payment to prior mortgagees. Out of this sum Rs. 900 were paid to the plaintiff but the plaintiff claimed that he was entitled to a much larger sum on the basis of the third mortgage deed for Rs. 99 which carried interest at Rs. 2 per cent per mensem as stated above. The defendant's conten-

tion was that this third mortgage for Rs. 99 was void inasmuch as it contravened the provisions of the Punjab Alienation of Land Act and also that it could take no effect as against the sale in favour of the defendants which was made by a registered document. The trial Court upheld the objection of the defendant as regards the invalidity of the mortgage under the Punjab Alienation of Land Act and dismissed the plaintiff's suit. On appeal the learned District Judge however held that the deed for Rs. 99 only created an additional charge on the land and it could not be said to contravene the provisions of the Punjab Alienation of Land Act. In support of this view it relied on 13 Lah 660 (1). The main point for consideration is whether the view taken by the District Judge is correct.

There is no doubt that the land in dispute had already been mortgaged by two deeds, of the years 1886 and 1896 before the Punjab Alienation of Land Act came into force. The third deed for Rs. 99 only was executed after that Act came into force, but it purports to create only an additional charge on the same land. The contention of the learned counsel for the appellant is that it is tantamount to a fresh mortgage inasmuch as the previous deeds carried no interest, while the third deed carries interest at Rs. 2 per cent per mensem. This fact in itself does not appear to me to be sufficient to hold that there was any fresh transfer of interest in the land. It was held by Wallis, C. J. in 66 I C 554 (2), that a document which gives immovable property as security for the satisfaction of a debt without transferring any interest in the property, merely constitutes a charge on the property, and is not a mortgage. In the present instance all that was done in 1927 was that a debt of Rs. 99 carrying interest at Rs. 2 per cent per mensem was made a charge on the land in dispute which was already under mortgage with the defendant. The terms of the original mortgage by which interest in the land was transferred to the mortgagee were unaffected. The mere variation as regards interest does not appear to me to constitute any substantial change in the terms of the original mortgage. It was remarked by the Full Bench

in the case referred to above: 13 Lah 660 (1), at p. 667:

If, for instance, the new transaction purports to cancel the earlier one, or contains conditions substantially different from those contained in the original mortgage, or an additional area of land is included in the security, there can be no doubt that the old mortgage is at an end and a new and wholly different relationship between the parties has been brought into existence, to which *ex necessitate rei* the provisions of the Punjab Alienation of Land Act will be attracted. Similarly if the new transaction raises the aggregate mortgage-money to a figure in excess of the value of the land, it will really be a sale, though ostensibly given the form of a mere advance on the old security. In each case, therefore, the Court has to determine the true nature of the transaction, and if it finds that in reality and substance it is a new mortgage or a sale, the transaction will be within the mischief of the Act and the Court will refuse to enforce it.

Bearing these principles in mind it seems to me that in the circumstances of the present case a mere additional term as to interest is not sufficient to justify the transaction of the year 1927 being treated as a fresh mortgage. The next contention urged by the learned counsel for the appellant was that the vendee had notice of the mortgage of 1927 and is therefore bound thereby. On this question the learned District Judge has found after consideration of all the evidence that it is not proved that the vendee had any notice of the previous mortgage. This is a question of fact and the finding of the learned District Judge on the point must be treated as final. I accordingly uphold the decision of the learned District Judge and dismiss the appeal with costs.

K.S./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 226

MONROE, J.

(Firm) Pars Ram Brij Kishore —
Appellants.

v.

Jagraon Trading Syndicate, Ltd. Jagraon—Respondents.

Misc. First Appeal No. 542 of 1935, Decided on 22nd June 1935, from order of Dist. Judge, Ludhiana, D/- 10th January 1935.

(a) Companies Act (1913), S. 156 — Shares forfeited for non-payment of call—Even such share-holder is subject to new liability created by S. 156 and he is liable as past member but not for interest.

Even where a share-holder forfeits the share by non-payment of call, he is still subject to a new liability, created by S. 156, Companies Act,

1. Sher Singh v. Daya Ram, 1932 Lah 465=139 I C 49=13 Lah 660=33 P L R 847 (F B).

2. Ramasami Iyengar v. Kuppusami Iyer, 1921 Mad 514=66 I C 554.

for payment of the amount unpaid on the shares in respect of which he is liable as past member. But his liability is limited to the amount unpaid on the shares but not to interest: 1916 All 317; 1933 P C 63 and 1935 Lah 335, Rel. on. [P 227 C 2]

(b) **Company**—Calls made by company but not paid—If such debts are time-barred, even liquidator cannot recover them.

Where calls made by a company are not paid and their recovery by the company is time-barred, the liquidator can have no higher rights than the company and as such he also cannot recover them: 1916 All 317, Foll. [P 227 C 2]

Madan Gopal and Shamair Chand—for Appellants.

Nawal Kishore—for Respondents.

Judgment.—This is an appeal from an order of the District Judge, Ludhiana, for the payment by the appellants of Rs. 1,650, the amount of a call on shares in the respondent company together with Rs. 92½ interest and costs. The appellants were share-holders in the company and a call was made on 17th July 1928: the shares were forfeited for non-payment of the call on 15th February 1930 and the company went into voluntary liquidation on 30th June 1930, and by an order of this Court of 11th November 1932, the liquidation was ordered to continue under the supervision of the Court and further proceedings were ordered to be taken in the Court of the District Judge, Ludhiana. The appellants were placed on the list of "B" contributories and having refused to comply with the liquidator's demand for payment, these proceedings were instituted under S. 187, Companies Act, 1913, which gives power to make calls on and order payment thereof by contributories to the extent of their liability for payment of the debts and liabilities of the company and also for the adjustment of the right of the contributories amongst themselves.

The argument for the appellants is that the claim sought to be enforced by these proceedings is for the payment of a debt in respect of these calls and that their claim is barred by limitation; and I think that if the liquidator was forced to rely on the debt created by the call on the shares and the forfeiture of them, this argument would prevail. The argument for the liquidator is that his claim is not on foot of the debt, but is for contribution under S. 156, which it is well-settled, creates a new liability. It cannot be contested that the appellants are within the terms of S. 156: the only

question which might have arisen is whether existing members are unable to satisfy their contributions, but the District Judge has gone into the accounts and has found that the liabilities cannot be met from the existing members. In my opinion the appellants are clearly subject to a new liability, created by S. 156, for payment of the amount unpaid on the shares in respect of which they are liable as past members; and they have been called on to pay an amount in respect of this sum in accordance with the Act. The point now raised by the appellants was raised and considered in 38 All 347 (1), where it was said:

We entirely agree with the contention put forward by the appellant's counsel that so far as the recovery of the original debt based upon calls made by the company, which has become time barred, is concerned, the liquidator has no higher right than the company. The company could not sue for those calls; no more can the liquidator.

But it was held nevertheless that the member was liable for unpaid calls and his liability was enforced in summary proceedings under the Act. The only distinction between that case and the present is that the present appellants have ceased to be members by reason of the forfeiture of their shares; but as I have indicated above, in the circumstances of the present case, this fact does not help them. 38 All 347 (1) was noticed by the Privy Council in 54 All 1067 (2), and was followed by a Division Bench of this Court in 1935 Lah 335 (3); the latter case arose in the liquidation of the respondent company and the facts are on all fours with those of the present case. One further point arises whether the appellants are liable for interest: the District Judge has allowed it, applying provisions of the Articles of Association, and if the debt created by the original call were now being claimed, interest would clearly be payable under the contract; but as the liability is created by S. 156, it must be measured by the terms of that section, which limits the claim to the amount unpaid on the shares in respect of which the contributory is liable;

1. Jagannath Prasad v. U. P. Flour and Oil Mills Co. Ltd., 1916 All 317=35 I O 159=38 All 347=14 A L J 349,
2. Hans Raj v. Dehra Dun Mussoorie Electric Tramway Co., 1933 P C 63=142 I O 7=60 I A 13=54 All 1067 (P C).
3. Jagraon Trading Syndicate, Ltd. v. Manakchand Roshan Lal, 1935 Lah 335=156 I O 951.

in my opinion the amount unpaid refers to capital only.

I should like to add that during the arguments there appeared to be some ground for the case presented by the appellants; it was not alleged in the petition that the existing members were unable to satisfy the contributions required to be made by them in pursuance of the Act, and in the argument my attention was not drawn to the finding of the Judge on this point and though there is a reference to S. 156 of the Act in the title of the petition, the frame of the petition as a whole indicates that the amount claimed is the old debt arising from the earlier calls and not the liability created by S. 156. I allow the appeal in part and vary the order by striking out the interest directed to be paid. In view of the partial success of the appeal and the lack of precision in defining the claim, I direct the parties to abide their own costs.

K.S./V.V.

Appeal allowed.

A. I. R. 1936 Lahore 228

TEK CHAND AND DALIP SINGH, JJ.

(Mahant) Digambar Datt Gir—Plaintiff—Appellant.

v.

Bhairon Gir — Defendant — Respondent.

First Appeal No. 1104 of 1933, Decided on 3rd December 1935, from decree of Senior Sub-Judge, Karnal, D/- 5th December 1932.

Hindu Law — Religious endowment — Sanyasi—Nanga Sadhu can revert to ordinary sanyasi sect—Reverted sanyasi can become Mahant of non-nanga sanyasi institution.

A sanyasi, who has become a nanga is not bound to remain so for ever. If after a time he does not wish to continue under the stricter discipline of the nangas, or undergo the severer austerities required of him as such, he may revert to his original position as an ordinary sanyasi and on such reversion he becomes eligible for appointment as the Mahant of Non-nanga Sanyasi institution. [P 231 C 2]

Shamair Chand, D. N. Aggarwal, Ram Chandra and Qabul Chand—for Appellant.

Parkash Chandra and Mohammad Amin—for Respondent.

Tek Chand, J.—Civil Appeals Nos. 1104 of 1933 and 433 of 1934 may be disposed of together, as they are between the same parties and arise out of two suits which were tried together in the

lower Court and were disposed of by the same judgment. The dispute relates to succession to the office of Mahant of an institution of dashnami sanyasis, known as Mandir Mahadev in Mauza Urnai Sangam, Tahsil Thanesar, Karnal district. This institution has attached to it agricultural land in three villages : (i) Mauza Urnai Sangam, (ii) Mauza Jaurasi Kalan and (iii) Mauza Tikri. The last Mahant was Rawan Gir, who died on 1st January 1927. On 5th February 1927 the revenue authorities sanctioned mutation of these lands in the name of Digambar Datt Gir, (who is the appellant in Civil Appeal No. 1104 of 1933) rejecting the claim of the rival claimant, one Narbada Gir. On 14th April 1927 Narbada Gir brought a suit in the Civil Court against Digambar Datt Gir, alleging that he (Narbada Gir) was a chela of Rawan Gir and had been orally nominated by him as his successor. Digambar Datt Gir denied that Narbada Gir was the chela of the deceased Mahant or that the latter had nominated him as his successor. He further pleaded that he was the lawful Mahant having been appointed under a registered will of Rawan Gir, dated 2nd April 1925. This suit proceeded for some time, but before the decision, Narbada Gir died. One Onkar Gir, describing himself as the chela of Narbada Gir and alleging that he had been nominated as his successor by the deceased, applied under O. 22, R. 3, Civil P. C., for being substituted as plaintiff in the suit in place of Narbada Gir. His application was however rejected as time-barred, and this order was upheld on appeal by the District Judge.

Thereupon Onkar Gir instituted a fresh suit against Digambar Datt Gir for possession of the property attached to the Mandir, alleging that he was the successor of Narbada Gir and was the lawfully appointed Mahant. After some months the parties entered into a compromise. Onkar Gir withdrew his claim and admitted that Digambar Datt Gir was the lawful Mahant. In accordance with the terms of the compromise the suit was dismissed on 29th May 1929. In the meantime Bhairon Gir (who is the appellant in Civil Appeal No. 433 of 1934) managed to get possession of the Mandir and the lands in Mauzas Urnai Sangam and Jaurasi Kalan. The land in Mauza Tikri, however, remained in possession of Digambar Datt Gir.

On 14th August 1929 Bhairon Gir instituted a suit against Digambar Datt Gir alleging that he was the gurbhai of Rawan Gir, both of them being the chelas of Khushi Gir who was the Mahant of the institution immediately preceding Rawan Gir, and claiming that on Rawan Gir's death he had been elected Mahant by the village Panchayat and the Sadhus of the dera. He denied that Digambar Datt Gir was the chela of Rawan Gir or that the latter had made any will nominating him as his successor or that the deceased had the power to do so. He further alleged that Digambar Datt Gir had become a nanga sadhu and therefore was not eligible for appointment as the Mahant of a dashnami sanyasi institution. He further averred that the essential qualifications for appointment as a Mahant were: (1) that he should have served the institution, (2) that he should be elected by the Panchayat of village and the Bhik of the Sadhus connected with the institution, (3) that he should be a dashnami sanyasi and should not have become a nanga sadhu, and (4) that he should be the "chela of the institution" but should not be sadhak chela of the late Mahant. Digambar Datt Gir denied the plaintiff's right to succeed, and pleaded that he was the sadhak chela of Rawan Gir, that he had been appointed as his successor by a registered will, dated 2nd April 1925 (Ex. D-1), that though he had once become a nanga and joined the Maha Nirbani Panchaiti Akhara of Allahabad he had reverted to his original status as an ordinary dashnami sanyasi before the death of Rawan Gir, and that according to the custom of dashnami sanyasi institutions his appointment was valid.

On 11th July 1930 Digambar Datt Gir brought a suit against Bhairon Gir for possession of the lands in Mauzas Urni Sangam and Jaurasi Kalan, which were in possession of the latter. The plaint in this suit was identical with Digambar Datt Gir's jawab-i-dawa in Bhairon Gir's suit, and the latter's jawab-i-dawa in this suit was practically a repetition of the plaint in his own suit. The two suits were tried together, and the evidence recorded in Bhairon Gir's suit. After a lengthy trial, the learned Subordinate Judge held that according to the custom prevailing in dashnami sanyasi institutions generally, a Mahant has got the power to nominate, orally or by will,

one of his sadhak chelas as his successor, that the nominee succeeds to the gaddi, unless objected to by the Bhik of dashnami sanyasis on the ground of his being a person of bad character; and that in case the last Mahant has failed to make the nomination, the Bhik has the power to elect the Mahant from amongst the chelas of the deceased. He found that it had not been proved that the custom of the institution in dispute was different, or that the panchayat of the village, in consultation with the sadhus attached to the dera, had the right to appoint the Mahant. On these findings, he held that Bhairon Gir was not the lawfully appointed Mahant of the institution and dismissed his suit.

In Digambar Datt Gir's suit the learned Judge held that he was the sadhak chela of the deceased Mahant, that this was not a disqualification, as alleged by Bhairon Gir, and that there was no bar to a nanga sadhu succeeding to the gaddi of a non-nanga dashnami sanyasi institution. He also found that Rawan Gir had executed the will (Ex. D-1) dated 2nd April 1925, reciting that he had two sadhak chelas, Digambar Datt Gir and Digambar Hari Gir, both of whom bore good character and were in every way qualified to be Mahants, and authorising Digambar Ram Gir and Balak Puri, Secretaries of Maha Nirbani Panchaiti Akhara, Allahabad, to select one of them as his successor. The learned Judge held that the deceased Mahant, though competent to nominate his successor, could not delegate the power of nomination to third persons, and that though the aforesaid Secretaries of the Akhara, had selected Digambar Datt Gir for the office, this selection was ineffectual and Digambar Datt Gir could not be held to be the lawfully appointed Mahant of the institution. On this finding he dismissed Digambar Datt Gir's suit also.

From this decision both Bhairon Gir and Digambar Datt Gir have filed appeals to this Court. I shall take up first Bhairon Gir's appeal (Civil Appeal No. 433 of 1934). As already stated, he does not claim to be a chela of the last Mahant Rawan Gir, but alleges himself to be his gurbhai, their common guru being Mahant Khushi Gir. It is no longer denied that on 30th March 1917 Khushi Gir had executed and got registered a will, nominating his chela Rawan Gir as the

next Mahant of this Mandir. Khushi Gir died six years later and under this will Rawan Gir succeeded him as the Mahant. It appears that on the death of Khushi Gir, Bhairon Gir claimed to succeed to the gaddi and alleged that, according to the custom of the institution, the right to elect the Mahant rested with the village Panchayat and the Sadhus attached to the dera, but his claim was rejected. He has put forward the same claim once again and has produced no less than 23 witnesses to support his case. We have read their evidence, but are so little impressed by it that we do not think it necessary to discuss it in detail. On matters relating to the past history of the institution and the customs and traditions of sanyasis the witnesses have disclosed hopeless ignorance, and with regard to the alleged election of Bhairon Gir there is little doubt that some of them have deliberately told lies. The so-called Village Panchayat, which, in consultation with the sadhus attached to the dera, is alleged to have elected Bhairon Gir as the Mahant, is described as a body consisting "of the lambardars and other notables of the village," nearly all of whom are Mahomedans. It is inconceivable that they could have had the determining voice in the election of the Mahant of a dashnami sanyasi institution of orthodox Hindus. Some of these lambardars and proprietors stated in the witness-box that their ancestors had gifted to this Mandir the lands in the three villages above-mentioned. No documentary evidence was however placed on the record to support this allegation, and according to the plaintiff's own witnesses the dera was founded more than 200 years ago, when the alleged gifts are stated to have been made. Obviously such an ancient gift cannot be supported by oral evidence of the kind produced by the plaintiff. In my opinion Bhairon Gir has utterly failed to substantiate his claim and I hold that his suit was rightly dismissed. I would accordingly dismiss his appeal (Civil Appeal No. 433 of 1934) with costs.

Coming now to Digambar Datt Gir's appeal we find it proved by overwhelming evidence that he was one of the two chelas of the late Mahant Rawan Gir, the other being Digambar Hari Gir. The finding of the learned Subordinate Judge on this point was not challenged before

us by the learned counsel for Bhairon Gir, whose objections to Digambar Datt Gir's eligibility for the office of Mahant are: (1) that he was a sadhak chela of the deceased, and that sadhak chelas are ineligible for such appointment, and (2) that he had become a nanga sadhu and therefore could not be appointed Mahant of a dashnami sanyasi institution. After hearing counsel and reading the evidence I have no doubt that both these objections are without force. Indeed, it appears that the defendant Bhairon Gir and his witnesses have no real conception as to what a sadhak chela is and have made meaningless and contradictory statements on the point. They have deposed that it is the choti-cut-chela of the last Mahant who is eligible for appointment as his successor and that his sadhak chela is not so eligible. It is hardly necessary to cite original texts to show that the correct position is just the reverse. It is well known that before a person is initiated into the order of sanyasis he has to pass through two well defined and distinct stages. If he is an adult, he personally, and if he is a minor, his father or, in his absence, his near male relative on his behalf, has to apply to the would-be guru to take him into the fold.

If the request is granted, certain ceremonies are performed with great solemnity. His choti (scalp-lock) is cut, his head shaved, his sacred thread torn, the guru-mantra whispered into his ears, and certain formulae recited by him. On completion of these ceremonies, he becomes the choti-cut-chela of the guru. But he is not a full-fledged sanyasi yet. He has to serve a period of probation, during which both parties have a locus penitentiae; the novice is at liberty to go back into the grihast-ashram, if he or his parents so desire; the guru, if not satisfied with the chela's fitness to lead the austere life of an ascetic or his capacity to undergo the stern discipline of the order, may discharge him. If, however, he has stood the 'test' and has made a firm and irrevocable resolve not to revert to worldly affairs, he is formally initiated after the performance of the prescribed ceremonies, the most important of which is virja-homam. He offers tarpan (oblations) to his ancestors; performs his own shradha as being dead to this world; puts on the sacred thread for

a while and then abandons it for ever; and after making circum ambulations round the sacred fire, severs himself completely and irrevocably from worldly affairs. On the completion of these ceremonies he becomes the sadhak chela of the guru, and a regular member of the order of sanyasis. For a detailed account of these ceremonies reference may be made to the "Note on the Customs of the Gosahens" compiled in 1825 by Mr. Warden after a very full and extensive enquiry and printed as Appendix B to the Law and Custom of Hindu Castes by Arthur Steele (pp. 431-446). The ceremonies described in this Note are practically the same as given in Sanyasagrahana puddhati, whose authorship is ascribed to Shri Sankracharya himself, and a translation of which will be found in J. C. Ghose's Law of Hindu Endowments and Religious Institutions, Vol. II, 257 (Edn. 2). See also A. C. Ghos's law of Hindu and Mohamadan Endowments, pp. 340-41, (Edn. 1); Harikishan Kaul's Census Report of the Punjab, 1911, p. 119; Bose's Glossary of Tribes and Castes in the Punjab, Vol. 3, p. 359; Encyclopaedia of Religion and Ethics, Vol. 6, p. 332; and Bhattacharya's Hindu Castes and Sects, p. 381. See also the judgment of Mookerjee, J., in 14 C W N 191 (1) (at 202 et seq). That these injunctions are still followed generally all over the country is established by the evidence of a large number of Mahants of dashnami maths, examined on interrogatories by Digambar Datt Gir in the present case, among whom are :

(1) Mahant Harnarain Gir of Akdalia, district Hoshangabad (C. P.); (2) Mahant Sobhan Gir of Dhamantri, district Amraoti (Berar); (3) Mahant Praganand Gir of Kailash (Bihar); (4) Mahant Maharaja Gir of Chhabina Khera (Udeypur State); (5) Mahant Gyan Puri of Malsar (Baroda State); (6) Mahant Balram Gir of Kalapura, (Baroda City); (7) Mahant Bhabat Puri of Pushker (Ajmere); (8) Mahant Mahesh Puri of Itwari Peith (Nagpur City); (9) Swami Mahadeo Gir of Shivala Ghat, Benares; (10) Mahant Goswami Shiv Nath Puri of Chankarpuri Math (Benares); (11) Goswami Ram Puri of Dhayan Puri Math (Benares); and (12) Mahant Mokand Gir of Dungar Gaon (Hyderabad, Deccan).

These witnesses have also deposed that

it is from amongst the sadhak chelas of a Mahant that his successor is, as a rule, appointed, and it is only right that this should be so, for, as stated above, it is only after the performance of the Virja homan ceremony that a person really becomes a sanyasi and thus becomes qualified to be the head of an institution of that order. Digambar Datt Gir has stated on oath—and his statement is corroborated by other unimpeachable testimony that he had been made a sadhak chela by Rawan Gir after the performance of Virja homan and other necessary ceremonies.

This, therefore, instead of being a disqualification, was really his qualification for appointment as the successor of the deceased Mahant. As to the next objection, it is admitted by Digambar Datt Gir that some years after his initiation as a sadhak chela of Rawan Gir, he had become a nanga Sanyasi Sadhu and had lived for some time in the panchaiti akhara of these sadhus at Allahabad. This circumstance, however, does not render him ineligible for appointment as Mahant, for it is proved that he had become a non-nanga again before the death of Rawan Gir. These nangas are dashnami sanyasis who are supposed to have attained a higher degree of freedom from passion and prejudice prevailing in the world, and for this reason they appear in a state of stark nudity as indicating that their "bodies have become like statues" and are no longer susceptible to natural excitement, and that their minds remain engrossed in divine meditation. A sanyasi, who has become a nanga is, however, not bound to remain so forever. If after a time he does not wish to continue under the stricter discipline of the nangas, or undergo the severer austerities required of him as such, he may revert to his original position as an ordinary sanyasi, and on such reversion he becomes eligible for appointment as the Mahant of a non-nanga sanyasi institution. Three such persons who have become nangas and who had succeeded as Mahants in non-nanga sanyasi institutions, have appeared as witnesses in the case, and they and the other witnesses have given instances of nangas succeeding to non-nanga sanyasi institutions as Mahants. Against all these, not a single instance to the contrary has been cited by Bhairon Gir. I hold, therefore, that

1. Ramdhan Puri v. Dalgir Puri, (1909) 14 O W N 191=2 I O 385.

the objections raised to the eligibility of Digambar Datt Gir for appointment as Mahant are groundless, and agreeing with the lower Court I overrule them.

The next question for consideration is whether Digambar Datt Gir was actually appointed Mahant of the Mandir in dispute. The lower Court has held that according to the custom of dashnami sanyasi institutions generally, a Mahant can nominate his successor from amongst his sadhak chelas and this appointment may be made orally or by will. As stated already, Mahant Khushi Gir had appointed Rawan Gir as his successor by a registered will, and this instance decidedly supports the lower Court's view. Mahant Rawan Gir also executed a will, but instead of making the appointment himself he directed the Secretaries of the Maha Nirbani Panchaiti Akhara of Allahabad to select his successor from amongst his two sadhak chelas, Digambar Datt Gir and Digambar Hari Gir. In accordance with his directions, shortly after his death these Secretaries made the selection in favour of Digambar Datt Gir. One of the Secretaries Digambar Ram Gir (D. W. 8) has appeared as a witness in the case and has deposed that the other chela Digambar Hari Gir was not anxious to become the Mahant and had consented to the selection of Digambar Datt Gir as the Mahant of this institution. Hari Gir has not appeared as a witness in the case, but it is noteworthy that 8 years have elapsed since the death of Rawan Gir, and he has not made any claim to the gaddi. On these facts, Mr. Shamair Chand contends that Digambar Datt Gir must be considered to be the lawfully nominated successor of Rawan Gir. Before coming to a proper decision on the validity of the appointment, however, it seems to us necessary to get further evidence as to the previous history of this institution, as the material bearing on the point on the present record appears to us to be very meagre. As has been pointed out by their Lordships of the Privy Council in 43 Cal 707 (2), at p. 714, citing with approval the well-known case of (1839) 6 S D A (Beng) 262 (3) at p. 268, broadly speaking such institutions divide themselves into three

classes: (1) Maurusi, in which succession is in the spiritual line from guru to chela; (2) panchaiti, which are purely democratic institutions, in which a successor is appointed by election by the Bhek; and (3) hakmi where the successor is nominated by the ruling chief, or the party who had endowed the temple.

Indar Nath (P. W. 11), one of the witnesses for Bhairon Gir, stated that the institution in dispute was a panchaiti dera. He is, however, not a sanyasi but a jogi, and is quite illiterate. His evidence is otherwise discrepant and no reliance can be placed on his solitary testimony. Mr. Shamair Chand for the appellant urges, on the other hand, that the institution is a maurusi institution, and he states that descent has been from guru to chela. He also states that of the two sadhak chelas of the deceased, Digambar Datt Gir is the senior. The documentary evidence on the record, however, takes us back to three generations only, in which succession has undoubtedly been from guru to chela; Rawan Gir succeeded his guru Khushi Gir, who succeeded his guru Balwant Gir, who is recorded in the revenue papers as the Mahant in 1908. The names of the four preceding Mahants are given as Akshma Gir, Zalim Gir, Guman Gir and Ganesh Gir, but it has not been made clear in what degree of spiritual relationship (if any) each of them stood to his predecessor, and how their appointments were made. In our opinion, there is a lacuna in the evidence bearing on this important point and we feel that it is not possible to come to a definite decision in Digambar Datt Gir's suit without further enquiry. We accordingly remand the case under O. 41, R. 25, Civil P. C., for enquiry on the following issues: (1) Is the dera of Mandir Mahadeo in Mauza Urnai Sangam a maurusi institution, in which succession to the office of Mahantship has been from guru to chela? and (2) is Digambar Datt Gir the senior chela of Rawan Gir?

Counsel for both parties have been directed to cause their clients to appear before the Senior Subordinate Judge, Karnal, on 16th December 1935, on which date the parties will file lists of witnesses whom they wish to produce and also file the documents in their possession or power on which they rely. The Court will then fix a date for recor-

2. Ram Parkash Das v. Anand Das, 1916 P C 256=33 I C 583=43 I A 73=43 Cal 707 (P C).

3. Mahant Ramanooj Das v. Mahant Debraj Das, (1839) 6 S D A (Beng) 262.

ding the evidence. The return shall be made within three months.

Dalip Singh, J.—I agree.

B.D./R.K.

Case remanded.

A. I. R. 1936 Lahore 233

YOUNG, C. J. AND MONROE, J.

Dilwar—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 913 of 1935, Decided on 5th November 1935, from order of Sess. Judge, Montgomery, D/- 15th August 1935.

(a) Criminal Trial—Defence—Alibi should be raised at first chance.

A defence of alibi if true ought to be raised at the earliest possible moment. [P 233 C 2]

(b) Criminal Trial—Evidence in murder case—Prosecution witnesses related to deceased victim—Unless enmity is shown towards accused, evidence of relatives should not be discarded.

In a case of murder the fact that the prosecution witnesses are relatives of the murdered man is no valid reason for discarding their evidence. What would be of importance is that the witnesses had enmity with the accused. Interests of the relatives is undoubtedly to see the true criminal prosecuted; they have no interest in accusing any one falsely unless they have enmity. [P 233 C 2]

(c) Murder—Weapon used to break every limb—Case is of murder.

If weapons like lathis or the blunt side of axes are used in order to break every limb of a man's body and a man dies thereof, it is just as surely murder as if the head had been smashed. [P 234 C 1]

R. C. Manchanda—for Appellant.

D. R. Sawhney—for Opposite Party.

Judgment.—Dilwar was charged with his brother Suja and a cousin Ahmad with murder. The learned Sessions Judge held that Suja and Ahmed had been falsely implicated in the crime and acquitted them: Dilwar, he condemned to death. At first sight it would appear that Dilwar on the finding of the learned Judge would have also to be acquitted on the ground that the same witnesses who had falsely accused Suja and Ahmad were the only persons who gave evidence against him and that therefore as they committed perjury in this matter, their evidence could not be accepted for any purpose in this case. On looking at the record however we find that we cannot agree with the learned Judge as to this finding. The defence which the learned Judge believed, that there was good alibi

for both Suja and Ahmad, we cannot accept. The alibi was never raised in the Court of the committing Magistrate and it was only in the Court of the Sessions Judge that the accused raised this defence. In our opinion, this in most cases would be fatal to any plea of alibi. A defence of this sort, if true, ought to be raised at the earliest possible moment. Further, the same defence witnesses are clearly telling lies on the question of the death of Gahra.

In the Court of the committing Magistrate Dilwar merely said that the case against him was due to enmity. In the Sessions Court he raised an absurd story that the deceased died by accident—he pulled a log away from a stack of wood and the other logs fell upon him. This story, in view of the medical evidence, is absurd. Most of the lambardars who were defence witnesses made no statements to the police, and it is impossible to believe that any of them could have made statements to the police. Lambardars knowing, as they must have known that the two accused who have been acquitted had been charged with murder, would have come forward much earlier with their evidence, if it was true. We are therefore not forced to discard the prosecution evidence. As regards Dilwar, who is the only accused now left, there are five eye-witnesses, two of them, at any rate, being only very distantly related to the deceased by marriage. In any event, we have frequently pointed out that in a case of this sort the fact that the prosecution witnesses are relatives of the murdered man is no valid reason for discarding their evidence. What would be of importance is that the witnesses had enmity with the accused. The interests of the relatives is undoubtedly to see the true criminal prosecuted; they have no interest in accusing any one falsely unless they have enmity. We have no reason to disbelieve any of these witnesses. There is also a dying declaration by the accused which was recorded some time after the actual injuries were inflicted. The defence that Dilwar put forward only in the Sessions Court is wholly unbelievable. He says that the dead man was killed by accident, as logs of wood fell upon him; in view of the medical evidence this cannot be believed. The injuries were terrible: almost every bone in the man's body was

broken and broken into several pieces. This would not happen owing to the logs of wood falling upon him. We are satisfied therefore that Dilwar is guilty of the offence with which he was charged. It has been argued by counsel that this is not a case under S. 302 as no vital part of the body was injured. We have frequently pointed out however that if weapons like lathis or the blunt side of axes are used in order to break every limb of a man's body it is just as surely a murder as if the head had been smashed. Injuries on the head are deliberately avoided in most cases in order to support such a defence.

The only other point is, whether Dilwar ought to be hanged or not. In this behalf we notice that it is the case for the prosecution, and indeed, it is in evidence, that the deceased had been carrying on with the sister of the accused and that there had been trouble about it. On the night in question the deceased, according to the plan which we have seen, had clearly left his fields to go near the house of the accused where he was actually beaten and killed. In our opinion, it appears that the deceased had gone there in order to carry on his intrigue with the sister of the accused, was found there and beaten to death. In this view of the matter we are justified in reducing the sentence from that of death to transportation for life. We therefore set aside the sentence of death and sentence the appellant to transportation for life: the appeal is otherwise dismissed.

B.D./R.K. *Sentence reduced.*

A. I. R. 1936 Lahore 234

BHIDE, J.

Nihalu—Plaintiff—Appellant.

v.

Bhagwana and *another*—Defendants—Respondents.

Second Appeal No. 310 of 1935, Decided on 22nd May 1935, from decree of Dist. Judge, Delhi, D/- 8th January 1935.

Deed—Construction—Nature of transaction must be decided by looking at substance—Sale cannot be converted into exchange by mere addition of trifling non-pecuniary consideration to price.

The question whether a transaction is a sale or an exchange has to be decided by looking at its substance. A transaction cannot be converted into an exchange merely by the addition of some trifling non-pecuniary consideration to the price so as to defeat the right of pre-

emptors: 29 P R 1893 and 1915 *Lah* 218, *Rel. on.* [P 234 C 2]

Mehr Chand Mahajan and *R. L. Chawla*—for Appellant.

Nanak Chand and *L. M. Dutta*—for Respondents.

Judgment.—This second appeal arises out of a suit for pre-emption with respect to the sale of an "ahata" for Rs. 900 and a bigha of land valued at Rs. 300. The defendants' contention was that the transaction was an exchange and not a sale and was therefore not subject to pre-emption. This plea was rejected by the trial Court but upheld by the lower Court, which has dismissed the suit. The plaintiff has come up in second appeal. A preliminary objection is raised that the finding of the learned District Judge that the transaction was an exchange is one of fact and as such not open to challenge. The District Judge has, however, given this finding without considering the relevant and material evidence. It is well-established that the question whether a transaction is a sale or an exchange has to be decided by looking at its substance: cf. 29 P R 1893 (1) and 82 P R 1915 (2). A transaction cannot be converted into an exchange merely by the addition of some trifling non-pecuniary consideration to the price so as to defeat the right of pre-emptors. The contention of the plaintiff in this case was that the one bigha of land was of trifling value and was not even intended to be transferred. The learned Judge of the trial Court held that the land was in fact transferred, but it was of small value and this portion of the consideration was added merely to defeat pre-emptors and that the transaction was in substance a sale. The District Judge has given no finding at all on the question of the value of the land, holding merely that the evidence was uncertain. He accepted the finding of the trial Court that the land was in fact transferred; but this in itself was not sufficient to determine whether the transaction was or was not a sale. The District Judge should have therefore arrived at a finding on the value of the land and then decided in view of all the other evidence whether the transaction was in substance a sale or an exchange.

1. *Gul Mahomed v. Khan Ahmad*, (1893) 29 P R 1893.

2. *Gul Muhammad v. Tota Ram*, 1915 *Lah* 218=31 IC 221=82 P R 1915.

I accept the appeal and setting aside the order of the District Judge remand the case to him for re-decision in the light of the above remarks. Costs to follow final decision.

K.S./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 235

AGHA HAIDAR, J.

Sultan Muhammad and others—Plaintiffs and another Defendant—Appellants.
v.

Mehr Khan and others—Defendants—Respondents.

Second Appeal No. 1241 of 1935, Decided on 25th October 1935, from decree of Senior Sub-Judge, Attock, D/- 30th March 1935.

Minor—Next friend agreeing to relinquish claim on special oath by opposite party—Oath is only certain method of proof and is not compromise—Interests of next friend identical with minor—Sanction under O. 32, R. 7, Civil P. C., is not necessary.

If the next friend of a minor expresses his willingness to relinquish the claim of the minor, should the opposite party take a certain oath, it is only a special method of proof adopted by the next friend and is not at all a compromise, and if the interests of the next friend are identical with the minor then sanction under O. 32, R. 7, Civil P. C., is not necessary for adopting special oath as a form of proof: 186 P R 1889, *Dissent.*; 18 P R 1891 and 1927 All 584, *Foll.*

[P 235 C 2]

Jalal-ud-Din Mirza—for Appellants.

Ram Lal Anand (I)—for Respondents.

Judgment.—A suit was brought by Durab on his own behalf and as the next friend of Sultan Muhammad, Mubariz and Sher Muhammad, minors, against Mehr Khan and Sher Muhammad, defendants. In the course of this suit Durab, whose interests were identical with those of the minors, agreed to be bound by the oath of a certain witness, namely Mian Muhammad. Mian Muhammad stated on oath that the plaintiffs had no concern with the land in dispute. On this statement the plaintiffs' suit was dismissed. The minor plaintiff now under the next friendship of another person have brought the present suit for a declaration that the decision in the previous suit was not binding upon them owing to Durab, their next friend, having acted negligently, fraudulently and collusively, and that sanction of the Court had not been obtained under O. 32, R. 7, Civil P.

C. The trial Court held that the next friend of the minors did not act negligently or fraudulently in the previous suit but decreed the claim on the ground that the undertaking given by the next friend of the minor plaintiffs in the previous suit that he would be bound by the oath of the witness Mian Muhammad, was tantamount to a compromise and the necessary sanction was not given by the Court under O. 32, R. 7, Civil P. C. He therefore held that the compromise and the decree passed on the basis thereof were not binding upon the plaintiffs. The defendants, Meher Khan and Sher Muhammad went up in appeal to the Senior Subordinate Judge. He agreed with the trial Court in holding that the next friend of the minors had not acted negligently or fraudulently in the previous suit. He further held that there was some kind of permission given by the Court before Mian Muhammad took the oath by which the next friend of the minors had expressed his willingness to abide. On these findings he allowed the appeal and dismissed the plaintiffs' suit. The plaintiffs have come up to this Court in second appeal.

The learned counsel for the appellants relied upon 186 P R 1889 (1), in which it was laid down that if the next friend of a minor expressed his willingness to relinquish the claim of the minor, should the opposite party take a certain oath this was in the nature of a compromise and that sanction under S. 462, Civil P. C., now O. 32, R. 7, was necessary and that in the absence of such a sanction the minors were not bound. The case was not followed in the Full Bench decision in 18 P R 1891 (2). My own view is that the proceedings, which were taken in the previous case when the next friend expressed his willingness to be bound by the oath of Mian Muhammad, were not in the nature of a compromise at all. It was a method of proof which the next friend had adopted. There was nothing illegal at all in that method. It must be further remembered that the interests of the next friend and the minors were identical. This being so, no sanction, as required under O. 32, R. 7, Civil P. C., was necessary. I am supported in this view by the authority of a Division Bench of

1. Shadi v. Nathu, (1889) 186 P R 1889.

2. Malak Sorab v. Anokh Rai, (1891) 18 P R 1891.

the Allahabad High Court in 102 I C 38 (3). I therefore affirm the decree of the lower appellate Court, though on different grounds from those which found favour with that Court, and dismiss the appeal with costs.

B.D./R.K.

Appeal dismissed.

3. Deoraj Misra v. Mt. Abhai Raji, 1927 All 584=102 I C 38=49 All 842=25 A L J 729.

* A. I. R. 1936 Lahore 236

JAI LAL, J.

Manzur Hussain and another—Judgment-debtors—Appellants.

v.

(Firm) Ram Rattan Shah Raj Mal—Decree-holders—Respondents.

Second Appeal No. 813 of 1935, Decided on 21st October 1935, from order of Dist. Judge, Gurdaspur, D/- 23rd January 1935.

*** Execution—Legal representative—Decree against estate of deceased—Estate in the hands of heirs—Income accruing after death—Income is liable to be sold in execution of decree.**

Where the estate in the hands of the heirs of the original debtor against whose estate the decree was passed is liable for the satisfaction of the decree, then even the produce and income of that estate which has accrued after the death of the original debtor is liable to attachment and sale in satisfaction of such decree: 1928 Oudh 40 and 1924 Mad 530, *Foil*.

[P 236 C 2]

Mohsin Shah—for Appellants.

Chiranjiva Lal Aggarwal—for Respondents.

Judgment.—In execution of a money decree passed against the estates of a person who was governed by the Customary Law of this province, the fruits of the trees in the garden have been attached. The District Judge has found that according to the custom governing the parties the heirs are bound to satisfy a decree passed against the estate of the deceased even out of ancestral property in their hands. The question then is whether after the death of the deceased, income from the land left by him which has devolved upon his heirs remains part of his estate or becomes the absolute property of his heirs. In the latter case it would not be attachable and saleable in execution of a decree passed against the estate; in the first case the decree being against the estate, it would be liable to satisfy the decree. No authority has been cited by the appellants' counsel to show that

the order of the District Judge holding that the fruit must be deemed to be a part of the estate of the deceased is erroneous. On the other hand, the learned District Judge has followed two previously decided cases. In 1928 Oudh 40 (1), it was held by a Division Bench of the Chief Court of Oudh that rents and profits are legal incidents of immoveable property and must bear the same character as the property itself, and it appears that under circumstances similar to the present case the rents and profits of immoveable property in the hands of a deceased owner which rents and profits had accrued after the death of the deceased after the estate had devolved on his heirs, were held liable for the satisfaction of a decree passed against the estate.

The same view was taken by the Full Bench of the Madras High Court in 1924 Mad 530 (2). In that case, it was held that income accrued since the late zamindar's death which had come into the hands of the new zamindar can be attached in execution of the decree passed against the zamindar. In this case it having been held that the estate in the hands of the heirs of the original debtor against whose estate the decree was passed is liable for the satisfaction of the decree, it follows that the produce and income of that estate which has accrued after the death of the original debtor is liable to attachment and sale in satisfaction of such a decree. The cases cited by the appellants' counsel in which it has been held that a limited owner has full control over the income of the estate in his or her hands or that fruits of trees are moveable property have no bearing on the present case. Here there is no question of any restrictions on the alienation by the limited owner, but the question is whether the income of the estate follows the same rule as the estate itself even when income had accrued after the succession *dah* opened out in favour of the next heir or whether it becomes the absolute property of the next heir and is not liable to attachment and sale in execution of a decree against the previous owner. The two authorities cited above

1. Sharaf Jahan Begam v. Mahomed Sadiq Ali Khan, 1928 Oudh 40=99 I C 897=2 Luck 408=4 O W N 98.

2. Kadirveluswamy Naiker v. Eastern Development Corporation Ltd., 1924 Mad 530=80 I C 163=47 Mad 411=46 M L J 261 (FB).

are conclusive on the question and accordingly I must dismiss this appeal, but pass no order as to costs because the point was certainly a difficult one.

L.D. R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 237

TEK CHAND, J.

Jowala—Defendant—Appellant.

v.

Dewan Singh — Plaintiffs and another Defendant — Respondents.

Second Appeal No. 1330 of 1933, Decided on 17th May 1935, from decree of Dist. Judge, Jullunder, D. - 31st May 1933.

Custom (Punjab) — Adoption — Entry in Riwajiam as to person who can be adopted is merely indicative and not mandatory—Adoption of collateral in fourth degree among Jats of Mauza Hussainpur, Tahsil Nakodar, Jullunder District, held valid.

An entry in a Riwajiam as to the persons who can be adopted is only indicative and not mandatory: 114 P R 1889; 10 P R 1908; 44 P R 1913 and 1926 Lah 207, *Ref.* [P 238 C 1]

An adoption of a collateral in the fourth degree, among Jats of Mauza Hussainpur, Tahsil Nakodar, Jullunder District, is valid even though nearer collaterals are alive.

[P 237 C 1, 2; P 238 C 1]

Achhru Ram and Indar Dev for Achhru Ram—for Appellant.

Vishnu Datt for Badri Das and Badri Das—for Respondents.

Judgment. — By a registered deed dated 12th August 1932, Devi Ditta, a Jat of Mauza Hussainpur, Tahsil Nakodar, Jullunder District, 'adopted' as his son, Jowala, who is his collateral in the fourth degree. Diwan Singh and Nand Singh, plaintiffs, who are related to Devi Ditta in the third degree, sued for a declaration that the adoption of Jowala was invalid as under the custom prevailing in the tribe the "adoption" of a remoter collateral is invalid in the presence of nearer collaterals who have not refused to be "adopted." The defendant pleaded that custom did not lay down any such imperative restriction and that the adoption was valid. The Courts below have found for the plaintiffs and have decreed the suit. The District Judge however had granted a certificate to the defendant for a second appeal under S. 41 (3), Punjab Courts Act. The answer to question 69 in Sardar Hotu Singh's Customary Law of the Jullunder District published in 1918 is that:

As a general rule the person adopted is selected

from collaterals, the nearer collateral being given preference; the selection is also made of a person of the same tribe and got as the adopter.

In the vernacular Riwajiam of the Nakodar Tahsil prepared in the course of Sardar Hotu Singh's settlement (Ex. P-5), the answer of the Hindu Jats is stated as follows:

As a general rule, first the sons of the real brothers are adopted. In their absence the remote collaterals having regard for nearness are adopted. It cannot be that a remote relation be adopted to the exclusion of a near relation's son. In case a near relation refuses, the son of a remote relation is adopted, but the adopter and the adoptee should be of one and the same tribe, with the condition that the adoptee and the adoptive father should be of one and the same got.

The question for consideration is whether this provision in the answer is mandatory, as alleged by the plaintiffs, or merely indicative, as contended for by the defendants. The riwajiams of several other districts contain similar provisions, which have been the subject of judicial decision during the last fifty years or so. In 114 P R 1889 (1), an identical entry in Walker's Customary Law of the Ludhiana District was under consideration and it was held that the restriction as regards the degree of relationship of the person to be adopted, as stated in the riwajiam, was not of a mandatory nature. 10 P R 1908 (2) was a case from the Amritsar District the riwajiam of which was in very similar terms. Robertson, J., who delivered the judgment of the Division Bench, observed that the entry is clearly only indicative and not mandatory. It is clearly not intended to force a near agnate upon the adopter, who is inimical to him or unsuitable, or unsatisfactory to him for any cause.

This interpretation was followed in 44 P R 1913 (3), in respect of an almost identical entry in the riwajiam of the Gujranwala District. In 7 Lah 117 (4), a somewhat similar answer in the riwajiam of the Gurgaon District was given the same meaning. In the vernacular riwajiam of the Nakodar Tahsil, (Ex. P/5) to which reference has been made already, a large number of instances are cited below the answer to the question, but in not a single one of them was the 'adoption' of a

1. Pala v. Buta, (1889) 114 P R 1889.
2. Nidhana v. Sharman, (1908) 10 P R 1908=7 P L R 1907.
3. Sant Singh v. Mula, (1913) 44 P R 1913=17 I C 350.
4. Shitah Singh v. Hazuri Singh, 1926 Lah 207=93 I O 993=7 Lah 117=27 P L R 200.

remoter collateral questioned or set aside at the instance of a near collateral. These are merely instances of adoptions of collaterals, which were held to be valid, as against those of sisters' or daughters' sons. The evidence produced in this case does not contain a single proved instance of such an adoption having been held to be invalid. As against this, the defendants have relied upon a decision of a Subordinate Judge, Jullunder, in *Ishar v. Chuhar*, (Ex. D/2), where the adoption of a collateral of the 6th degree was upheld in a suit which had been instituted by collaterals of the third degree. In that suit the plaintiffs directed their attack mainly against the factum of the adoption and did not question its validity. It is significant that if the custom was so well established, as contended for by the plaintiff-respondents, this obvious plea should not have been taken. The decision of the Subordinate Judge in that case was affirmed on appeal by the District Judge (Ex. D/5). Mr. Badri Das for the respondents has argued that in view of the entry in the *riwajiam* the onus lay heavily on the defendant-appellants and that the solitary instance cited by them, assuming it to be an instance in point, was not sufficient to discharge the onus. In my opinion this is not a correct view of the matter.

The question here is not one as to the quantum of evidence necessary to rebut a clear entry in the *riwajiam*, but the real point for decision is the meaning to be given to the entry in the *riwajiam*. If the entry were held to be mandatory, there can be no question that the evidence produced by the defendants must be held to be insufficient to justify a finding that the onus has been discharged. But if the entry is merely indicative and is to be given the meaning that has been given to similar entries in the *riwajiams* of the neighbouring districts, I have no doubt that the decision of the lower Courts is incorrect. After giving the matter careful consideration, I am of opinion that the view taken in the previous rulings of the Chief Court and this Court must be followed and the entry held to be merely indicative. I hold that the adoption of Jowala by Devi Ditta was valid by custom and that the plaintiffs' suit has been wrongly decreed. I accordingly accept the appeal, set aside the judgments and decrees of the Courts be-

low and dismiss the plaintiffs' suit. Having regard to all the circumstances I leave the parties to bear their own costs throughout.

K.S.

Appeal accepted.

A. I. R. 1936 Lahore 238

BLACKER, J.

Ghulam Rasul—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1532 of 1934, Decided on 22nd February 1935, from order of Sess. Judge, Lahore, D/- 4th October 1934.

Criminal P. C. (1898), S. 195 (1) (b)—S. 195 applies to cases of false report made in investigation of police with intention that there should be trial in consequence of it.

The words in sub-s. (1) (b) of S. 195, Criminal P. C., "in relation to any proceedings in any Court" apply to the case of a false statement made in an investigation by the police with the intention that there shall in consequence of this be a trial in the criminal Court: 1929 *Sind* 132, *Foll.* [P 238 C 2]

Faqir Singh—for Petitioner.

Order.—It is alleged that the petitioner in this case made a report to the police that a certain person had stolen his watch from his car. It is also alleged that he removed that watch from his car and deposited it with another person in order to make it appear that the watch had been stolen. In investigation, the police came to the conclusion that the report was false and that the watch had been removed by the petitioner himself. The case was accordingly reported to the Magistrate for cancellation. The present petitioner was then challaned under Ss. 193 and 211, I. P. C., and the Magistrate took cognizance of this chalan, recorded the evidence of the prosecution witnesses and framed charges against him. For the petitioner it is contended that in view of S. 195 (1) (b), Criminal P. C., the Magistrate's action is illegal and should be quashed. It appears to me that this contention must be accepted. I am clear that the words in this sub-section "in relation to any proceedings in any Court" apply to the case of a false report or a false statement made in an investigation by the police with the intention that there shall in consequence of this be a trial in the criminal Court, and I find support for this view in the case reported as 1929

Sind 132 (1). I therefore accept this petition and order that the proceedings in the lower Court be quashed.

B.D./R.K. *Petition accepted.*

1. Chuhar Mal-Nihal Mal v. Emperor, 1929 Sind 132=1929 Cr C 160=117 I C 147=30 Cr L J 732=23 S L R 285.

A. I. R. 1936 Lahore 239

DIN MOHAMMAD, J.

Balkishen—Judgment-debtor—Appellant.

v.

(Firm) *Narain Dass-Chela Ram*—Decree-holder—Respondent.

Misc. First Appeal No. 543 of 1935, Decided on 20th May 1935, from order of Senior Sub-Judge, Amritsar, D/- 20th March 1935.

Execution — Appointment of receiver merely to receive daily earnings of judgment-debtor's theatre after collection and keep accounts, but not to actually collect at doors — Order held was not ultra vires.

Section 51, Civil P. C., prescribes the procedure in execution and lays down that the Court may on the application of the decree-holder order execution of the decree by appointing a receiver. No further restrictions have been placed on the power of the Court in this section, nor has the nature of the property been defined of which a receiver can be appointed. This section will therefore evidently be governed by the provisions of O. 40, R. 1. Hence where the judgment-debtor has a theatre and a receiver is appointed in execution of a decree against the judgment-debtor to receive the earnings collected and keep accounts but not to receive money at the doors, the money so earned is property within the meaning of O. 40, R. 1 and as such the order is not ultra vires, but is just and convenient: *Cadogan v. Lyric Theatre*, (1894) 3 Ch D 338; 1932 Cal 189 and 1930 Cal 610, *Disting.*; 1922 Pat 318, *Appl.*

[P 240 C 1, 2]

J. G. Sethi—for Appellant.

D. R. Sawhney—for Respondent.

Judgment.—This appeal has arisen out of certain execution proceedings. The decree-holder respondents applied to the executing Court for the appointment of a receiver to collect the gate money of a cinema hall owned by the judgment-debtor. The executing Court allowed this application but with the express reservation that the receiver will not be entitled to manage the show but would merely keep an account of the income and expenditure and deposit the amount daily in the civil Court account. Against this order the judgment-debtor has appealed. Counsel for the appellant contends that such future earnings are not

covered by O. 40, R. 1, Civil P. C., and that therefore no receiver can be appointed to collect them. In support of his contention he relies on (1894) 3 Ch D 338 (1), 59 Cal 205 (2), 34 C W N 440 (3) and 61 I C 849 (4). In (1894) 3 Ch D 338 (1):

A judgment for debt was recovered against a theatre company. The theatre was subject to a mortgage. The company had no land except the theatre, of which they were lessces and were in occupation, and they were using it for the ordinary purposes of a theatre.

It was held that a receiver could not be appointed at the instance of the judgment-creditor to receive by way of equitable execution the moneys paid by the public for entrance to the theatre. It was however added that a receiver ought to be appointed of the rents and profits of the company's lands by way of equitable execution, without prejudice to the right of any prior incumbrancers, and that the company should be ordered to deliver up possession of the lands to him. In the present case also the hall is under a mortgage with possession and the judgment-debtor is said to have taken it on lease from the mortgagees. Counsel for the appellant contends that that case is on all fours with his and that the gate money received by the judgment-debtor is consequently immune from the operation of O. 40, R. 1. I, however, do not agree with him there.

Under the provisions of the Civil Procedure Code, a receiver can now be appointed before or after the decree of any property and all such powers as to management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits as the owner himself has, can be conferred upon him. It is no doubt true that in his judgment, Lord Herschell, L. C., has observed that money paid for entrance to a theatre cannot properly be described as rent or profits of the premises, but here, as stated above, the receiver is not entitled to receive

1. *Cadogan v. Lyric Theatre*, (1894) 3 Ch D 338 = 63 L J Ch 775 = 71 L T 8.
2. *Hemchandra Nath v. Prokash Chandra*, 1932 Cal 189 = 137 I O 98 = 59 Cal 205 = 35 C W N 1066.
3. *Dharendra Krishna v. Surendra Krishna*, 1930 Cal 610 = 129 I O 609 = 34 C W N 440.
4. *Pirithi Chand Lal v. Kalikanand Singh*, 1922 Pat 318 = 61 I C 849 = 3 P L T 24 = 6 Pat L J 866.

money at the doors but is merely entitled to receive the daily earnings after they have been collected. To my mind, the money so earned would clearly come within the definition of property as used in O. 40, R. 1. As soon as the gate money is received and collected for the judgment-debtor, it becomes his property and I fail to see how it cannot be utilized for the benefit of his judgment-creditors either by attachment or through the appointment of a receiver.

In 59 Cal 205 (2), a Division Bench of the Calcutta High Court held that a simple contract creditor, who has no specified charge or no right to be paid out of a specified fund, could not in general ask for the appointment of a receiver. This evidently means that circumstances may exist when such an application can be made and in my view in the present case such special circumstances do exist. In 34 C W N 440 (3), which is an earlier judgment of the same High Court, it was laid down by a Division Bench that the words "just and convenient" did not mean that the Court was to appoint a receiver simply because the Court thought it convenient, but they meant that the Court should make the appointment for protection of rights or prevention of injury according to legal principles. The Judges had made the same observations in that case in regard to a simple contract creditor as have been cited above. On the merits it was remarked that no sufficient case had been made out for the appointment of a receiver. I have already made it clear that this is a special case in which order for the appointment of a receiver is necessary and on this basis, I find that this authority also is of no use to the appellant. The observations made in 61 I C 849 (4), which has been quoted by the appellant in his own favour, rather support the respondent. A Division Bench of the Patna High Court held in that case that:

There is no jurisdiction in a Court to appoint a receiver at the instance of a simple contract creditor unless the creditor establishes a special equity in his favour for such appointment. The appointment of a receiver is an equitable relief and will be only granted on equitable grounds.

The decree in the present case was made on 8th May 1928. The judgment-debtor had undertaken to pay Rs. 75 per mensem and after making thirteen such payments made a default. He does not

appear to be in possession of any other property. This hall is under a mortgage with possession of which the judgment-debtor is holding a lease himself. The appointment of a receiver may not be made to coerce a judgment-debtor into discharging his obligation, but I do not see any reason why this power should not be exercised merely because the judgment-debtor finds himself coerced to pay off the decree. S. 51, Civil P. C., prescribes the procedure in execution and lays down that the Court may on the application of the decree-holder order execution of the decree by appointing a receiver. No further restrictions have been placed on the power of the Court in this section, nor has the nature of the property been defined of which a receiver can be appointed. This section will therefore evidently be governed by the provisions of O. 40, R. 1, Civil P. C. There also no express prohibition has been laid down against the appointment of a receiver in regard to such property as is involved in this case, and in the absence of any such express prohibition I am not prepared to hold that the order of a Court appointing a receiver to receive these earnings will be ultra vires. I have already made it clear that I treat the collections of the gate money after they have been earned as the property of the judgment-debtor, and in these circumstances I consider that the order of the Court below was quite legal.

Counsel for the appellant further contends that before an order under O. 40, R. 1 can be passed, the Court must be satisfied that the order will be just and convenient. This is no doubt so, but I do not find any injustice or inconvenience to the judgment-debtor in the order proposed by the executing Court. The Senior Subordinate Judge has been quite considerate towards the judgment-debtor and has paid ample regard to his comfort. He has laid down an express condition in his order that the receiver will have no concern in the management of the cinema which will still vest in the judgment-debtor as before. He has also made it clear that the receiver will have no hand in the selection of the pictures to be shown or in any other administrative matter, but will merely confine his activities to the keeping of an account of the income and expenditure. In these circumstances, the order under appeal is

neither unjust nor inconvenient. In the result, I dismiss this appeal with costs.

K.S./v.v.

Appeal dismissed.

*** A. I. R. 1936 Lahore 241**

CURRIE, J.

Dia Parkash—Plaintiff—Appellant.

v.

Bhana Mal—Defendant—Respondent.

Second Appeal No. 290 of 1935, Decided on 6th June 1935, from decree of Senior Sub-Judge, Amritsar, D/- 6th December 1934.

(a) Possessory Suit—Plaintiff in possession of property—Defendant having no right therein contesting plaintiff's right to be manager—Suit for declaration by plaintiff and to restrain defendant from interfering with his possession must be decreed.

Plaintiff was admittedly in possession of the Shiwala and the defendant claimed no right therein for himself. He merely contested the plaintiff's right to be the manager. In a suit by plaintiff for a declaration that he is in possession of same and to restrain the defendant from interfering with it:

Held: that the possession of plaintiff was sufficient evidence of title as owner against the defendant and that he was entitled as against the present defendant to a decree declaring that he was in possession of the property and restraining the defendant from interfering with him in the management thereof: 20 Cal 834 (P C), Foll. and 78 P R 1902, Appr. [P 242 C 1]

* (b) Hindu Law—Religious endowment—Failure of succession to trusteeship—Right of management reverts to founder and follows line of inheritance from founder and not merely descends to his heirs—*Obiter*.

Obiter.—On the failure of the succession to the office of the trustee the right of management reverts to the founder and follows the line of inheritance from the founder and not merely descends to his heirs. Hence though a daughter's son's son is not an heir of the founder he is still in the line of inheritance from the founder and as such the management devolves on him: 32 Cal 129 (P C), Foll.

[P 242 C 1, 2]

Kishen Dial—for Appellant.

Dev Raj Sawhney—for Respondent.

Judgment.—The facts leading to this second appeal may be briefly stated. One Lachhi Misar died and on 27th July 1876, Mt. Radhan, the widow of his brother, obtained a succession certificate. She sued Dhari Mal, a son of Mt. Atman Devi, sister of Lachhi Misar, for a house and obtained a decree on 23rd March 1878. This house is now in possession of the plaintiff-appellant *Dia Parkash* who according to the pedigree table given in the judgment of the lower appellate Court is the great-grandson of Mt. Radhan's

daughter Mt. Bishan Devi. On 10th November 1880, Mt. Radhan executed a deed of endowment in which she recited that according to the will of Lachhi Misar she had constructed a temple and a well and assigned two shops for the maintenance thereof. Two trustees Mohan Lal and Maharaja Mal were appointed. Mohan Lal has been long deceased and we are not concerned with him. Maharaj Mal continued to act after the death of Mohan Lal and the plaintiff's father Labhu Ram brought a suit against him which however was dismissed. Maharaja Mal then died and the present defendant-respondent is his son Bhana Mal. The plaintiff *Dia Parkash* sued for a declaration against Bhana Mal, that he was in possession of and entitled to the management of the temple and property, and asked for an injunction restraining the defendant from interfering in the management. His suit was decreed by the trial Court, but on appeal the Senior Sub-Judge (with special appellate powers) held that the plaintiff being a daughter's son's son was not, under Hindu law, the heir of Mt. Radhan. He accordingly dismissed the suit. He did not decide the question whether the founder of the institution was Lachhi Misar, as contended by the defendant or Mt. Radhan.

Before me it has been contended on behalf of the appellant that this decision is wrong, and that in any event the plaintiff being in possession was entitled to a decree. It will be convenient to take the second contention first as the appeal must succeed on this ground. It is contended that as the plaintiff is in possession he is entitled to the declaration as against the defendant who claims no interest in the management. Admittedly the plaintiff is in possession of the Shiwala though he alleges that owing to interference on the part of the defendant the tenants of the shops refused to attorn to him. The trial Court recorded a clear finding to the effect that the defendant had been guilty of interference and this finding was not attacked in the grounds of appeal presented before the Senior Sub-Judge. The only ground that could be suggested as raising the point in any way is ground No. 1 which runs that the plaintiff had no cause of action against the defendant and the suit should have been dismissed on this preliminary ground only.

This clearly does not relate to the finding of the trial Court and that finding

therefore must be accepted. For the appellant reference has been made to 78 P R 1902 (1) and 20 Cal 834 (2). In the latter ruling at p. 842 their Lordships remarked that

the possession of the plaintiff was sufficient evidence of the title as owner against the defendant.

That remark would apply to the present case. The plaintiff is admittedly in possession of the Shiwala and the defendant claims no right therein for himself. He merely contests the plaintiff's right to be the manager. There are descendants of Mt. Atman Devi, the sister of Lachhi Misar, but they are not parties to the present suit though one of them appeared as a witness. Similarly the tenants of the shops are not parties to the suit and nothing which is decided in this suit would affect the rights of any other parties. It appears to me therefore that while it is impossible to give the plaintiff a decree declaring that he is of right entitled to the management of the property as a descendant of Mt. Atman Devi, he is nevertheless entitled as against the present defendant to a decree declaring that he was in possession of the property and restraining the defendant from interfering with him in the management thereof. This however must be construed as in no wise limiting the right of the defendant to take any legal action which he might be entitled to take under S. 92, Civil P. C., or otherwise in the event of mismanagement of the property. To this extent I accept the appeal and grant the plaintiff-appellant a decree. As regards the first point it is admitted that on the failure of the succession to the office of the trustee the right of management reverts to the founder and his heirs (Mulla's Principles of Hindu Law, Para. 421). Mr. Kishan Dayal for the appellant contends that the management of the institution devolves on the ground that he is too remote in descent to be considered an heir under Hindu Law.

Admittedly, the present plaintiff as a daughter's great-grandson would not be an heir to Mt. Radhan though he is in the line of inheritance. Mr. Kishan Dayal has referred to 32 Cal 129 (3) at

p. 131, where their Lordships of the Privy Council remarked that the management and control of the property follows "the line of inheritance from the founder." He contends that this expression is distinguishable from the words "heirs of the founder." No direct authority has been cited by counsel on either side, but the contention of Mr. Kishan Dayal has considerable force and the decision of the Senior Sub-Judge appears to me to be erroneous and based on too narrow an interpretation of the law. It is however unnecessary to record a definite finding on this point, which is not free from difficulty as in view of my finding on the question of possession the appeal must succeed. As the defendant has throughout contested the plaintiff's claim he will pay the costs throughout.

K.S./V.V.

Appeal allowed.

A. I. R. 1936 Lahore 242

AGHA HAIDAR, J.

Khan Chand—Creditor—Appellant.

v.

Nur Muhammad and others—Respondents.

Misc. First Appeal No. 1191 of 1935. Decided on 31st October 1935, from order of Dist. Judge, Mianwali, D/- 16th April 1935.

Immoveable Property—Flour mill is not immoveable property.

Flour mill, as such, can change hands and be removed from one place to another and so it is not immoveable property within the meaning of S. 2 (6) of the Registration Act: 25 Bom 659, *Foll.* [P 242 C 2; P 243 C 1]

*S. L. Puri—*for Appellant.

*V. N. Sethi—*for Respondents.

Judgment—In this case the sole question is whether a particular flour mill in which the insolvent holds a share was immoveable property within the meaning of the term as used in the Registration Act and, therefore, the registered mortgage in favour of Kahan Chand, though of a later date, ought to have priority above the hypothecation in favour of Girdhari Shah which is of an early date. The flour mill, as we are aware, is a heavy machine consisting of large pieces of iron and other metals. It is brought from distant places by rail and is carted away to the place where it is to be fixed and worked. It is attached to the ground by means of nails and bolts and other appliances so that it may remain in a proper position. It can also be trans-

1. Abdul v. Sarbuland, (1902) 78 P R 1902.

2. Ismail Ariff v. Mahomed Ghous, (1893) 20 Cal 834=20 I A 99=6 Sar 305 (P C).

3. Jagindra Nath Roy v. Hemanta Kumari Dasi, (1905) 32 Cal 129=31 I A 203=8 Sar 698 (P C).

ferred by sale or otherwise after it has been used, and in that event it is removed from the spot where it was fixed by unfastening the nails and bolts to be re-fixed once again at another place and this may go on. In short the flour mill, as such, can change hands and be removed from one place to another; on the other hand a house which is attached to the earth, cannot be removed from its site as such, and fixed in another place. It will have to be demolished first and then the masonry and the timber or iron work can be removed by ordinary means of transport, but it would not be the house itself, as we understand the expression. Furthermore, we cannot ignore the fact that in the present case the insolvent was the lessee of the premises and his interest in the land leased to him and on which he had established the flour mill was limited in point of time. Ordinarily speaking, therefore, it does not stand to reason that he would erect a permanent structure on the land on which he was merely a tenant for a limited period. In my opinion the Court below rightly followed the law as laid down in 25 Bom 659 (1). In view of the law laid down in that judgment, and with which I entirely agree, I affirm the order of the Court below and dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

1. N. C. Macleod v. Kikabhoy Khushall, (1901) 25 Bom 659=3 Bom L R 426.

A. I. R. 1936 Lahore 243

RANGI LAL, J.

Nanak Chand—Defendant—Petitioner.
v.

Hazari Mal and others—Plaintiffs and another—Defendants—Respondents.

Civil Revn. No. 352 of 1934, Decided on 1st February 1935, from order of Dist. Judge, Delhi, D/- 24th January 1934.

Decree—Setting aside of—Defendants filing separate applications to set aside ex parte decree—Decree set aside against one defendant only—Decree being indivisible held should be set aside against all.

A trust deed was alleged to be executed by two defendants who were sued on the basis of the trust. An ex parte decree was passed against both. Separate applications to set aside ex parte decree were made by both the defendants. The decree was set aside as against one while the application of other was dismissed. The defendants challenged the validity of the trust deed itself. On revision:

Held: that if the decree against one were allowed to stand and the suit was allowed to proceed against the other, it might result in two inconsistent decrees. The decree was one and indivisible and so under O. 9, R. 13, Civil P. C., the decree should be set aside against all the defendants. [P 243 C 2]

Kishan Dayal—for Petitioner.

Shamair Chand—for Respondents.

Order.—A suit was brought against Nanak Chand and Kastur Chand, who are father and son, on the basis of a trust deed said to have been executed by them. An ex parte decree was passed against both of them on 20th July 1932. The father applied to have the decree set aside on 3rd August 1932, and the son applied separately on 4th August 1932. The trial Court dismissed both the applications on 20th February 1933. The learned District Judge accepted the appeal of the son and set aside the decree against him, but he dismissed the appeal of the father. A petition for revision against the order dismissing the appeal of the father has been filed to this Court. It has been urged that the learned District Judge has failed to consider the proviso to O. 9, R. 13, Civil P. C., which lays down that where the decree is of such a nature that it cannot be set aside as against one defendant only it may be set aside as against all or any of the other defendants also. The question for consideration is whether the decree is or is not of such a nature that it cannot be set aside as against one defendant only. It has been urged before me that the validity of the trust deed relied on by the plaintiffs is not admitted and if the decree against the father stands and the suit is allowed to proceed against the son, it may result in two inconsistent decrees. The decree is one and indivisible, and complications may arise if it is allowed to stand against the father and not against the son. 24 All 383 (1) and 25 Cal 155 (2) support the position taken up by the petitioner. This Court can interfere in revision because a clear provision of law seems to have been ignored by the learned District Judge.

I accept the petition and set aside the ex parte decree against the father also. No order as to costs.

B.D./R.K.

Petition accepted.

1. Bhura Mal v. Har Kishen Das, (1902) 24 All 383=1902 A W N 76.
2. Mahomed Hamidullah v. Tohurenissa Bibi, (1898) 25 Cal 155=1 C W N 652.

A. I. R. 1936 Lahore 244

BHIDE, J.

Fazal Ahmad—Defendant.

v.

Tola Ram Singh—Plaintiff.

Civil Ref. No. 6 of 1935, Decided on 9th October 1935, from decision of Dist. Judge, Attock, D/- 2nd October 1934.

(a) Punjab Tenancy Act (16 of 1887), S. 4 (7)—Mukarridar—Person paying rent for land held by him is a tenant even though a Mukarridar.

The question whether a Mukarridar comes within the definition of a 'tenant' should be decided on the condition on which the land is held by him. Where a person holds land on payment of rent it would be sufficient to bring him within the definition of the term 'tenant.'

[P 245 C 1]

(b) Punjab Tenancy Act (16 of 1887), S. 4 (1)—Land—Option given to lessee to build on land—No building constructed—Land still remains 'land' under Act.

The mere option given to a person to erect building on land leased to him is not sufficient to take the land in dispute out of the definition of that term in the Punjab Tenancy Act when in fact no building has been erected thereon.

[P 245 C 2]

(c) Punjab Tenancy Act (16 of 1887), S. 100—Case triable by Revenue Court, heard and decided by civil Court—Proper issues and evidence recorded—Parties not prejudiced—Case should not be remanded but decree should be registered as one of Revenue Court.

According to S. 100, Pun. Ten. Act if it appears that a suit is determined in good faith and that the parties are not prejudiced by the mistake as to jurisdiction, the decree can be registered as that of a Court having jurisdiction. Where proper issues are framed and the whole evidence is recorded it is not necessary in the interests of justice to remand the case, as S. 100 gives discretion to Lahore High Court to register decree as that of a Revenue Court in such cases.

[P 245 C 2]

Barkat Ali and Mohammad Din Jan—for Defendant.

Shamair Chand, Yashpal Gandhi and M. C. Mahajan—for Plaintiff.

Order.—This is a reference by the District Judge of Attock under S. 100, Pun. Ten. Act, recommending that a certain decree of the Senior Subordinate Judge, from which an appeal was preferred to him, be registered as a decree of a revenue Court inasmuch as the suit was cognizable by a revenue Court. The material facts may be briefly stated as follows:

The plaintiff Tola Ram Singh took a lease of 28 kanals 6 marlas of land as a Mukarridar from two persons named Chanpir and Ghulam Hussain on 18th February 1919. According to the terms of the lease the plaintiff was entitled to

sink a well and use the land for agricultural purposes or in the alternative to erect buildings thereon. The rent was fixed at Rs. 3 per kanal. Subsequently on 14th May 1925 Chanpir and Ghulam Hussain mortgaged the 'right to receive the rent' in favour of the plaintiff. On 24th July 1930 Chanpir and Ghulam Hussain transferred the land to the defendant Fazal Ahmad by virtue of a deed of exchange and the latter thereupon issued a notice to the plaintiff alleging that the plaintiff was keeping the land uncultivated and was therefore liable to ejectment. The plaintiff then instituted the present suit for a declaration that he was in possession of the land on a permanent lease as a Mukarridar and that he was not liable to ejectment. As regards the deed of exchange on which the defendant Fazal Ahmad relied the plaintiff alleged that it was champertous and against public policy and was therefore void. The suit was originally filed in a revenue Court but the revenue Court held that it was triable by a civil Court.

In the civil Court the question of jurisdiction was again raised but the Senior Subordinate Judge held that the suit was cognizable by a civil Court and decided on merits in favour of the plaintiff. From this decision an appeal was preferred to the District Judge who took a different view on the question of jurisdiction. He came to the conclusion that the suit as originally framed was rightly held to be cognizable by a civil Court but that inasmuch as certain issues between the parties which it was necessary to decide were triable only by a revenue Court, the plaint should have been returned for presentation to a revenue Court, as required by proviso to sub-s. 3, S. 77, Pun. Ten. Act. The learned District Judge was however of opinion that the suit had been tried in good faith and there had been no prejudice to the parties and he has therefore recommended under S. 100, Pun. Ten. Act that the decree of the Senior Subordinate Judge be registered as a decree of a Revenue Court.

On behalf of the plaintiff it is contended that the view of the learned District Judge that the suit was triable by a revenue Court was not correct; it is urged that the plaintiff being a Mukarridar does not come within the definition of a 'tenant' that Fazal Ahmad is not a landlord within the definition of that term and that

the land in dispute also does not fall within the definition of 'land' in the Punjab Tenancy Act. As regards the first point it is admitted that there are certain rulings of the Punjab Chief Court in which it has been held that a Mukarridar is a tenant though of a higher status. It is however contended that owing to the amendment of the Punjab Tenancy Act in the year 1925 these rulings are no longer good law. All that was however done in 1925 was to define the term 'Mukarridar' in S. 4, Cl. 20. Some other sections of the Punjab Tenancy Act were also amended and 'Mukarridars' were classed as 'occupancy tenants' for the purposes of those sections. They have, however, not been excluded from the definition of a tenant under Cl. 5, S. 4 as certain other persons have been; for example an inferior land owner, a mortgagee of the rights of a landlord and so on. It seems to me that the question, whether a Mukarridar comes within the definition of a 'tenant' will have to be decided on the conditions on which the land is held by him. In the present instance it appears from the lease dated 18th February 1919 that the land was taken by the plaintiff from Chanpir and Ghulam Hussain on payment of Rs. 3 per kanal as rent and this would, in my opinion, be sufficient to bring him within the definition of the term 'tenant.' The contention of the term in the Punjab Tenancy Act does not appear to me to have any force. Only 'the right to receive the rent' had been mortgaged by Chanpir and Ghulam Hussain in favour of the plaintiff. Their other rights as 'landlords' were still with them and these were all transferred to Fazal Ahmad. The mortgage arrangement was only of a temporary character and but for that special contract Fazal Ahmad would be the person entitled to receive the rent from the plaintiff. The definition of the term 'landlord' in the Punjab Tenancy Act is as follows:

'Landlord' means a person under whom a tenant, holds land, and to whom the tenant is, or but for a special contract, would be liable to pay rent for that land.

It has been found by the learned District Judge that there had been a valid transfer of the land in favour of Fazal Ahmad; in the circumstances, it seems to me that he comes within the definition of a 'landlord.' The last point urged was that the land in dispute does not fall

within the definition of that term. The term 'land' is defined as follows:

'Land' means land which is not occupied as the site of any building in a town or village and is occupied or had been let for purposes subservient to agriculture, or for pasture, and includes the sites of buildings and other structures on such land.

In the present instance it is true that the plaintiff was given the option to build on the land but it is admitted that as a matter of fact no building has yet been erected thereon. The mere option given to the plaintiff is not, in my opinion, sufficient to take the land in dispute out of the definition of that term in the Punjab Tenancy Act. The learned counsel for the plaintiff did not dispute the fact that certain issues relating to the conditions of the tenancy did arise between the parties and these issues would clearly be triable by a revenue Court under Cl. (1), sub-s. 3, S. 77. The suit was therefore rightly held to be cognizable by a revenue Court in view of the proviso to sub-s. 3, S. 77. The last point for consideration is whether the decree of the Senior Subordinate Judge should be registered as that of a revenue Court or whether the suit should be sent for retrial to the Senior Subordinate Judge as contended by the learned counsel for the defendant. According to S. 100, Punjab Tenancy Act if it appears that the suit was determined in good faith and that the parties have not been prejudiced by the mistake as to jurisdiction, the decree can be registered as that of a Court having jurisdiction. All that the learned counsel for the defendant has urged is that the revenue Courts are considered to be in a better position to decide cases relating to land and, as objection to jurisdiction was taken at the outset, the case should be sent back for retrial. It was, however, admitted that the proper issues had been framed and the whole evidence had been recorded. In the circumstances it does not appear to me necessary in the interests of justice to remand the case to the Senior Subordinate Judge. S. 100 gives discretion to this Court to register the decree as that of a revenue Court in such cases. The defendant will, of course, now get a decision by a revenue Court on appeal, and that seems to be sufficient to meet the ends of justice.

As the whole evidence has been recorded it will be putting the parties to un-

necessary expense if the case were ordered to be tried de novo.

I accordingly accept the recommendation of the learned District Judge and direct that the decree of the Senior Subordinate Judge be registered as that of a revenue Court and that the appeal presented to the learned District Judge be returned for presentation to the Collector. The question of jurisdiction was not free from difficulty and I therefore make no order as to costs in this Court.

B.D./R.K. *Order accordingly.*

*** A. I. R. 1936 Lahore 246**

JAI LAL, J.

Punjab National Bank, Ltd.—Defendants—Appellants.

v.

(Firm) Nanhemal Janki Das—Plaintiffs—Respondents.

Misc. First Appeal No. 719 of 1935, Decided on 16th October 1935, from order of Senior Sub-Judge, Delhi, D/- 28th January 1935.

*** Res-judicata—Restitution—Principle of res-judicata is not applicable to application for restitution or application for execution of portion of decree.**

Where the execution of the decree has been allowed to proceed without any objection by the judgment-debtor which was open to him and which he had opportunity to make in such proceedings he is not entitled to raise such objection in subsequent execution proceedings as the principle of res judicata debars him from doing so. But the above principle has no application to restitution or even to an application for execution of a portion of the decree: 8 Cal 51 (P C); 6 All 269 (P C) and 1933 Lah 594, Ref. [P 247 C 1]

Nawal Kishore—for Appellants.

Shamair Chand—for Respondents.

Judgment.—The firm Nanhemal Jankidas instituted a suit against the Punjab National Bank Ltd., for recovery of Rs. 1,15,875 being principal and interest claimed by them to be due on a deposit made with the bank. The bank admitted liability for Rs. 1,03,000 and paid that amount in Court. They, however, disputed liability for the rest of the plaintiffs' claim which apparently represented interest on the principal amount deposited with them after a certain date. The trial Court decreed the suit with costs against the Bank. The result was that the decree-holder firm recovered from the Bank the balance of their claim and Rs. 3,411 as costs of the suit as awarded by the trial Court to them. The Bank preferred an appeal to this Court

which was accepted by a Division Bench on 15th March 1933. This Court dismissed the suit with costs throughout and provided that the costs would be calculated on the amount in dispute between the parties, namely Rs. 12,875 and not as in the lower Court's decree on Rs. 1,15,875. This means that the decree of the trial Court awarding costs of the suit to the plaintiffs was set aside and the plaintiffs were to pay the costs of the defendants in the trial Court and also in the High Court on Rs. 12,875. The Bank then applied for the recovery of their costs and for the restitution of the amount paid by them to the plaintiffs but it seems that they did not mention Rs. 3,411 costs on the original suit which they had paid in execution of the decree; they merely claimed restitution of Rs. 12,875. The trial Judge directed that the amount claimed by the bank be paid to it and this order was complied with.

It appears, therefore, that the Bank has already recovered the principal amount of the decree, that is Rs. 12,875 paid by them to the plaintiffs. They have also recovered the costs awarded to them but they have not recovered the costs paid by them to the plaintiffs on the amount sued as awarded by trial Court. It is obvious that they are entitled to claim restitution of this amount of costs under the decree of this Court, but Mr. Shamair Chand, counsel for the respondents, the plaintiff firm, in supporting the order of the trial Judge rejecting a further application made by the Bank claiming restitution of the amount paid by them to the plaintiffs as costs, contends that this Court did not intend that there should be a restitution of these costs and also that an application for restitution does not lie in view of the fact that a previous application for restitution was made and granted by the Court below. By raising this last contention the learned counsel seeks to bring into operation the principle of res judicata to applications for restitution and incidentally to applications for execution of decrees. A further minor point is raised that in the application for restitution, by some curious mistake, the Bank claimed restitution of Rs. 2,853-12-0 instead of Rs. 3,411 and they are not entitled on this appeal to claim restitution of the larger amount. I may at once say that there is force in this last contention. The Bank did not

claim restitution of the full amount of Rs. 3,411, no doubt by some accidental mistake, still on this appeal I am unable to direct restitution of a larger amount than what they claimed in the Court below. With regard to the first objection that the decree of this Court did not direct restitution of the costs recovered by the plaintiffs, all that is necessary to say is that the judgment of this Court is quite clear on the point and there can be no doubt that the decree of the Court below was set aside and the suit was dismissed with costs throughout. It is obvious that as a result of this judgment the plaintiffs were bound to return to the defendants whatever they received in excess of the amount found to be due to them.

On the question of res judicata the learned counsel has cited some authorities, as for instance, 8 Cal 51 (1); 6 All 269 (2); 14 Lah 409 (3) and other cases which take the same view as cases mentioned above. In all these cases it has been held that where the execution of the decree has been allowed to proceed without any objection by the judgment-debtor which was open to him and which he had opportunity to make, in such proceedings he is not entitled to raise such objection in subsequent execution proceedings as the principle of res judicata debars him from doing so. I am unable to see that the law laid down in these cases has any application to restitution or even to an application for execution of a portion of the decree. If it had been the case that the Court in the first instance held that the appellant bank was not entitled to obtain restitution of the amount now in dispute or the bank had taken it into account when calculating the amount due to it and received the net amount thus due according to such calculation, then there might have been some force in the objection of the respondent's counsel that the Bank should be held to be estopped from claiming the amount now in dispute. But no application, directly or indirectly, was made on the previous occasion to recover the costs which had been illegally realised by the decree-hol-

der. The learned counsel for the respondents has not been able to controvert the proposition that an execution of a decree for money can be had for a portion of the decretal amount in one Court and for the rest in another Court. The same principle would apply to applications for restitution as in this case. In my opinion there is no ground for holding that the present application is barred by res judicata and that, therefore, the bank is not entitled to apply for restitution of the costs paid by it to the respondent firm.

I accept this appeal and set aside the order of the Court below dated 28th January 1935 and direct that the application of the bank for restitution of Rs. 2,853-12-0 on account of costs and interest thereon at six per cent per annum from the date of payment till realisation be entertained by the Court below and the case proceeded with in accordance with law. There will be no order as to the costs of these proceedings either in this Court or in the Court below.

B.D./R.K.

Appeal allowed.

* A. I. R. 1936 Lahore 247

YOUNG, C. J. AND RANGI LAL, J.

Bakhshan—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1341 of 1934, Decided on 8th January 1935, from order of Sess. Judge, Dera Ghazi Khan, D/- 28th August 1934.

* (a) Criminal Trial—Confession—Confession recorded without questioning accused as to its voluntary nature—Defect is not curable under S. 533, Criminal P. C.—Such confession is inadmissible under S. 80, Evidence Act—Such confession however can be proved as admission under S. 21, Evidence Act—Magistrate can use such irregularly recorded confession to refresh his memory while proving confession as admission under S. 21.

Where the Magistrate does not comply with one of the requirements of S. 164, Criminal P. C., namely, that a confession shall not be recorded unless upon questioning the person making it, the Magistrate has reason to believe that it was made voluntarily, this defect cannot be cured under S. 533, Criminal P. C., because the confession cannot be said to have been 'duly made,' viz., in accordance with law. The record of the confession cannot, therefore be admitted in evidence under S. 80, Evidence Act. The consequence of non-compliance with the provisions of S. 164 is that the record of the confession cannot be admitted in evidence under S. 80, Evidence Act, without further proof. The admissibility of evidence is how-

1. Mungal Pershad Dichit v. Grijakant, (1882) 8 Cal 51=8 I A 123=4 Sar 249 (P C).
2. Ram Kirpal v. Rup Kuari, (1884) 6 All 269=11 I A 37=1886 A W N 286 (P C).
3. Ved Kaur v. Balkishan Das, 1933 Lah 594=141 I C 577=14 Lah 409=34 P L R 528.

ever governed by the Evidence Act; and under S. 21 an oral confession by an accused person is relevant subject to the provisions of Ss. 24 to 29. The confession must, in such a case, be proved by the testimony of the Magistrate who heard it. If he did not record it at all, he would obviously have to rely on his memory alone. If he did record it, but not in accordance with law and consequently the record is rendered inadmissible under S. 80, he can still use it to refresh his memory when in the witness-box. The adverse party can then call upon him to produce the document and cross-examine him thereupon. If the confession was read out to the accused and was admitted by him to be correct and was also signed by him, it can perhaps be regarded as a confession in writing and can be proved by the prosecution under S. 21, Evidence Act. [P 249 C 2; P 250 C 1]

*** (b) Criminal Trial—Confession—Initial presumption—Confessions not regularly recorded should not be admitted into evidence unless it is proved that it does not offend provisions of S. 24, Evidence Act.**

In the case of a confession recorded according to law, there is an initial presumption that it does not offend against S. 24, Evidence Act, but, if, on a consideration of the direct and circumstantial evidence in the case, it does appear to the Court that the confession was obtained by any inducement, threat or promise such as is referred to in the aforesaid section it will be held to be inadmissible. In the case of a confession not recorded according to law, no such presumption arises and it is apparently the duty of the prosecution to satisfy the Court that the confession does not contravene the provisions of S. 24, Evidence Act, before it can be admitted. [P 250 C 1, 2]

*** (c) Criminal Trial—Confession—Weight to be attached—Confessions classified into five classes—Amount of weight to be attached to each class is different—Court, with due regard to cumulative effect of evidence, should decide weight to be attached to any confession.**

Confession made to a Magistrate can be divided into five classes: (1) Those recorded with all the formalities prescribed by Ss. 164 and 364, Criminal P. C. (2) Those imperfectly recorded, but where the defect is cured by S. 533, Criminal P. C. (3) Where the defect is not cured and confession is proved by the testimony of the Magistrate. (4) Where the Magistrate refuses to record the confession of an accused person produced before him for that purpose but hears it. (5) Where the accused appears before a Magistrate of his own accord and makes an oral confession.

Confessions falling under classes 1 and 2 are recorded under great precautions and should, therefore, obviously carry more weight than those falling under the remaining classes. A confession under class 3 would be less weighty because some of the precautions prescribed by law were not observed. A confession under class 4 should have very little weight unless the Magistrate can explain to the entire satisfaction of the Court why he refused to act under Ss. 164 and 364, Criminal P. C. The weight to be attached to a confession under class 5 would depend entirely on the circumstances under which it is made. It is impossible to lay down

any hard and fast rule as to the amount of weight to be attached to a particular confession. This is a matter for the Court to decide in each case on consideration of cumulative effect of the entire evidence in the case.

[P 251 C 1, 2]

Mohammad Aslam Khan—for Appellant.

Ram Lal—for Opposite Party.

Judgment.—On the 30th April 1934, at midday, Bakhshan, accused, appeared at the Jampur Police Station in the Dera Ghazi Khan district with a superficial cut wound $2\frac{1}{4}'' \times \frac{1}{2}'' \times \frac{1}{2}''$ on his throat and reported that towards the small hours of the morning he was going in the company of Mt. Ghulaman whom he had abducted six or seven months before when they were waylaid by her husband Jumma and his friends, Ghulam Hussain, Kalu and Qadra, who carried her away after having wounded him with a knife. He was sent to the hospital and Allah Ditta, Head Constable, accompanied by Mir Hazar Khan, tracker, constable, and Khan Chand Sarbrah, Zaildar, went to the spot indicated in the above report as the scene of the occurrence. No marks of any struggle were found there, but the dead body of Mt. Ghulaman was found under a Jal tree close by. Hazar Khan noticed the track of a man and a woman coming from the Bakainwala well to that place and the track of the man alone leaving the place and proceeding to Shahanwala well, then to Bakainwala well and thence to the Jampur road where it was lost. The footprints on these tracks were clearly identifiable in spite of a slight drizzle which had taken place in the interval and some of these were properly covered. The place where the dead body was found was in the jurisdiction of the Kot Chhutta Police Station and the investigation was therefore taken up by the Sub-Inspector in charge of that police station.

On 1st May 1934, a track identification parade was held and Ghulam Hussain, Kalu and Qadra were made to walk with several other men but the track of none of those men was found to tally with the track of the man who had accompanied the woman to the Jal tree and had left her there. On the following day another parade was held when the accused was made to walk with a few other men. His footprints were picked out by the tracker as corresponding to the man's footprints

which had been preserved. The woman's footprints were found to be those of the shoes on the feet of the corpse. The accused was then questioned about the matter and expressed his willingness to make a statement. He was promptly produced before a second class Magistrate who was specially empowered to record confessions and made a confession to the effect that he had abducted Mt. Ghulam six or seven months before, had kept her concealed at various places but found it impossible to do so any longer, that he was taking her on the night in question to restore her to her people, that she strongly objected to this and threatened to have him prosecuted if he did so, that he thereupon killed her with a razor and then tried to commit suicide but succeeded only in inflicting a superficial cut on his throat and that he then went and made a false report as stated above. After making this confession the accused dug out a razor which was buried near the Jal tree. It was on examination by the Chemical Examiner and the Imperial Serologist found to be stained with human blood. The accused was then sent up for trial. He pleaded not guilty and denied having made any confession. He said that he had been beaten by the police and that his thumb-mark was obtained on a statement recorded at the dictation of the Sub-Inspector. The prosecution case rests on: (a) the confession; (b) the track evidence; and (c) the recovery of the razor at the instance of the accused. The track evidence is particularly reliable in this case as it furnished the first clue against the accused and showed the falsity of the first information report. It receives support from independent evidence which goes to show that the accused went first to the Shahanwala well and then to the Bakainwala well after the occurrence.

The evidence on point (c) consists of the statements of Din Mohammad Khan, Zaildar, P. W. 6, and Ghulam Mohammad Khan, Sub-Inspector, P. W. 16, which we have no reasons to disbelieve. A defence witness stated that a razor was picked up from the spot on 30th April 1934, but he is a relation of the accused and his testimony is not entitled to any serious consideration. As for the confession, it has been contended that it is not admissible in evidence because the Magistrate who recorded it did not question the accused in order to ascertain

whether it was being made voluntarily. The Magistrate appeared as a witness and stated that before recording the confession he had warned the accused that he need not make a confession and that if he made one it might be used as evidence against him. At the foot of the statement the following certificate was appended :

I had clearly explained to Bakhshan that he need not make the confession, and that, if he did, his confession would be used against him as a piece of evidence. I am sure it has been obtained without resort being had to force or compulsion. The confession was made in my presence and within my hearing. It was read out to him and he admitted it to be correct. And this is the statement, entire and correct, made by Bakhshan.

It is clear that the Magistrate did not comply with one of the requirements of S. 164, Criminal P. C., namely, that a confession shall not be recorded unless upon questioning the person making it the Magistrate has reason to believe that it was made voluntarily. This defect could not be cured under S. 533, Criminal P. C., because the confession cannot be said to have been 'duly made', viz., in accordance with law. The record of the confession cannot, therefore, be admitted in evidence under S. 80, Evidence Act. This being so, the question arises whether the confession can be proved as an admission under S. 21, Evidence Act. There has been some conflict of judicial opinion on this point but the view of this Court with which we entirely agree, has consistently been that Ss. 164 and 364, Criminal P. C., merely prescribe the mode of recording a confession and do not in any way affect the provisions of the Evidence Act regarding the admissibility of a confession heard by a Magistrate. S. 164, Criminal P. C., authorises a Magistrate to record a confession but does not make it incumbent upon him to do so, nor does it enact that, if a confession is not recorded in accordance with the provisions of that section, the evidence given by the Magistrate to prove the confession shall be inadmissible. The consequence of non-compliance with those provisions is that the record of the confession cannot be admitted in evidence under S. 80, Evidence Act, without further proof. The admissibility of evidence is governed by the Evidence Act and under S. 21 of that Act an oral confession by an accused person is relevant subject to the provisions of Ss. 24 to

29. The confession must however be proved by the testimony of the Magistrate who heard it. If he did not record it at all he would obviously have to rely on his memory alone. If he did record it, but not in accordance with law and consequently the record is rendered inadmissible under S. 80, he can still use it to refresh his memory when in the witness-box. The adverse party can then call upon him to produce the document and cross-examine him thereupon. If the confession was read out to the accused and was admitted by him to be correct and was also signed by him, it can perhaps be regarded as a confession in writing and can be proved by the prosecution under S. 21, Evidence Act. In the present case the confession was thumb-marked by the accused after it was read out to him and was admitted to be correct. In any case, the Magistrate stated that Ex. P. D. was a correct record of the statement made by the accused and the document was read out in Court. The Magistrate gave evidence three months and 25 days after he recorded the confession and could not be expected to remember what the accused had stated. He could only testify to the effect that the statement made by the accused was contained in the record prepared by him.

We are therefore of opinion that the confession has been properly proved. It is clear that this confession cannot be excluded under Ss. 25 to 29, Evidence Act. S. 24 is the only section which need be considered. That section makes a confession irrelevant if it appears to the Court that it was caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings, against him. In the case of a confession recorded according to law there is an initial presumption that it does not offend against S. 24, but, if, on a consideration of the direct and circumstantial evidence in the case, it does appear to the Court that the confession was obtained by any inducement, threat or promise such as is referred to in the aforesaid

section it will be held to be inadmissible. In the case of a confession not recorded according to law no such presumption arises and it is apparently the duty of the prosecution to satisfy the Court that the confession did not contravene the provisions of S. 24, Evidence Act, before it can be admitted. The points that go to show that the confession in this case did not contravene those provisions are: (1) The accused was not suspected till the track evidence definitely seemed to connect him with the crime; (2) the confession was made soon after the track evidence was obtained; (3) there was no opportunity for any torture and the accused made no complaint of any kind before the Magistrate; (4) there is no allegation that the confession was the result of any inducement, threat or promise, proceeding from a person in authority; (5) when the accused was faced with the track evidence he must have felt that a denial of guilt would be of no avail.

For these reasons we are satisfied that S. 24, Evidence Act, is no bar to the admissibility of this confession. The next question for consideration is, whether we believe the confession to be true. This question will arise even in the case of a recorded confession admitted under S. 80, Evidence Act. In the present case the circumstances under which the confession was obtained furnish the best guarantee of its truth. The wound found on the throat of the accused was superficial and the medical officer who examined it was inclined to think that it was self-inflicted and not caused by an adversary in the course of a struggle. This wound and the injuries found on the deceased could have been caused by the razor which was produced by the accused himself. These facts coupled with the excellent motive mentioned in the confession and the track evidence not only go to show the truth of the confession but furnish the corroborative evidence which prudence requires in the case of a retracted confession. It has been urged that an oral confession proved by the testimony of the Magistrate who recorded it, even if admissible in evidence, should not have the same value as a confession recorded under all the safeguards which were considered to be necessary by the legislature. As an abstract proposition this is perhaps unexceptionable, but still the exact weight which is to be attached

to a particular confession, whether recorded in accordance with law or not, would depend on the facts of each case. Confessions made to a Magistrate can be divided into five classes: (1) Those recorded with all the formalities prescribed by Ss. 164 and 364, Criminal P. C.; (2) those imperfectly recorded but where the defect is cured by S. 533, Criminal P. C.; (3) where the defect is not cured and the confession is proved by the testimony of the Magistrate; (4) where the Magistrate refuses to record the confession of an accused person produced before him for that purpose but hears it; (5) where the accused appears before a Magistrate of his own accord and makes an oral confession.

Confessions falling under classes 1 and 2 are recorded under great precautions and should, therefore, obviously carry more weight than those falling under the remaining classes. A confession under class 3 would be less weighty because some of the precautions prescribed by law were not observed. A confession under class 4 should have very little weight unless the Magistrate can explain to the entire satisfaction of the Court why he refused to act under Ss. 164 and 364, Criminal P. C. The weight to be attached to a confession under class 5 would depend entirely on the circumstances under which it is made. It is impossible to lay down any hard and fast rule as to the amount of weight to be attached to a particular confession. This is a matter for the Court to decide in each case on consideration of the cumulative effect of the entire evidence in the case. In the present case we agree with the learned Sessions Judge and the assessors that the confession corroborated as it is by the other evidence referred to above fully proves the guilt of the accused. The murder was committed in a brutal manner and there are no extenuating circumstances in the case. We, therefore, dismiss the appeal and confirm the sentence of death.

B.D./R.K.

*Appeal dismissed.***A. I. R. 1936 Lahore 251**

JAI LAL AND SALE, JJ.

(Firm) Jowala Das Govind Ram—Appellant.

v.

Thakar Das—Respondent.

First Appeal No 810 of 1932, Decided on 1st July 1935.

(a) Charge—Mortgage suit—Bank claiming prior charge in pursuance of prior deed of good faith by mortgagors—Bank not claiming equitable mortgage—Document itself held could not create charge.

A mortgage suit involved certain properties. A bank claimed that a charge prior to the mortgage was created in their favour by the execution of a 'deed in good faith' executed in favour of the bank by the mortgagors and which comprised the properties mortgaged. It was not the case for the bank that the deed of good faith created an equitable mortgage in their favour:

Held: that for the purposes of the suit it was not possible to distinguish between a charge and an equitable mortgage and since the document was not relied on as creating an equitable mortgage it could not itself create any charge on the properties mentioned therein.

[P 254 C 1]

(b) Mortgage—Equitable—Essentials of.

To establish a mortgage by deposit of the title deeds, it is necessary to prove (1) a debt, (2) a deposit of title deeds and (3) an intention that the deeds shall be security for the debt.

[P 254 C 1]

(c) Mortgage—Equitable—Creation of—Title-Deeds must be documents creating title and not merely evidencing title.

It is necessary to distinguish between documents creating title and documents evidencing title, and it seems desirable to restrict as far as possible to the former category the deeds, the deposit of which can validly create an equitable mortgage.

[P 255 C 1]

(d) Mortgage—Equitable—Deposit of jama-bandi copies—No equitable mortgage is created—Equitable mortgage sought to be created by deposit of receipts and mutation copies—Clear evidence that no better document available is necessary—Receipts must definitely relate to property to be charged.

In no circumstances can the deposit of a mere certified copy of a jamabandi entry constitute an equitable mortgage. In order that receipts and certified copies of mutations should be capable by their deposit of creating a valid equitable mortgage, it would be necessary that there should be clear evidence that no better document of title was available, and in the case of receipts it should also be established beyond doubt that the receipt produced definitely relates to the property to be charged.

[P 255 C 1, 2]

Badri Das and J. L. Kapur—for Appellants.

Iqbal Singh, M. A. Majid and Shuja-ud-din—for Respondent 1.

Sale, J.—On 3rd August 1926, Thakar Das and Mathra Das jointly executed a registered mortgage deed in favour of twenty-two firms to secure a debt aggregating to Rs. 80,000. It appears that Thakar Das and Mathra Das had also had dealings with the Imperial Bank of India, Lyallpur Branch, and on 31st August 1926 the Imperial Bank served a notice on all the twenty-two mortgagees, with information to Thakar Das and Mathra Das, that some of the properties covered by the registered mortgage deed in their favour, were already mortgaged to the Bank.

Following the disclosure of these facts, a complaint of cheating was brought against the mortgagors, Thakar Das and Mathra Das by some of the firms concerned in the registered mortgage. As a result of this complaint, there was a compromise which was embodied in a fresh agreement between Thakar Das-Mathra Das and their mortgagees dated 12th September 1927. Subsequently the mortgagors again defaulted, and the twenty-two firms sued to recover Rs. 55,625 principal and interest on the revised agreement. During the pendency of this suit, the Imperial Bank applied to be impleaded as a defendant on the ground that a portion of the mortgaged property in suit was the subject of a prior charge in their favour. The Bank produced a document Ex. D-27 printed at p. 73 of the paper book entitled a "Deed of Good Faith" dated 9th May 1925, by which Mathra Das, acting as a proprietor of the firm Thakar Das-Mathra Das, deposited for safe custody with the Bank certain title deeds and other documents as "a guarantee of good faith." The documents thus deposited included five of the properties subsequently mortgaged to the twenty-two plaintiffs. These are Nos. 7, 8, 9, 12 and 13 in the schedule of the deeds attached to this "Deed of Good Faith." The Bank however did not claim that this transaction amounted to the creation of an equitable mortgage. The case for the Bank is, as was made clear by the evidence of Mr. Seton, printed on pp. 18 and 19 of the paper book, that an equitable mortgage by the deposit of title deeds was created subsequently by Mathra Das on 12th May 1926, as evidenced by the Title Deed Register Ex. D. 3-38 printed on pp. 76 and 77 of the paper book. The relevant entries in this

Title Deed Register include documents relating to properties Nos. 7, 8, 12 and 13 of those mentioned in the schedule attached to the Deed of Good Faith, but there is no document relating to item No. 9 "Three shops at Lyallpur."

The lower Court has held that this Deed of Good Faith dated 9th May 1925 created a charge on the properties mentioned therein, and that the transaction evidenced by the Title Deed Register Ex. D-3/38 dated 12th May 1926, created an equitable mortgage in favour of the Bank. Since both these transactions were prior to the registered mortgage deed in suit in favour of the plaintiffs dated 3rd August 1926, the Senior Subordinate Judge held the Bank to be a prior mortgagee, and in granting the plaintiffs a decree for Rs. 55,625 with costs and interest against the mortgagors Thakar Das and Mathra Das, directed that the property covered by their mortgage should, in default of payment, be sold subject to the claims of the Imperial Bank in respect of the five properties therein included. This decree has not been contested by the mortgagors Thakar Das and Mathra Das, but the plaintiff-mortgagees, appeal against the finding of the trial Court that the property mortgaged to them is subject to a charge held by the Imperial Bank. It may be mentioned here that during pendency of the suit in the lower Court, the Imperial Bank obtained on 19th January 1930, a decree against Mathra Das and Thakar Das on the basis of their equitable mortgage, but the plaintiffs in the present case were not a party to that suit. The question for determination in this appeal is whether the Imperial Bank of India are prior mortgagees in respect of the five properties mentioned. For facility of reference I append a comparative statement [See page 253] relating to these five properties showing their description in the particulars filed with the plaint, the corresponding entries in the Bank's Deed of Good Faith and Title Deed Register, and the relevant documents stated to have been deposited by Mathra Das as mentioned in the Title Deed Register of the Bank in order to create an equitable mortgage. I shall refer to these properties by the serial number given in column No. 1 of this statement. The two main points, the decision on which will determine this appeal, are (1) whether there is any proof of an intention by Thakar

COMPARATIVE STATEMENT.

1	2	3	4	5
No. of property in plaint.	No. in Sch. 1, page 101.	No. in Deed of Good Faith, Ex. D-3-27, page 73.	No. in equitable mortgage Ex. D-3-38, page 76.	Documents with their pages and exhibits.
1 Shop No. 3583, area 4 marlas 262 sqr. ft. situate at Mandi Lyallpur.	9 3 shops and Ihata situate at Grain Market, Lyallpur.	9 3 shops at Lyallpur.	(Blank) Sd. S. H. Sale.	(1) Copy of sale-deed dated 22nd November 1919, Ex. P-34, page 118. (2) Deed of rent, dated 27th December 1920, Ex. P.-33, page 122. (3) Registered sale of mortgagee rights dated 6th February 1913, Ex. P.-35, page 112. (4) Mortgage-deed, dated 12th November 1905, Ex. P.-36, page 109.
2 Houses Nos. 163 and 209, area 1 kanal 2 marlas 102 sqr. ft.	7 5 shops Nos. 163 and 209.	7 Site for 5 houses at Lyallpur.	7 5 houses in Lyallpur.	(1) Original mutation, dated 23rd June 1930, Ex. P.-24, page 140. (2) 4 Government receipts for Rs. 13,000, Exs. P.-25, P. 26, P.-27 and P.-28, pages 120 and 121.
3 Houses are 12 marlas and 166 sqr. ft.	1 House in Montgomery Bazar, 12 marlas and 166 sqr. ft.	12 Site for house at Lyallpur.	1 One house in Montgomery Bazar.	(1) Original sale-deed Ex. P.-16, page 115. (2) Receipt by mortgagee, Ex. P.-17, page 117. (3) Jamabandi, Ex. P.-18, page 136.
4 Godown khasra Nos. 1739-1740, area 10 17 marlas.	6 Godown No. 10.	8 Site for Godown at Lyallpur.	6 Godown in Lyallpur.	(1) Mutation, dated 5th December 1923, Ex. P.-21, page 138. (2) Receipt for Rs. 9,360, Ex. P. 23, page 121. (3) Receipt for Rs. 2,840, Ex. P. 23, page 120.
5 Kothi area 7-15.	8 Site for construction of bungalow.	18 Site for house at Lyallpur.	8 Site for a bungalow.	(1) Fard Intikhab, Ex. P.-20, page 137.

Das and Mathra Das to create an equitable mortgage in favour of the Bank and (2) whether the documents deposited with the Bank in this connexion were "title deeds" sufficient to create an equitable mortgage.

As already stated, it is not the case for the Bank that the Deed of Good Faith dated 9th May 1925, created an equitable mortgage. It appears that the only importance that Mr. Majid on behalf of the Bank attaches to this document is the

fact that it includes properties Nos. 1-9 described as three shops at Lyallpur, which is omitted from the list of documents said to have been deposited by way of equitable mortgage with the Bank on 12th May 1926. For the purposes of the present suit it is not possible to distinguish between a charge and an equitable mortgage, and since the document of 1925 is not relied on as creating an equitable mortgage, I am unable to see how this document can itself create any charge on the properties mentioned therein. It has been urged on behalf of the appellant that in so far as the document of 1925 can be said to transfer an interest in immoveable property, it is inadmissible for want of registration. It is possible that for this reason the bank has not chosen to rely on this document as creating an equitable mortgage. But in any event the question whether it is or is not admissible for this purpose does in the circumstances arise. I am of opinion, that whatever may have been the real intention of the parties in executing the Deed of Good Faith in 1925, it cannot now be relied on to create any charge in respect of the properties mentioned therein, and since it is not the case for the bank that it created an equitable mortgage, its only relevancy is to throw light on the question of the intention of the parties with respect to the deposit of title deeds in May 1926.

To establish a mortgage by deposit of title deeds, it is necessary to prove (1) a debt, (2) a deposit of title deeds and (3) an intention that the deeds shall be security for the debt. The existence of a debt as between Mathra Das-Thakar Das and the Imperial Bank is abundantly proved and had not been contested. The deposit of certain documents with the intention to create an equitable mortgage as security for a debt is proved not only by the correspondence that passed between the parties, but also by the evidence of the Bank's officers coupled with the factum of deposit of documents with the Bank in May 1926. It is true that Mathra Das has now prevaricated in his evidence on this point, but this prevarication is explained by the complaint of cheating which had been brought against him by some of the plaintiff mortgagees and subsequently settled by an agreement. The finding of the lower Court that Mathra Das did intend to create an

equitable mortgage with the Bank on 12th May 1926 has not been challenged in appeal by Mathra Das himself, and I agree with the trial Court in holding that Mathra Das and Thakar Das did intend to create an equitable mortgage on 12th May 1926, by depositing with the Bank the documents mentioned in the last column of the comparative statement already recited. But since no mention was made in May 1926 of the deposit of any documents in respect of property No. 1 (the three shops at Lyallpur) it follows that the Bank cannot claim any priority as mortgagees in respect of this property.

It remains to consider how far the documents deposited in respect of properties Nos. 2, 3, 4 and 5 are "title deeds" within the meaning of S. 58, T. P. Act. Of the relevant documents, only one, an original sale-deed relating to property No. 3, is unquestionably a title deed. The other documents consist of certified copies of mutation entries, jamabandi entries and receipts. The nature of the documents which constitute title deeds for the purpose of creating an equitable mortgage has been exhaustively discussed in a Division Bench ruling of this Court cited as Civil Appeal No. 2208 of 1929. The question in that case was whether a copy of a sale-deed and a certified extract of an entry from a jamabandi were documents of title, the deposit of which would create a valid equitable mortgage. The question was answered in the negative by separate but concurring judgments of the learned Judges. We are not here concerned with the question whether a copy of a sale-deed is a document of title; but the decision in that case is material so far as the question of certified extracts from the jamabandi entries are concerned.

Bhide, J., observed in this connexion :

Certified copies of extracts from jamabandis are available to any one on payment of fee. I do not see how the possession of an extract from a jamabandi by a creditor could support an inference that the owner intended to create a lien on the property to which the copy relates. It would be difficult to lay down any precise definition of a title deed or a document of title, but bearing in mind the nature of an equitable mortgage, I am inclined to think that the documents to be deposited must be original documents, by which title to the property in question is conferred on the mortgagor or his predecessors-in-interest. It might be said that it may happen that a person may not be in pos-

session of any such document at all, though he may be in a position to prove a good title by the production of other documents such as certified extracts from a jamabandi or copies of the original deed. But this seems to be hardly a good reason for holding that an equitable mortgage may be created by the deposit of such copies. It seems to me that if the debtor is not in a position to deposit documents of title from which an intention to create a mortgage could be reasonably inferred, the only result will be that he will not be able to effect an 'equitable' mortgage. But this will be no great hardship, especially in this province, where even oral mortgages are permissible. Equitable mortgages in India, unlike those in England, stand on the same footing as legal mortgages, cf. 31 P R 1916 (1), 11 Lah 564 (2), and to hold that such mortgages can be effected even by the deposit of copies, would be to open the door wide to fraud and perjury of the worst type.

The observations of Dalip Singh, J. in his judgment are also apposite:

In India, where there is no distinction between equitable and legal estates and in this province in particular, . . . it would to my mind be grossly inequitable and would open the door to the greatest frauds, if equitable mortgages were allowed to be created by deposit even of portions of title deeds as appears to have been held in England or by documents evidencing title as contended by the learned Counsel for the Bank. The extraordinary nature of this contention would appear when one realises that copies of jamabandis are available to an applicant by payment of the necessary fees to a Patwari. Any number of such copies might be obtained. Even after an alienation had been made of the property, it is a well-known fact that some time elapses before the mutation is sanctioned and any correction made in a jamabandi. It will thus be open to any fraudulent person to obtain an unlimited number of copies of a jamabandi shortly before an alienation of the property and then to proceed to make equitable mortgages of the property by the deposit of these copies with different persons. It is difficult to see why such a procedure should receive the sanction of the Courts of law.

I am in agreement with these observations of the learned Judges. It is apparent that in order to restrict the scope of the doctrine of equitable mortgages as applicable to this province and to prevent frauds, it is necessary to distinguish between documents creating title and documents evidencing title, and it seems desirable to restrict as far as possible to the former category the deeds, the deposit of which can validly create an equitable mortgage. I am of opinion that in no circumstances can the deposit of a mere

certified copy of a jamabandi entry constitute an equitable mortgage. For this reason, it is clear that property No. 5, viz., the site for the construction of a bungalow at Lyallpur the alleged mortgage of which is supported by merely a jamabandi entry, must be excluded. Turning now to the question of receipts and certified copies of mutations, it is urged that it would be unreasonable to exclude such documents, if no true document of title is available to the debtor. But to make such documents admissible for the purpose, it would be necessary, in my opinion, that there should be clear evidence that no better document of title is available and in the case of receipts, it should also be established beyond doubt that the receipt produced definitely relates to the property to be charged. No such evidence has been offered in the present case. The receipts cited as documents of title in support of items 2 and 4 are printed at pp. 120 and 121 of the printed record. They do not describe the property to which they are supposed to relate, nor has any evidence been called to connect them with any particular property. Consequently, I am unable to hold that they are documents of title for the purposes of this case.

Properties Nos. 2 and 4 are also supported by mutation orders. Now these properties are situated in the Canal Colony of Lyallpur and are said to have been purchased from Government at a public auction. It is a matter of common knowledge, which has not been contradicted in this case, that in auction sales of colony sites in the Canal Colonies, conveyance deeds are usually granted by Government, or at any rate, are available, if desired. The procedure is described in paras. 342 to 346 of the revised 1934 edition of the Punjab Colony Manual. There is no evidence in this case that sale deeds or sale certificates were not granted. On the contrary in the case of the mutation, Ex. P. 24 at p. 140, it is specifically mentioned in the column under head 'Nature and date of transfer' that the sale was effected under a sale certificate. It has not been explained why this sale certificate was not produced as the true document of title. In these circumstances, it is impossible to hold that the extracts from the mutation register produced in this case are valid documents of title for the purpose of creating an equitable

1. Mrs. Stewart v. Bank of Upper India, 1916 Lah 89=84 I C 987=31 P R 1916.

2. Ralli Brothers of Karachi v. Punjab National Bank, Ltd., 1930 Lah 920=129 I C 21=11 Lah 564=31 P L R 984.

mortgage. Properties numbered 2 and 4 must, therefore, also be excluded. The result is that properties bearing serial Nos. 1, 2, 4 and 5 in the comparative statement attached to this judgment must be excluded from the lien claimed by the Bank. Property No. 3 remains, consisting of one house in Montgomery Bazar. This is the only case in which an unquestionable title deed, viz., an original sale-deed, was deposited with the Bank. It is conceded on behalf of the appellant that if, as I hold, an equitable mortgage in favour of the Bank is established, the Bank is entitled to priority in respect of this property.

I would, therefore, accept the appeal to the extent of declaring that the decree granted in favour of the plaintiffs against defendants 1 and 2 is subject to the charge of the Imperial Bank only in respect of the house in Montgomery Bazar, Lyallpur, comprising 12 marlas 166 square feet, numbered III in the particulars of the mortgage deed described in the plaint.

As the appellant has only been partially successful I would leave the parties to bear their own costs.

It follows that the cross-appeal presented on behalf of the Bank in respect of costs only fails, and is dismissed with costs.

Jai Lal, J.—I agree.

S.R./R.K.

Order accordingly.

* A. I. R. 1936 Lahore 256

AGHA HAIDAR, J.

Emperor

v.

Shera—Convict—Respondent.

Criminal Revn. No. 628 of 1935, Decided on 13th September 1935, from decision of Dist. Mag., Multan, D/- 24th April 1935.

(a) Penal Code (1860), Ss. 376, 377—Cases should be tried by Magistrates with S. 30, Criminal P. C., powers.

Cases of rape and unnatural vice should, as far as possible, be tried by Magistrate with S. 30, Criminal P. C., powers, so that if circumstances call for a heavy sentence, then the same may be given up to the outside limit of seven years. [P 256 C 2]

* (b) Penal Code (1860), S. 377—Crime committed with violence—Sentence of whipping in addition to penal servitude is proper.

Where a person commits an unnatural offence after using violence and under most revolting circumstances, a sentence of whipping, in addition to penal servitude, is eminently right and proper. [P 256 C 2]

M. Tufail for Government Advocate—
for the Crown.

Order—This case has been very properly submitted to this Court by the District Magistrate for enhancement of the sentence. The accused, who is aged 22 years, caught hold of the complainant, who is aged about 12 years, and after using violence committed unnatural offence upon his person under the most revolting circumstances. The accused was tried by a first class Magistrate for the offence under S. 377, I. P. C. The Magistrate, who seems to have very strange ideas about this particular form of crime and also about his own duties as a Magistrate, has imposed the ridiculously light sentence of six months' imprisonment upon the accused.

I have expressed the opinion in my judgments on more than one occasion that cases of rape and unnatural vice should, as far as possible, be tried by Magistrate with S. 30 powers, so that if circumstances call for a heavy sentence, then the same may be given up to the outside limit of seven years. This however, was not done in the present case, and all that I can do is to enhance the sentence to two years' rigorous imprisonment. I am also of opinion that it is a case in which whipping would be eminently right and proper. I order, therefore, that in addition to the sentence of two years' rigorous imprisonment, the accused be given thirty stripes, provided the medical officer certifies that he is physically fit to undergo this particular form of punishment. I understand that the accused has already served out his sentence. He shall be arrested and sent to jail to serve out the rest of the sentence and shall be whipped as already indicated.

B.D./R.K.

Sentence enhanced.

A. I. R. 1936 Lahore 257

TEK CHAND AND DALIP SINGH, JJ.

*Punjab and Kashmir Bank, Ltd.,
Rawalpindi—Plaintiff—Appellant.*

v.

*Mt. Damodri and others—Defendants
—Respondents.*

First Appeal No. 2197 of 1934, Decided on 22nd November 1935, from preliminary decree of Sub-Judge, First Class, Rawalpindi, D/- 30th August 1934.

Company—Reference to arbitration—Reference in writing and according to provisions of Arbitration Act—No appeal lies from award—Reference to arbitration by Court—Appeal does lie from such award.

Section 152, Companies Act, applies to those cases only in which a Joint Stock Company by written agreement refers to arbitration in accordance with the provisions of the Arbitration Act, any dispute between itself and any other company or person. [P 258 C 1]

In a case where the reference to arbitration is not by written agreement of the parties, but is made by the Court in a pending suit, the arbitrator has to submit his report to the Court which has to pass a decree in the suit in accordance with the terms of the award or pass such other order in accordance with law as it thought fit. A decree on such award is open to appeal in the ordinary course. Such a case does not come under S. 152, Companies Act. [P 258 C 1]

*Dev Raj Sawhney and N. L. Sadana—*for Appellant.

*Ganesh Datta and N. S. Gauba—*for Respondent 2.

Judgment.—On 11th March 1919, Mt. Damodri, defendant 1, mortgaged a house and a shop to Prithmi Chand, defendant 2, and Hari Chand, father of defendant 3, for Rs. 15,000 agreeing to pay interest at 9 per cent per annum with yearly rests. In 1922 by consent of the mortgagor and the mortgagees the shop was sold and the sale proceeds were paid to the mortgagees in part payment of the amount due to them. On 9th January 1925 the mortgagees transferred their mortgagee rights to the plaintiff, the Punjab and Kashmir Bank Ltd., for Rs. 16,485 which was found to be the amount due on that date. On 22nd November 1932, the plaintiff Bank instituted a suit for recovery of the amount due on foot of the mortgage, impleading the original mortgagor and the mortgagees as defendants. After some proceedings the parties presented an application to the Court praying that the suit be referred to the arbitration of Bhagat Lachhmi Narain pleader. The Court granted the prayer

and the case was referred to arbitration. The arbitrator gave his award on 1st August 1934 holding:

(1) That the sum of Rs. 20,680 was due to the plaintiff Bank on foot of the mortgage on the date of the suit, (2) that defendants 2 and 3 would be liable for any deficiency in case the amount decreed is not raised by sale of the mortgaged property or other property of defendant 1, the liability of defendant 3 being limited to the assets of his father in his hands, and (3) that the costs of the suit on the amount decreed will be paid by defendant 1.

Neither party filed any objection to the award, and on 30th August 1934 the learned Subordinate Judge entered judgment for the plaintiff in accordance with the award, and passed a decree in terms of O. 34, R. 4, Civil P. C., fixing 5th January 1935, as the date for payment of the amount found due. In accordance with this judgment a decree-sheet was prepared, declaring that the amount due to the plaintiff on account of principal, interest and costs calculated up to 5th January 1935 was Rs. 21,466-8-0 and ordering that if the defendant paid this amount into Court on or before 5th January 1935, the plaintiff shall deliver all documents relating to the property to the defendants and re-transfer the property to them free from the mortgage, but if such payment was not made on or before the aforesaid date, the mortgaged property, or a sufficient part thereof, shall be sold. The plaintiff has appealed urging that there has been miscalculation of the amount due as stated in the decree-sheet, the correct amount payable on 5th January 1935 being Rs. 3,246-1-6 in excess of that given therein, and praying that future interest at the contractual rate should also have been allowed.

A preliminary objection is taken by counsel for the respondent that no appeal lies. It is pointed out that one of the parties to the suit is a Joint Stock Company incorporated under the Indian Companies Act, and under S. 152 (3) of that Act all arbitrations, to which one of the parties is such a company, must be taken to have been held under the provisions of the Indian Arbitration Act, and as decrees passed in accordance with awards given under that Act are not appealable it must be held that no appeal is competent in the present case. This

contention is obviously without force. S. 152 applies to those cases only in which a Joint Stock Company by written agreement refers to arbitration in accordance with the provisions of the Indian Arbitration Act any dispute between itself and any other company or person. In the present case the reference to arbitration was not by written agreement of the parties, but was made by the Court in a pending suit. The arbitrator had to submit his report to the Court which had to pass a decree in the suit in accordance with terms of the award or pass such other order in accordance with law as it thought fit. Such a decree is clearly open to appeal in the ordinary course. In these cases, the reference, or the award passed thereon, is not made under the provisions of the Indian Arbitration Act and S. 152, Companies Act, has no applicability to it. I overrule the objection.

On the merits the learned counsel for the respondent admitted that there has been a miscalculation. There is no reason why interest at 9 per cent with yearly rests should not have been calculated till 5th January 1935, the date fixed for payment by the Court. This amount comes to more than Rs. 27,000. But as the plaintiff in the appeal asked for enhancement of the decretal amount by Rupees 3,246-1-6 only, apparently calculating simple and not compound interest, a decree for more than that amount cannot be passed. There is no reason why future interest should not be allowed at such rate as the Court thinks reasonable. We think simple interest at 6 per cent per annum to be ample and allow future interest at that rate. We accordingly accept this appeal and modify the decree of the lower Court so as to declare that the sum due on 5th January 1935 was Rupees 24,712-9-6 and not Rs. 21,466-8-0 as stated in the decree of the lower Court. We also order that a clause be added to the decree that the plaintiff shall get future interest at 6 per cent per annum on the above amount from 5th January 1935 till payment. Costs of this appeal shall be paid by defendant 2 to the appellant.

B.D./R.K.

*Appeal allowed.***A. I. R. 1936 Lahore 258**

TEK CHAND AND DALIP SINGH, JJ.

Baghel Singh and others—Defendants—Appellants.

v.

Mt. Dhan Kaur and others—Plaintiffs and another—Defendant—Respondents.

First Appeal No. 1737 of 1930, Decided on 31st October 1935, from decree of Senior Sub-Judge, Lyallpur, D/- 27th May 1930.

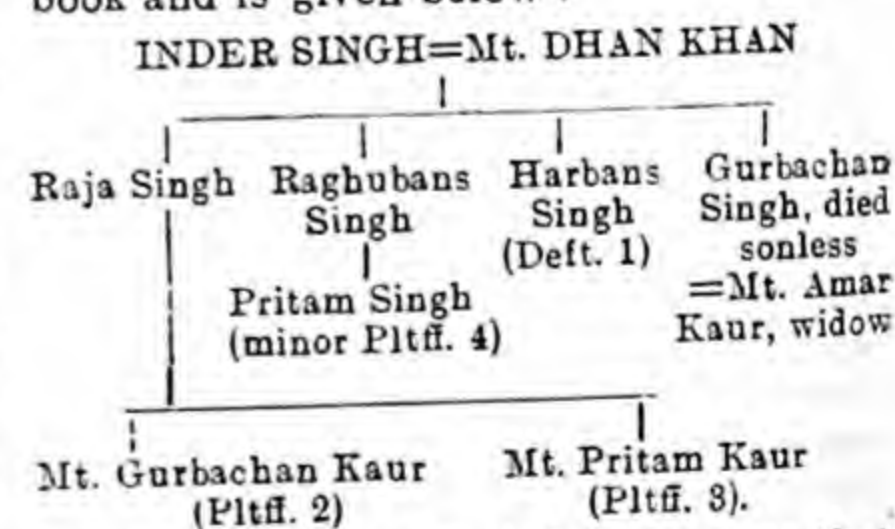
Custom (Punjab)—Alienation—Sodhi Khatri of Lyallpur District are governed by Hindu law.

Sodhi Khatri of Lyallpur District are not governed in matters of alienation by the principles of Punjab Customary Law, but are governed by their personal law, i. e., Hindu law: 84 P R 1898; 50 P R 1895; 110 P R 1906 (F B); 1922 Lah 122; 43 P R 1911 and 1916 Lah 204, Ref. [P 261 C 1]

J. N. Aggarwal and S. L. Puri—for Appellants.

Jhanda Singh and A. N. Chona—for Respondents.

Dalip Singh, J.—Plaintiffs in this case sued for a declaratory decree to the effect that three mortgage-deeds executed by defendant 1, Harbans Singh, in favour of defendants 2 to 4 and the father of defendants 5 to 9 were void and unenforceable against the plaintiffs for various reasons, all of which do not now concern us. The pedigree table of the plaintiffs is printed at p. 2 of the paper book and is given below:



It was not contested before us that Pritam Singh, minor, plaintiff 4, is the only one of the plaintiffs who might possibly be entitled to maintain this suit. The alienations are by Harbans Singh and are as follows: (1) A mortgage-deed dated 9th July 1924 for Rs. 7,500, printed at p. 127 of the paper book, by Harbans Singh in favour of defendants 2 to 4 and Lachhman Singh, father of defendants 5 to 9. (2) A mortgage-deed between the same parties for Rs. 16,800 dated 18th June 1926, Ex. D-11, printed

at p. 131. (3) A mortgage-deed dated 9th June 1928 for Rs. 23,100, Ex. D-12, printed at p. 156, by Harbans Singh in favour of defendants 3 and 4.

It is admitted that mortgages 1 and 2 have merged in mortgage 3 and the only real contesting defendants are defendants 3 and 4 and the father of defendants 5 to 9. The issues are given at p. 13. The only issues which now concern us are : (1) Whether the plaintiff 4 is entitled by custom to contest the alienation made by his uncle Harbans Singh; and (2) if so, whether the alienations are for consideration and necessity.

The other issues were decided in favour of the defendants and they have not been agitated before us in appeal. The trial Court held that it was proved that the parties who are Sodhi Khattris, actually residing in a village in Lyallpur District, but who allege that they came originally from village Malla in Ludhiana District, are governed by custom and not by Hindu law and that therefore the plaintiff was entitled to question the alienation. On the question of consideration and necessity he held that except for a small sum, neither consideration nor necessity was proved for the transactions.

The first question agitated before us in appeal by the defendant-mortgagees is the question whether the plaintiff has succeeded in proving that the tribe is governed by custom at all. It was conceded before us by the learned counsel for the respondents that the initial onus lies on the plaintiff as the parties are Khattris, who are high caste Hindus, and therefore presumably would follow their personal law, unless proved to the contrary. The *riwaj-i-am* does not help us in the case because Sodhis form so insignificant a portion of the population of Ludhiana District that, it appears, they were not questioned in that district at all. The plaintiff however urges and has sought to prove by oral evidence that he is connected with Sodhi Khattris who reside in Ferozepore District, and that his ancestors originally came from a village called Guru-Ja-Kotha in that district and settled, or acquired land, in Malla in Ludhiana. His claim therefore is that the Sodhis of Ferozepore District are governed by custom and that his family which came from Ferozepore District

must be presumed to have brought their custom along with them. The plaintiff has also sought to prove from the pedigree table his descent from Guru Ram Das, one of the ten Sikh Gurus, and incidentally to prove his connexion with the family known as the Guru Har Sahai family, among whom there was a case reported as 50 P R 1895 (1). I may say at once that the attempt of the plaintiff to prove any connexion with this family is not established in my opinion. The only witness on the point is one Nanak who claims to be the mirasi of the family. He no doubt has produced a pedigree table which, he alleges, was prepared by himself with the assistance of his father and certain bahis which he has not produced in Court. Now, while it is well known that the mirasis do recite these pedigree tables, and if the family were connected with Guru Ram Das, such a connexion would be valued and known; it is also known that the mirasi's evidence (oral) can be very easily secured, and that unsupported by any documents it must be scrutinised with the greatest care. In this particular case the witness admitted that there were bahis or books from which he had prepared the alleged pedigree table, but he did not produce the said bahis. In other words, the best available evidence was not produced in the case and the solitary statement of the witness unsupported by any other material cannot, in my opinion, be held to establish the pedigree table claimed by the plaintiff.

On the other hand however I consider that having regard to all the circumstances, though the oral evidence by itself might not be very convincing, the plaintiff may be said to have succeeded in establishing that his family came originally from Ferozepore District. Malla is a village no doubt situate in Ludhiana District, but it is within three or four miles of the Ferozepore border. The boundaries of a district are more or less arbitrary things created for purposes of administrative convenience. There is no rebuttal of the evidence of the plaintiff that his family came from Guru-ka-Kotha in Ferozepore District to the village Malla. On the other hand I do not consider that the plaintiff has succeeded in

1. Sodhi Kartar Singh v. Shar Singh, (1895) 50 P R 1895.

proving which of his family were the first to acquire land in Malla, other than his grandfather Indar Singh. Indar Singh was in military service and it appears that he acquired some land in village Malla, Athur and Risalpur in Ludhiana District as well as acquired some land by Government grant in the Lyallpur District. It is not clear how much land in Malla belonged to the family before Indar Singh made his acquisition there. One witness states vaguely that the father of Indar Singh had also acquired some land in village Malla, but the nature and extent of this acquisition is left totally vague.

The question therefore is whether the plaintiff on whom the onus lay has succeeded in proving that Sodhis of Ferozepore District generally follow custom, in the sense that alienations of ancestral property by them can be controlled by their reversioners. On this point there is no *riwaj-i-am* again qua the Ferozepore District. It is correct that Sodhi Khatri were one of the tribes that were questioned during the preparation of the *riwaj-i-am* of that district, but the question of the right of reversioners to control alienations of ancestral property does not appear to have been put to any tribe at all and therefore the *riwaj-i-am* being silent on the point cannot be said to be of any help. The learned counsel for the respondents contended that as it was stated in the beginning that the Sodhi Khatri of the district were questioned and as it was also mentioned in the preface that the Sodhi Khatri were governed by custom, it must be presumed that they were governed by all the incidents of what is known as "Punjab Agricultural Custom." The fact of the Sodhis being governed by custom is based however apparently on two rulings alone. These rulings will be duly considered later. The fact that Sodhis were one of the tribes questioned does not appear to me to meet the situation when as a matter of fact no inquiry was made on this particular point from the tribe concerned. The learned counsel for the respondents was therefore constrained to rely on the oral evidence and on certain rulings.

The oral evidence consists of five witnesses, Sodhis, who appeared and stated that they were governed in matters

of alienation of ancestral property by custom and that such alienations could not be effected without valid necessity. They do not appear to be very clear as to what valid necessity was or what degree of reversioners could control the alienations.

The age of the first witness Lachhman Singh (P. W. 1) was 40. The age of the second witness Gurbachan Singh was 26; the age of the third witness another Lachhman Singh, was 40; the age of the fourth Harbans Singh was 52, and the age of Gurbaksh Singh was 25 years. The witnesses do not appear therefore to be necessarily men likely to know of the existence of any tribal custom, nor, with the exception of Gurbachan Singh, P. W. 2, and Gurbaksh Singh, P. W. 5, are the men of particular status. One and all however assert that the custom of the Sodhis is the same throughout the province and they make no distinction whatsoever as to the custom of any particular family. Not one of them is able to give any instance where the custom alleged was successfully asserted. The oral evidence by itself is not, in my opinion, sufficient in the absence of any instances to establish the proposition alleged.

There now remains only to consider the rulings relied on by the learned counsel for the respondents. These begin with 50 P R 1895 (1). In that case it was held that Sodhi Khatri belonging to a particular family, which had had a somewhat peculiar career and which had acquired whole villages and adopted according to the ruling the rule of primogeniture, had succeeded in proving that alienations among them could not be effected without valid necessity. Several members of the family and several old and disinterested persons of respectability appear to have supported the custom alleged in that family. Upon that the learned Judges who decided that case held that it was established that alienations could not be effected without valid necessity among that group of Sodhi Khatri. As already stated the connexion of the present plaintiff with that family is by no means established. Even if the pedigree table alleged by Nanak Mirasi were to be accepted, the plaintiff does not belong to that family at all but is only remotely connected with it as a collateral descended from one Pirthi, the common ancestor.

The next ruling relied upon was 84 P R 1898 (2). Here the matter of custom or Hindu law was not in issue so far as the Chief Court was concerned, but the learned counsel relies on the fact that Hindu law was not pleaded originally. This no doubt is so, but in the absence of anything more, it cannot be held to prove that the custom was so well known that it was not contested for that reason. One of the Judges who was a party to 84 P R 1898 (2) was also a party to the decision in 50 P R 1895 (1), and no doubt he interpreted the decision in 50 P R 1895 (1) to apply to all Sodhi Khatri of Ferozepore. But this extension does not seem to be warranted by the judgment itself. Moreover that ruling was based on the fact that according to the then prevailing view the primary rule of decision was custom under the Punjab Laws Act. This view has since been overruled in 110 P R 1906 (3) and the overruled decision has been affirmed by their Lordships of the Privy Council in 45 Cal 40 (4). These rulings do not therefore, in my opinion, prove the plaintiff's contention.

The last ruling relied upon was 4 L L J 64 (5). Here it was held in a case which arose in the same family as that of 50 P R 1895 (1), that Hindu law did not apply to the family, following the ruling reported as 50 P R 1895 (1). This again, for reasons already stated, does not to my mind help the plaintiff at all. Moreover there are rulings, 43 P R 1911 (6) and 35 I C 471 (7), where Sodhis were not proved to follow custom in Ludhiana and Ferozepore Districts respectively. The result is that I would hold, in disagreement with the trial Court, that the plaintiff on whom the onus lay has failed to establish that the Sodhi Khatri of this family or tribe are not governed in matters of alienation by the principles of Punjab Customary Law. It is common ground that if Hindu law

2. Harvans Singh v. Harnam Singh, (1898) 84 P R 1898.

3. Daya Ram v. Sobel Singh, (1906) 110 P R 1906=31 P L R 1907 (F B).

4. Abdul Hussain Khan v. Sona Dero, 1917 P C 181=48 I C 306=45 I A 10=45 Cal 450 (P O).

5. Labh Singh v. Rur Chand Tulsi Ram, 1922 Lah 122=4 L L J 64.

6. Harnam Singh v. Har Devi, (1911) 43 P R 1911=10 I C 865.

7. Harchand Singh v. Munshi Ram, 1916 Lah 204=85 I C 471=142 P L R 1916.

applies the plaintiff has no case as Harbans Singh, alienor, was separate and had no male issue. I would therefore accept the appeal and dismiss the plaintiff's suit. It is not necessary in this view to decide the question of consideration and necessity, but in view of all the circumstances I would leave the parties to bear their own costs throughout.

Tek Chand, J.—I agree.

B.D./R.K.

Appeal allowed.

A. I. R 1936 Lahore 261

TEK CHAND AND SKEMP, JJ.

Harnam Singh and others—Plaintiffs
—Appellants.

v.

Mt. Bhagi and another—Defendants—
Respondents.

First Appeal No. 1762 of 1931, Decided on 23rd January 1935, from decree of Senior Sub-Judge, Amritsar, D/- 1st August 1931.

(a) Evidence — Admissibility — Entries in Pandas' books—No evidence as to by whom entries are made—Entries held inadmissible.

Where in support of certain statement, entries in Pandas' books were relied on, but the person from whose custody the books were produced and his clerk were only witnesses examined and neither of them wrote the entries nor knew as to by whom they were written :

Held: the entries were inadmissible.

[P 262 C 2]

(b) Marriage—Presumption.

From long cohabitation the presumption of marriage can be raised.

[P 262 C 2]

(c) *Riwaj-i-am*—Entry in, favouring adoption—Onus of proving adoption invalid is on person challenging it.

Where the *Riwaj-i-am* entry is in favour of a particular adoption being valid, the onus of proving that such an adoption is invalid is on the person challenging it: 1916 P C 128 and 1928 P C 294, *Foll.*

[P 262 C 2 ; P 263 C 1]

(d) Custom (Punjab) — Adoption—Dhillon Jats of Tarn Taran Tahsil, Amritsar District — Adoption of daughter's son is valid.

Among Dhillon Jats of the Tarn Taran Tahsil, Amritsar district, a daughter's son can be validly adopted: 1931 Lah 216, *Disting.*; 85 P R 1907; 86 P R 1907 (S B) and 2 P W R 1907, *Rel. on.*

[P 262 C 1]

Parkash Chand, Pran Nath Mehta and J. L. Kapur—for Appellants.

Nihal Singh—for Respondents.

Skemp, J.—This appeal has arisen from the following facts: Bhag Singh, a Dhillon Jat of Mauza Kaka Karyala, Tahsil Tarn Taran, gifted 7/8ths of his land to Teja Singh, the gift being effected by means of a mutation on 7th August

1926. The gift was made to Teja Singh as the adopted son of Bhag Singh. Bhag Singh died on 29th March 1929, and on 22nd June 1929 the mutation of the remainder of Bhag Singh's property was effected in favour of Teja Singh. On 15th April 1930 the plaintiffs, the real brother and nephews of Bhag Singh, brought a suit alleging that Teja Singh was not the adopted son of Bhag Singh, but was the son of one Mt. Tabo, who was the mistress and not the wife of Bhag Singh. They denied the factum of adoption, and they denied its validity if the factum was proved. There was a further dispute on the point whether the land was ancestral, but it is now conceded that Bhag Singh's land was ancestral.

The Senior Subordinate Judge of Amritsar framed issues dealing with the following main points: (1). Whether the suit was time-barred. (2). Whether Teja Singh was adopted by Bhag Singh, and (3). if so, whether the adoption was valid. He found that the suit was within time as far as the gift was concerned but was barred in reference to the mutation. He further found that Mt. Tabo was the wife of Bhag Singh, that Bhag Singh had adopted Teja Singh and that the adoption was valid by custom among the Dhillon Jats of the Tarn Taran Tahsil. He dismissed the suit and the plaintiffs have appealed.

Three points have actually been argued before us: (1). Was Mt. Tabo the wife of Bhag Singh? (2). Was Teja Singh actually adopted by Bhag Singh? and (3). Was the adoption valid by custom? On the first point the defendants produced a large number of witnesses who say that Mt. Tabo was left a widow, her husband Gajja Singh dying long ago. Buta (P. W. 2), one of the plaintiffs' witnesses, states that he died 50 years ago. The plaintiffs' witnesses go on to say that after his death Mt. Tabo came to live in the house of Bhag Singh and bore him several children, four daughters and a son, who died in infancy. One of the daughters died, and the other three are Mt. Aso, Mt. Santo and Mt. Harnamo. Mt. Harnamo, the youngest, is the mother of Teja Singh. Some of the plaintiffs' witnesses have stated that Mt. Tabo never lived in Bhag Singh's house but he used to visit her. But the fact of their having several children cannot be ignored and it is very improbable that if they were not married

she would have lived with Bhag Singh who is a lambardar and an owner of a large area of land. The defendants relied in this connexion on some documentary evidence. They relied on certain extracts from Pandas' books from Hardwar, but after hearing arguments we are of opinion that these particular entries are inadmissible in evidence. Two witnesses were called, Ram Prasad, a semi-blind old man, aged 70, from whose custody the books were produced, and his clerk Balmokand. Neither of them wrote the entries in question and neither of them could say by whom they were written. Ram Parshad himself said he never saw Bhag Singh.

It therefore appears that these particular entries are inadmissible. But in the death certificate of Mt. Tabo, dated 21st May 1914, she is described as the wife of Bhag Singh. Taking all the facts together and the presumption of marriage which arises from long cohabitation I would hold it proved that Mt. Tabo was the wife of Bhag Singh. (His Lordship then examined the evidence on the factum of adoption and held that it was proved. The judgment proceeded.) On the third point, the validity of adoption, the *riwaj-i-am* of the Amritsar District is in favour of the respondents. This is so, both in the first *riwaj-i-am* of the year 1865 and the *riwaj-i-am* prepared at the last settlement of 1914. For the first *riwaj-i-am*, see Answer 14 of that document printed at pp. 86 and 87 of the paper book. This recites that a male owner can adopt the son of any other Jat (except from the Bal sub-caste) without regard to collateralship, nearness or remoteness of relationship, and without regard to the boy being his daughter's son or otherwise. This document refers to the Dhillon got of the Jat caste in the Amritsar District. In Craik's Customary Law, 1914, the general custom is stated differently. Answer 86 says: A daughter's or sister's son is not eligible for adoption, except among Dhillon Jats of Tarn Taran and Mughals of all the three tahsils. The parties here are Dhillon Jats of Tarn Taran Tahsil and the *riwaj-i-am* is in favour of the defendants. Hence according to the rulings of their Lordships of the Privy Council, 45 P R 1917 (1) and 10

1. Beg v. Allah Ditta 1916 P C 129=38 I C 354
=44 I A 89=44 Cal 749=45 P R 1917 (P C).

Lah 86 (2), the onus is on the plaintiffs to show that the adoption was invalid.

To discharge this onus they have produced a good deal of oral evidence. Thirteen Dhillon Jats have come forward to say that among their got a daughter's son cannot be adopted and four of them are lambardars; on the other hand it is quite easy to produce interested testimony of this kind and not one of them has quoted any instances. The defendants have also produced a considerable number of oral witnesses and from their evidence the learned Senior Subordinate Judge has found that four instances are proved—see p. 43 of the paper book. The plaintiffs also relied on certain judgments and have placed three copies on the record, but all three are instances not of adoption but of gift. Two of them (Civil Appeal 159 of 1899 and Civil Appeal 193 of 1901 before the Divisional Judge of Amritsar) were considered in a Division Bench judgment of the Chief Court, 85 P R 1907 (3). This found that among Dhillon Jats of the Tarn Taran Tahsil the validity of an adoption of a daughter's son had been established. This judgment referred to two other cases which were subsequently printed, one as 86 P R 1907 (4) and the other as 2 P W R 1907 (5). In all these three Chief Court cases it was held that among Dhillon Jats of the Tarn Taran Tahsil a daughter's son could be adopted. There are also two judgments on this record one of a Subordinate Judge, Amritsar, and one of the District Judge, Amritsar, in both of which the same conclusion has been reached.

We have also been referred to 128 I C 310 (6) in which a Division Bench of the High Court held that among Dhillon Jats of the Amritsar Tahsil the adoption of a daughter's son was not permitted by custom. In this case no instances based on documents appear to have been cited; the judgment proceeds on the onus as laid down in the *riwaj-i-am* and definitely states that precedents of the neighbouring tahsil of Tarn Taran and the

neighbouring district of Hoshiarpur are not relevant. This case therefore is to be distinguished. For the above reasons I would reject the appeal with costs.

Tek Chand, J.—I agree.

K.S.

Appeal rejected.

A. I. R. 1936 Lahore 263

JAI LAL, J.

Mangal and others — Defendants — Appellants.

v.

Hakim Behari Lal — Plaintiff—Respondent.

Second Appeal No. 1388 of 1933, Decided on 14th October 1935, from decree of Dist. Judge, Ambala, D/- 7th March 1933.

Custom (Punjab) — Alienation—Chanauli, Dist. Ambala—Non-proprietor can dispose house site.

No custom exists in village Chanauli, Tahsil Rupar, District Ambala, whereby the non-proprietors are precluded from disposing of the sites of their houses. [P 264 C 1]

Dwaraka Nath Aggarwal—for Appellants.

Tek Chand—for Respondent.

Judgment.—The dispute in this case is about the site of a house in village Chanauli in the Tahsil of Rupar, District Ambala. The site is situated in the *abadi* of the village and a house stood on it previously. It was owned by one Banna, a Brahmin of the village, who admittedly was a non-proprietor, the appellants being the proprietors of the village. The respondent claims title to the site by virtue of two deeds of sale from Mt. Malan and Mt. Dwarki. Both these ladies are widows of collaterals of Banna. It appears that at the time of the two sales some male collaterals of Banna also were alive who would have been entitled to inherit half the land sold with Mt. Malan and Mt. Dwarki respectively. Arjanand would have inherited the land jointly with Mt. Malan. He, however, has died sonless. It is at the same time significant that none of these men have at any time objected to the sale of the site by Mt. Malan and Mt. Dwarki. The learned District Judge on the above facts has found that whereas Mt. Malan and Mt. Dwarki were admittedly some of the collaterals of Banna they passed a good title to their respective vendees in the site, as presumably, in his opinion, the only persons

2. Vaishno Ditti v. Rameshri, 1928 P C 294=113 I C 1=55 I A 407=10 Lah 86 (P C).

3. Sohna v. Sundar Singh, (1907) 85 P R 1907.

4. Buta Singh v. Ramsingh, (1907) 86 P R 1907 (S B)

5. Bela Singh v. Amar Singh, (1907) 2 P W R 1907=25 P L R 1907.

6. Ajaib Singh v. Lal Singh, 1931 Lah 216=128 I C 310=31 P L R 532.

who could object to sales by them were the remaining collaterals. The suit out of which this appeal has arisen was instituted by the vendee of the site against the proprietors, the appellants. The suit was for possession. It was defended on various grounds. The title of the plaintiff was denied; it was asserted that by custom the non-proprietors in this village were not entitled to sell the sites of their houses and that the defendants had been in adverse possession of the site for more than 12 years. All these questions have been decided against the defendants by the District Judge and on this appeal it is contended that they have all been wrongly decided. On the question of custom the appellants have secured a certificate from the learned District Judge under S 41, Punjab Courts Act.

I have heard counsel at length and am of opinion that there is no ground for interfering with the decree of the learned District Judge. He has held that the title of the plaintiff in the land in dispute has been proved by virtue of the sales by Mt. Malan and Mt. Dwarki. The defendants as proprietors could only succeed by proving that by custom the sales were invalid and, therefore, the land reverted to them. This they have failed to prove according to the conclusion of the District Judge, which I shall examine presently. The District Judge also has held that the defendants have failed to prove their adverse possession of the land. This is a finding of fact which cannot be attacked in second appeal. This disposes of the question of limitation as well. The real question that requires determination is whether the conclusion of the District Judge that no custom exists in this village whereby the non-proprietors are precluded from disposing of the sites of their houses is erroneous. The present wajib-ul-arz of the village admittedly contains no entry in favour of the defendant-appellants. The previous wajib-ul-arz did. It may be mentioned that the absence of the entry in the present wajib-ul-arz is probably due to the fact that in the current settlement no entries are made relating to the site of the village. The District Judge has stated that there have been twenty alienations of sites by non-proprietors in this village, including three Court sales, and there has been absolutely no contest by the village proprietors. The appellants'

counsel has criticised all these instances in this Court but has admitted that there are certainly eleven instances of undisputed alienations. With regard to the remainder alienations his criticism was that some of them were in favour of near relations by non-proprietors.

With regard to the others he contended that the consideration was too small to draw the attention of the proprietors. If the respondent's case had stood on the alienations of the latter description alone there would have been good ground for the appellants to contend that the custom propounded by the respondent has not been established. But as the learned District Judge says there are more than twenty alienations and not a single instance to the contrary has been quoted by the appellants. I am unable, under the circumstances, to hold that the District Judge has reached an erroneous conclusion. Ghanauli is described as a fairly big village with a good number of shops. It is inhabited by different classes of persons so that the original tribal bond has been broken by the alienations that have taken place. I dismiss this appeal with costs.

B.D./R.K. *Appeal dismissed.*

A. I. R. 1936 Lahore 264

DALIP SINGH AND RANGI LAL, JJ.

Mohammad and another—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 608 of 1935, Decided on 24th July 1935, from order of Sess. Judge, Attock, D/- 30th April 1935.

Confession—Person in authority—Accused making confession to servant of his landlord—Servant held is a person in authority.

Accused made confession to the servant of his landlord. The landlord was a big zamindar and his servant had considerable authority in the village:

Held: that the confession made to the servant was not admissible in evidence under S. 24, Evidence Act, because the servant was a "person in authority": 14 P R 1911 Cr; 1916 Lah 216; 1933 Pat 149 and 1929 Oudh 272, Ref. [P 266 C 1]

*Amolak Ram Kapur—*for Appellants.

V. N. Sethi for Government Advocate—
for the Crown.

Rangi Lal, J.—Four persons, namely Mohammad, Karam Illahi, Ghulam Mohammad and Nur Khan were charged with the murder of one Sher Zaman. The

first two have been convicted under S. 302, I. P. C., and the remaining two have been acquitted. Mohammad has been sentenced to death and Karam Ilahi to transportation for life. They have appealed through Lala Amolak Ram Kapur who has addressed us at great length on their behalf. The case of Mohammad is also before us for confirmation of the capital sentence. The case for the prosecution is briefly as follows. Mohammad accused had a liaison with Mt. Mulk Bano, wife of Sher Zaman deceased. Nur Khan is a brother of Mohammad; Ghulam Mohammad is a distant relation and Karam Illahi is a friend. The deceased and his father had made complaints to Mohammad's father about Mohammad's misconduct, with the result that Mohammad was driven out of the village and went to live in village Bhagvi, ten miles away. A month later he sent a love message through Karam Ilahi who made use of one Mt. Hassan Jan for conveying it to Mt. Mulk Bano. This became known and Mt. Hassan Jan and Karam Ilahi both got into trouble. Some time later on the night between 2nd and 3rd October 1934, Sher Zaman was cruelly murdered when he was going from his house in the village to his bakh. He received three incised wounds, two punctured wounds and a contused wound on the head, an incised wound $6\frac{1}{2}'' \times 1\frac{1}{2}''$ on the neck and a stab wound in the abdomen. He was missed on the following day, but no search was made for him. On 4th October 1934 his dead body was found in the dry bed of a stream and a report was made to the police at 11-30 a. m. It was stated therein that the four accused were suspected of the crime. A Head Constable promptly came to the spot and arrested Karam Ilahi, Ghulam Mohammad and Nur Khan. Karam Ilahi produced a shirt and a pair of trousers from his house and they were on examination found to be stained with human blood. Ghulam Mohammad produced a knife and two pieces of bamboo stick from a pond. They were also found to be stained with human blood. Mohammad was not found in the village, but was arrested next morning at Bhagvi. He was then wearing a shirt which was found to have human blood on it.

The prosecution evidence against the appellants can be classified and discussed as under:

(1) The testimony of certain wajtakkar witnesses. This has been disbelieved by the learned Sessions Judge and has not been relied on before us by the learned counsel for the Crown. It is therefore unnecessary to refer to it.

(2) A tracker constable is said to have identified the footprints found near the scene of the occurrence with the footprints of the four accused. The prints were of shoes and the tracker was a constable. The learned Sessions Judge was, in my opinion, justified in holding that the track evidence was of very small value.

(3) Extra judicial confessions said to have been made by Mohammad to Subedar Ahmad Khan, P. W. 20, and to Aulia Khan, P. W. 16. Ahmad Khan stated that on the evening of 4th October 1934, he heard that Sher Zaman had been murdered, that Mohammad was one of the four culprits named, that on the following morning he sent for Mohammad and questioned him about the matter, that the latter confessed after a little hesitation that he, Karam Ilahi, Ghulam Mohammad and Nur Khan had murdered Sher Zaman, that on hearing this confession the witness made over Mohammad to Aulia Khan and Fazl Chaukidar and himself went to village Naka, one mile away and brought the Assistant Sub-Inspector and made over the accused to him. Aulia Khan stated that Mohammad confessed in the same terms to him and Fazal, after he had been placed in their custody by Subedar Ahmad Khan. He however contradicted Subedar Ahmad Khan on an important point. According to him, the accused remained in his custody from the morning of 5th October 1934 to the morning of 6th October 1934 when the Assistant Sub-Inspector came and took charge of the accused. It has however been proved by unimpeachable evidence that Mohammad was arrested by the Assistant Sub-Inspector on the morning of 5th October 1934. The dead body of Sher Zaman was not found till 4th October 1934 and it cannot therefore be said that Aulia Khan was under any mistake when he made the above statement. He has, in my opinion, clearly told a lie and his statement in regard to the confession said to have been made to him cannot, therefore, be relied on with confidence. Fazal was not produced by the prosecution. Ahmad Khan

admitted that before Mohammad confessed to him he was told that if he told the truth, it would be to his advantage.

This was clearly an inducement and the point that arises for consideration is whether it proceeded from a person in authority. Ahmad Khan is a retired Subedar and is the agent of Sardar Mohammad Akbar Khan, who is apparently a big landlord in the village. Mohammad accused is a tenant of Sardar Mohammad Akbar Khan. It is, therefore, beyond dispute that Ahmad Khan held a position of considerable authority in the village which is in no way inferior to that of a Zaildar. There are several cases in which it has been held that a Zaildar is a person in authority within the meaning of S. 24, Evidence Act: vide inter alia 14 P R 1911 Cr (1) and 34 I C 642 (2). In 12 Pat 241 (3) and 1929 Oudh 272 (4), the manager of a big estate was held to be a person in authority. The learned counsel for the Crown doubts the correctness of these rulings and contends that a Zaildar or a person holding a similar position can be said to be a person in authority, only if the police is close by and that person can be said to be an agent of the police. I am not prepared to give such a restricted meaning to the expression 'person in authority' as used in S. 24, Evidence Act, and to dissent from the rulings referred to above. Anyhow, I am not satisfied in this case that the Sub-Inspector was far away when the confession is said to have been made. It is alleged that he was at village Naka which is about a mile from Bhagvi when Ahmad Khan came and informed him about the confession. It has not been explained why he stayed at Naka. The investigating officer at Dhok Silo, where the crime was committed, must have issued orders on 4th October 1934 for the arrest of Mohammad at Bhagvi. Taking all these facts into consideration, I am of opinion that the confession is inadmissible under S. 24, Evidence Act.

1. Kutab Ali v. Emperor, (1911) 14 P R 1911 Cr =12 I C 973=12 Cr L J 597.
2. Karamsingh v. Emperor, 1916 Lab 216=34 I C 642=17 Cr L J 226=153 P L R 1916.
3. Santokhi Beldar v. Emperor, 1933 Pat 149=1933 Cr C 404=142 I C 474=34 Cr L J 349=12 Pat 241=14 P L T 82 (S B).
4. Taule v. Emperor, 1929 Oudh 272=1929 Cr C 14=117 I C 737=30 Cr L J 829=6 O W N 309.

(4) It is alleged that before the arrival of the police in village Dhok Silo the remaining three accused had confessed to Mohammad Khan Zaildar. His evidence on this point is as follows:

In consequence of some information obtained from him (Ilam Din), I went to Dhok Silo. I called Ghulam Mohammad, Nur Khan and Karam Ilahi accused. On my inquiry, all the three accused confessed separately before me that they had committed the murder along with Mohammad accused and that they also admitted that they had thrown the dead body into the kas Chiranwala. . . . I did not tell the accused that the police would torment them and so they should tell the truth. I did not threaten the accused when questioning them. I told the accused, however, that one of them might possibly gain advantage if they all confessed. We have to say so in order to get something out of them. No one else was present when the confessions were made to me.

If it is believed that the witness has given a true account of what happened, it is somewhat doubtful whether he can be said to have given each of the accused such an inducement as would give him grounds which would appear to him reasonable for supposing that by making the confession he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. I am, however, of opinion that the statement is much too vague and it would be unsafe to rely on it in proof of an extra-judicial confession. It is by no means certain that the witness has stated exactly what he said to the accused and what each accused said to him. It is not known in what order each accused spoke and whether each of them made an independent statement or not. It does not appear how the murder was committed and what part each accused took in the commission of the crime.

(5) The recovery of a blood-stained shirt from the person of Mohammad is certainly an incriminating circumstance but is of little value by itself.

(6) The recovery of blood-stained garments from the possession of Karam Ilahi also tends to incriminate him, but cannot by itself be the basis of a conviction.

(7) It has been established by satisfactory evidence that Mohammad had a liaison with Mt. Mulk Bano and thus had a motive for killing Sher Zaman. The other accused had no such motive.

The above discussion makes it clear that if the confessions are excluded, the remaining evidence is by no means suffi-

cient to support the convictions. It is not clear how the learned Sessions Judge distinguished the case of Gulam Mohammad from that of Karam Ilahi if he believed the confessions to be true. The accused merely denied the charge and produced no defence. For the reasons given above, I am of opinion that the case against the appellants has not been proved beyond doubt. I would therefore give them the benefit of the doubt and acquit them.

Dalip Singh, J.—I agree.

B.D./R.K.

Accused acquitted.

A. I. R. 1936 Lahore 267

BHIDE AND CURRIE, JJ.

Bahadur Khan and others—Defendants—Appellants.

v.

Kundan Lal—Plaintiff—Respondent.

Second Appeal No. 1791 of 1926, Decided on 14th October 1935, from decree of Dist. Judge, Hoshiarpur, D/- 14th January 1926.

(a) Custom (Punjab)—Alienation—Village Basi Kalan, Hoshiarpur District—Non-proprietors can sell or mortgage their houses.

Ghair maliks of Basi Kalan of District Hoshiarpur have power to mortgage and sell their houses. [P 267 C 2]

(b) Custom (Punjab)—Alienation—Town—Distinguishing features of town from village, explained.

Where a certain place is occupied by a heterogeneous population with a preponderance of non-agriculturists and the culturable area is very small and there are two regular bazars with many shops and there is a hospital, schools for boys and girls, a post office, such place is a town and not a village: 1921 *Lah* 121 and 1920 *Lah* 888, *Ref.* [P 268 C 1]

Shuja-ud-Din and Mohammad Amin Khan—for Appellants.

J. N. Aggarwal and M. C. Sud—for Respondent.

Bhide, J.—This second appeal arises out of a suit for possession of a house situate at Basi Kalan in the Hoshiarpur district. Plaintiff alleged that the house had been sold to him by one Bhulla by a deed dated 2nd November 1921, but that he had been dispossessed by the defendants. The defendants pleaded that Bhulla was a non-proprietor and had no right to sell the site of the house and that the plaintiff had in fact never got possession of the house. The issues framed were as follows:

1. Was Bhulla (deceased) an owner of the property in dispute? O. P. on the plaintiff.

2. If Bhulla (deceased) was a ghair malik, have the ghair maliks of Basi Kalan power to mortgage and sell their houses? O. P. on plaintiff.

3. To what relief is the plaintiff entitled? O. P. on plaintiff.

The case was fought out as a test case and a mass of oral and documentary evidence was produced in Court as well as before a commissioner, who was ordered to make a local inquiry. The trial Court eventually decided the issues in favour of the plaintiff and the decision was confirmed on appeal by the learned District Judge. From this decision the present appeal has been preferred by the defendants on a certificate granted by the learned District Judge on the question of custom involved in issue 2. The learned counsel for the appellants raised certain preliminary objections, viz., that the learned District Judge had relied on certain documents which were not on the record, that the inquiry before the local commissioner was irregular and that a material issue with respect to the defendants' alternative plea as regards the abandonment of the house by Bhulla had not been framed. The learned counsel was however unable to say what documents relied on by the District Judge were not on the record. As regards the local inquiry all that the learned counsel had to urge was that the local commissioner had not sent up a proper report and that certain documents produced before the local commissioner could not be properly treated as evidence in the case. But here too he was unable to say which evidence produced before the local commissioner had been relied upon by the Court and materially affects the decision. As regards "abandonment," the plea was apparently never seriously pressed and the point does not appear to have been argued before the learned District Judge. If the appellants had attached any importance to this plea, they would certainly not have failed to get an issue framed on this point, when they were treating this case as a "test case," and making every effort to defeat the plaintiff's claim. I see therefore no force in any of the preliminary objections. On the merits, the learned District Judge has found that (i) the defendants were estopped from chal-

lenging the right of Bhulla to alienate the house; (ii) that Basi Kalan was a town and there was no restriction on the power of non-proprietors to alienate their houses and (iii) last by that even if Basi Kalan were to be considered to be a village, the defendants had failed to prove any custom, restraining non-proprietors from selling the sites of houses occupied by them.

The learned District Judge has dealt with all these points in the course of an elaborate judgment but it seems to me that point 2 is perfectly clear and this appeal must fail on that point alone. The learned District Judge's finding that Basi Kalan is a town is based on a number of facts found by him, which cannot be challenged in this second appeal, e.g., that Basi Kalan is occupied by a heterogeneous population with a preponderance of non-agriculturists, that the culturable area is only about 639 kanals, that there are two regular bazars with about 220 shops, that there is a hospital, schools for boys and girls, a post-office and so forth. It is not easy to give any precise definition of a town, but as pointed out in 62 I C 808 (1), and 55 I C 520 (2), the presence of a substantial market and the avocations of the bulk of the population are usually attached considerable importance in determining whether a place is a town or a village. In view of the facts found by the learned District Judge I do not think his conclusion that Bassi Kalan is a 'town' can be said to be vitiated by any error of law, and the finding must, therefore, be accepted as final for the purposes of this appeal. If Bassai Kalan is a town there can be no presumption as to the existence of any such custom as is alleged by the appellants. Not only this, but the wajib-ul-arz of the village also seems to be against them. Para. 19 of the wajib-ul-arz of 1908 (p. 449 of the typed record) reads as follows:

There is no miscellaneous income in this village. Though this village is owned by us on behalf of Khan and others, proprietors, shown at No. 5 of the Tarij papers yet every proprietor and non-proprietor living in this village is the owner of his house. There is no income on account of rent of houses or miscellaneous income from anybody.

1. Mansa Ram v. Joti, 1921 Lah 121=62 I C 808.
2. Shankar Das v. Mathra Das, 1920 Lah 388=55 I C 520=56 P L R 1920.

The learned Counsel urged that this provision only meant that the non-proprietors were owners of the materials of the houses occupied by them. But this interpretation seems to be clearly opposed to its plain language. The word used in the provision is 'makan' and not 'malba' and both the proprietors and non-proprietors have been put on the same footing as regards the ownership of their houses. The provision clearly appears to me to mean that although the town is owned by the defendants, they have no longer any interest in the houses occupied by the non-proprietors and they derived no kind of benefit or income therefrom. The learned Counsel also referred to certain agreements taken by the defendants from certain non-proprietors at the time of occupation of vacant sites. But these appear to be clearly in the nature of exceptions when the defendants have sought to protect their rights for the future by taking special agreements. If there was any general custom in the village restricting the powers of the non-proprietors to alienate their houses, there would have been no necessity to take these agreements at all. In view of the above facts this appeal must, I think, fail and I would accordingly dismiss it with costs.

Currie, J.—I agree.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 268

COLDSTREAM AND JAI LAL, JJ.

Peoples Bank of Northern India, Ltd.
—Plaintiff—Appellant.

v.

Hargopal and others — Defendants—Respondents.

First Appeal No. 400 of 1933, Decided on 4th April 1935, from decree of Senior Sub-Judge, Gujrat, D/- 28th November 1932.

(a) Principal and Agent—Duties and liabilities of agent—Director of bank acting as agent—Suit against him is governed by Art 90, Lim. Act.

Where director of a bank acted in a transaction as an agent of the bank, the suit against him is a suit by a principal against an agent to which Art. 90 applies: 1923 Lah 58; 1927 Lah 433, *Dissent.*; 1924 Lah 435, *Foll.*; *Case law discussed.* [P 269 C 1]

(b) Master and Servant—Master's liability—Master, as agent of bank, supporting servant's loan application fraudulently—Loan was in reality for benefit of master's firm—Servant becoming bankrupt and unable to pay

loan—Master held liable for payment due to his own fraud.

K was munim of H, a director of a bank. K's application for loan from bank was supported by statement as to his business and property known by H to be untrue and that the loan was in reality taken for the benefit of H's firm and the receipt of the money was entered in firm's books. The bank sued K for money but he had been adjudicated a bankrupt during the pendency of the suit:

Held: that H had acted dishonestly in sanctioning K's application for loan and was liable for a fraud committed by him. [P 271 C 1]

(c) Legal representative — Liability of—Remedy for wrongful act, which is not mere tort but breach of quasi contract, done by deceased person—Property misappropriated by deceased and added to his own—Suit against his legal representative held competent—S. 306, Succession Act, applies.

A remedy for a wrongful act, which is not a mere tort but a breach of a quasi contract, done by a deceased person, can be pursued against his legal representatives where property belonging to another person has been appropriated by the deceased and added to his estate. Such an action is not one excluded by S. 306, Succession Act: 17 C W N 5, *Rel. on.* [P 271 C 1]

Daulat Kam and Basant Krishna—for Appellant.

Chaman Lal Dewan and Jagan Nath Talwar for *Baignath* and *Kidar Nath*—for Respondents.

Coldstream, J.—The suit from which this appeal arises was instituted on 12th March 1932 by the Peoples Bank of Northern India against Muhammad Ali and Har Gopal who were members of the Local Board of the Bank at Gujrat, Muhammad Ali being Chairman of the Board, to recover Rs. 5,000 with interest from the defendants as damages for loss suffered on account of their negligence and fraud in sanctioning a loan of Rs. 5,000 ostensibly in favour of one Karam Singh, on 21st January 1927. The plaintiff's case was that Karam Singh who was impleaded as a defendant pro forma was at the time Munim of the firm of Gur Sahai-Dhere Shah of which Har Gopal was a member, that his application for the loan was supported by statements as to his business and property known by the other defendants to be untrue, and that the loan was in reality taken for the benefit of Har Gopal's firm. The Bank had sued Karm Singh and obtained a decree for Rs. 6,026 against him on the basis of a promissory note undertaking to repay Rs. 5,000 with interest at 9 per cent, but Karm Singh had been adjudicated a bankrupt during the suit and all that could

be recovered was Rs. 226-6-9. The Sub-Judge, 1st class, who tried the suit found it proved that Har Gopal had committed a fraud as alleged, but dismissed the suit holding that it was barred by limitation, the case being governed in his opinion by Art. 36, Lim. Act. The Bank has appealed. Har Gopal died pending the appeal and his two sons have been impleaded as his representatives. The first ground of appeal taken in the memorandum has not been pressed before us and the only points for decision by us are whether the suit is barred by limitation, whether Har Gopal acted fraudulently and negligently as alleged by the plaintiff and whether a decree can be passed executable against the estate of Har Gopal in possession of his sons.

In applying Art. 36, Lim. Act, the learned Sub-Judge has relied upon 71 I C 899 (1) which was followed in 8 Lah 167 (2). Neither of these decisions related to a suit, the decree appealed against in each case having been passed in proceedings upon an application under S. 235, Indian Companies Act. In both these cases it was held by this Court that an application to recover compensation from an ex-director of a company in respect of an alleged act of misfeasance or breach of trust was governed by Art. 36, Sch. 1, Lim. Act. A case on all fours with the present one is 5 Lah 27 (3). That was an appeal against a decree passed in a suit brought by the Bharat National Bank against the Chairman of its local directorate in Hoshiarpur to recover advances made in bad faith. It was held that in each case it is a question of fact as to whether the director whose acts are brought into question was in the circumstances of that particular case, in the position of a trustee, a partner or an agent to the company or to the body of share-holders; and that as in the case before the Court the defendant in acting as the Chairman of the Local Board of Directors, was, so far as the transaction in respect of which he had been sued, acting as agent to the Bank, the provisions Art. 90, Lim. Act applied.

1. Bank of Multan v. Hukam Chand, 1929 Lah 58=71 I C 899.
2. Bhim Singh v. Official liquidator, Union Bank of India, 1927 Lah 433=100 I C 907=8 Lah 167=28 P L R 863.
3. Daulat Ram v. Bharat National Bank, 1924 Lah 435=79 I C 740=5 Lah 27.

It was remarked by the learned Judges that the only question argued in the *Bank of Multan case* (1) which had been referred to in argument was whether Art. 36 or S. 10 applied. Eforde, J., who delivered the judgment was party to the later judgment in 8 Lah 167 (2). In deciding in that judgment that an application under S. 235 was barred under Art. 36, Lim. Act, he distinguished the *Bharat National Bank case* (3) from the *Multan Bank case* (1) on the ground that the latter was an application under S. 235, Companies Act, and the former a suit by a principal against an agent, and observed that the question of limitation governing an application under S. 235, Companies Act, had not been fully dealt with in the *Bharat National Bank case* (3). In concurring with Eforde, J., Harrison, J., added that the application disclosed nothing beyond misfeasance, malfeasance and non-feasance and that the liquidator had so defined and limited his position as to make it impossible to substantiate the contention that the application would be governed by any Article other than Art. 36.

The view adopted by this Court in 71 I C 899 (1) and in 8 Lah 167 (2), that an application under S. 235, Companies Act, is governed by Art. 36, was dissented from by the Bombay High Court in 54 Bom 226 (4). Marten, C. J., and Patkar, J., in separate judgments held, in agreement with the Allahabad Court's judgment in 47 All 669 (5), that a misfeasance application under S. 235, Companies Act, was governed by Art. 120, Lim. Act, as the claim made was not one independent of contract, to which Art. 36 would apply, and as Arts. 115 and 116 would not apply where there was no specific breach of a specific contract made by one or more individuals with the person making the claim. The applicability of Art. 90 was not considered.

The Allahabad Court also declined to follow the *Multan Bank case* (1) and *Bhim Singh's case* (2) on this point when the questions what articles of the Limitation Act governed applications under S. 235, Companies Act, and from what date in such

cases the limitation would run, came before a Full Bench in 1933 All 789 (6). Previous decisions of the Court had been that a misfeasance application under S. 235, Companies Act, was governed by Art. 120. Mukerjee, J., adhered to the view that the only article applicable was that article, and was of opinion that limitation would start from the winding up order. The conclusion reached by Sulaiman, C. J., with whom King, J., concurred, was that an application under S. 235, Companies Act, would be governed by that article of the Limitation Act which would be appropriate according to the relief sought had the application been a suit brought for seeking the same relief on behalf of the company, and that the starting point for limitation would vary with the particular article which applied to the facts of the case. The judgments of the different High Courts on the question, what article of the Limitation Act governed misfeasance applications, were reviewed in 1933 by the Judicial Commissioner of Sind in 1933 Sind 103 (7). His view was that Art. 36 could not apply to such an application, the misfeasance not being independent of contract and that Art. 115 was applicable to the facts of the particular case before him. I have referred to all these judgments because they are of interest as showing that the view taken in the *Multan Bank case* (1) and *Bhim Singh's case* (2) on which the learned Subordinate Judge has relied has been rejected by other High Courts as authority for any other proposition than that where limitation for an application under S. 235, Companies Act, begins to run from "the time when the right to sue accrues," it will run from the time of the malfeasance.

It appears to me clear from the wording itself of sub-s. (3) of S. 235, Companies Act that it cannot be laid down that any particular Article of the Limitation Act, will apply to all applications under the section. As pointed out by Sulaiman, C. J. in 1933 All 789 (6), the application might ask for a relief, which, had it been a suit, would have been governed by Art. 90 or Art. 115 or Art. 116, or if no special Article was applicable, by

4. Govind Narayan v. Rangnath Gopal, 1930 Bom 572=127 I C 305=54 Bom 226=32 Bom L R 232.

5. In the matter of the Union Bank, Allahabad, 1925 All 519=88 I C 785=47 All 669=23 A L J 473.

6. Shiam Lal v. Official Liquidator U. P. Oil Mills Co., 1933 All 789=145 I C 893=1933 A L J 1203 (F B).

7. Karachi Bank Ltd. v. Shewaram, 1933 Sind 103=143 I C 713.

Article 120. The Division Bench judgment in 5 Lab 27 (3) has not been overruled by this Court so far as I am aware. In my opinion it applies fully in the circumstances of this case. In the present case there can be no doubt, in my opinion, that Hargopal acted in the transaction, under consideration as an agent of the Bank. The suit against him was a suit by a principal against an agent to which Art. 90, Lim. Act, applied and was, therefore, not barred by time. That Har Gopal acted dishonestly in sanctioning Karam Singh's application for the loan is proved beyond any doubt by the evidence in the case which makes it clear that the application was presented in bad faith by Karam Singh who was munim of Har Gopal's firm Gur Sahai-Dhera Shah (Gur Sahai is Har Gopal's brother and Dhera Shah was his father) and took the money for the firm with the connivance of Har Gopal. The application form misrepresented the applicant's circumstances to the knowledge of Har Gopal. The plea that the loan was sanctioned upon a recommendation by the Local Manager was false. Karam Singh in his jawab-i-dawa stated that the receipt of the money was entered in the firm's books. The firm admittedly kept the usual account books and they were with the firm. The account books have been withheld.

It is contended on behalf of Har Gopal's son that the principle *actio personalis moritur cum persona* precludes the survival of the right to sue against them. There is, however, no doubt that a remedy for a wrongful act which was not a mere tort but a breach of a quasi contract, done by a deceased person, can be pursued against his legal representatives where property belonging to another person has been appropriated by the deceased and added to his estate, see 17 C W N 5 (8). Such an action is not one excluded by S. 306, Succession Act. The money ostensibly lent to Karam Singh was added to Har Gopal's joint family estate and is recoverable therefrom. For these reasons I would accept this appeal so far as Har Gopal's representatives are concerned and, setting aside the judgment appealed against, grant the appellant a decree for Rs. 5,250 and costs

throughout executable against the estate of Har Gopal in the possession of his sons.

Jai Lal, J.—I agree.

R.W./V.V.

Appeal accepted.

* A. I. R. 1936 Lahore 271

COLDSTREAM AND JAI LAL, JJ.

Peoples Bank of Northern India, Ltd.
—Plaintiff—Appellant.

v.

Har Gopal and others—Defendants—Respondents.

Second Appeal No. 1489 of 1933, Decided on 20th May 1935, from decree of Dist. Judge, Gujranwala, D/- 12th June 1933.

* (a) *Company—Directors—Suit against—Loss caused by wilful breach of their obligation—Art. 90 and not Art. 36, Lim. Act, applies.*

Where conduct of the directors of a bank is such as to render them liable to the amount lost by the bank owing to wilful breach of their obligation as directors, Art. 90 and not Art. 36 applies: 1936 Lah 267, *Foll.*; 1927 Lah 433, *Dissent.* [P 272 C 1]

* (b) *Tort—Death of tortfeasor—Right to prosecute action survives—Onus lies on person to prove exception to above rule.*

The general rule is that a right to prosecute an action survives and it is for the person claiming exemption from this rule to show that his case falls within the exception (action against directors for loss caused by breach of their obligation survives): 1936 Lah 268; 31 Cal 993 and 1927 Cal 277, *Foll.* [P 273 C 1]

* (c) *Company—Directors—Loss caused for loan by directors tainted with dishonesty—Directors are liable for it.*

Where the debtor does not pay his debt, and the loan is tainted with dishonesty of the directors, the directors must be held responsible for the debt, which is found to be bad. [P 273 C 1, 2]

Bhagwat Dayal and Kishen Dayal—for Appellant.

Chaman Lal, J. N. Talwar and Madan Mohan—for Respondents.

Coldstream, J.—The suit out of which this appeal arises was instituted by the Peoples Bank of Northern India to recover a sum of Rs. 2,143-13-1 from Fateh Ali on the basis of a promissory note for Rs. 1,600 executed by him in favour of the Bank. It was alleged by the Bank that in sanctioning the loan the local directors of the Gujrat branch of the Bank namely, Har Gopal, Muhammad Ali and Gian Chand, had acted dishonestly and these persons were impleaded with Fateh Ali as defendants. Muhammad Ali and

Gian Chand did not contest the suit. Fateh Ali admitted his liability for the debt. The Subordinate Judge, 2nd class, passed a decree against Fateh Ali for Rupees 2,143 13 1 with costs. He dismissed the suit against the local directors, as barred by time, holding that the Article of the Limitation Act applicable was Art. 36. As regards the conduct of the directors, he found it proved that they had been guilty of neglect but had not been so wilfully negligent or fraudulent as to be personally liable for Fateh Ali's debt. The Bank appealed to the District Judge of Gujrat against the Subordinate Judge's decision regarding limitation and the liability of the local directors. The learned District Judge agreed with the trial Court in holding that the suit was one governed by Art. 36, Lim. Act, following 8 Lah 167 (1), and dismissed the appeal. At the same time he recorded a finding that all three local directors were equally guilty of wilful negligence, remarking that if the suit against them had been within time, he would certainly have held them jointly and severally liable for the loss suffered by the Bank.

The Bank has now come to this Court on second appeal and it is contended before us that the District Judge's decision on the point of limitation is incorrect, the Article of the Limitation Act, applicable being Art. 90 as was recently held by this Court in Civil Appeal No. 400 of 1933 (2). That judgment decided another appeal by the Peoples Bank of India in a case in which the Bank had sought to recover from Har Gopal the present respondent the amount of a loan which, according to the Bank had been dishonestly sanctioned by him and the other local directors of the Gujrat Branch of the Bank. The question what article of the Limitation Act would govern a suit of that kind was considered by the present Bench and the judgment set forth our reasons for holding that the proper article to apply would be Art. 90. There is nothing in the circumstances of the present case to distinguish it, so far as the question of limitation is concerned, from the case there dealt with. I would accordingly reverse the decision of the District Judge on this point and hold that this suit was

within time, the misconduct itself complained of having occurred within three years of the institution of the suit.

The finding by the District Judge, that the conduct of the three local directors was such as to render them liable to the amount lost by the Bank, owing to the wilful breach of their obligation as directors, was justified by the evidence. My conclusion is that the suit should have been decreed against the three directors, it not being shown that the Bank could have decreased their loss by some action which they ought to have taken, but did not take. L. Har Gopal is dead and his two sons have been impleaded as his legal representatives. The question now to be decided is whether a decree can be passed against them. It is contended on their behalf that the cause of action in this case having been against Har Gopal personally does not survive against his representatives on the principle *actio personalis moritur cum persona*. Reliance is placed on a number of rulings in which Indian Courts have applied this principle to cases not on all fours with the present one.

In Civil Appeal No. 400 of 1933 (2), to which reference has been made above, it was pointed out that a remedy for a wrongful act which was not a mere tort but a breach of a quasi-contractual obligation committed by a deceased person can be pursued against his legal representative where property belonging to another person has been appropriated and added to his estate. In the present case it is not established that the money lost to the Bank was appropriated by Har Gopal, but I do not think that this fact affects the question of abatement in this case. S. 306, Succession Act, expressly provides that rights to prosecute all actions survive against the executors and administrators of a person against whom the rights existed except causes of action for defamation, assault as defined in the Penal Code, or other personal injuries not causing the death of the person, or where, after the death of the party, the relief sought could not be enjoyed or the granting of it would be nugatory. It may properly be assumed that the liability of legal representatives who are not executors or administrators is the same. This was the view taken by a Full Bench of the Calcutta Court in 31 Cal

1. Bhim Singh v. Basheswar Nath, 1927 Lah 433=100 I C 907=8 Lah 167.
2. Peoples Bank of Northern India v Har Gopal, since reported in 1936 Lah 268.

993 (3) where they were dealing with the question whether a suit for malicious prosecution abated with the death of the plaintiff or could be continued by his heirs who had not taken out administration to his estate. In the course of his judgment Maclean, C. J., remarked :

We have been referred to various authorities in the Court of England upon the question but it seems unnecessary to go into those cases because the law in India has been codified by S. 89, Probate and Administration Act (now S. 306, Succession Act).

It is true that the words "or other personal injuries" have been read by some of the Indian Courts to include injuries such as malicious prosecution even where the plaintiffs sought to recover pecuniary loss arising out of the injury. This interpretation can be based only on the assumption that 'other personal injuries' referred to in S. 306, Succession Act, must be injuries ejusdem generis not only with assault but also with defamation. This interpretation was not accepted by the Calcutta Court, who in the case just cited observed that to make the words 'personal injuries' include a case of malicious prosecution would be straining the language of the Legislature and placing upon it an unnatural and forced construction. A Division Bench of the same Court following this ruling in 53 Cal 987 (4) expressed their dissent from the judgments of the Madras, Bombay and Patna Courts which took a different view, remarking that, having regard to the language used they did not think that the Legislature intended to perpetuate in this country a doctrine so archaic and unjust. Whatever, however, may be the correct view as to the revival of an action for injuries of other kinds there is no doubt in my mind that the present case is not one of a personal injury which could have caused, but did not cause, death. The general rule as laid down in S. 306, Succession Act, is that a right to prosecute an action survives. It is for the person claiming exemption from this rule to show that his case falls within the exception and here this has not been shown. Lastly it is contended for Har Gopal's son that the loss to the Bank is not proved. But Fateh Ali did not pay his debt. The loan was tainted

with dishonesty and the directors were responsible for a debt which had been found bad. They are liable for this debt. I would for all these reasons accept the appeal and modify the decrees so as to make it executable in respect of the decretal amount not only against Fateh Ali but also against the estate of Har Gopal in the hands of his son for any balance not recoverable from Fateh Ali. The lower appellate Court's order as to costs will stand and the appellants will have their costs here against Har Gopal's sons.

Jai Lal, J.—I agree.

R.W./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 273

BHIDE AND CURRIE, JJ.

Mt. Harbans Kaur and another — Defendants—Appellants.

v.

Nagina Singh — Plaintiff and others—Defendants—Respondents.

Second Appeal No. 2279 of 1934, Decided on 4th November 1935, from decree of Dist. Judge, Lyallpur, D/- 16th November 1934.

Custom (Punjab) — Succession — Self-acquired property — Jats in Lyallpur District, emigrants from Jullundur District — Daughters exclude collaterals.

In the Lyallpur District among Jats, emigrants from the Jullundur District, daughters of male proprietors, who die without male lineal descendants, exclude collaterals from the succession to the self-acquired property of their father. [P 275 C 2]

R. C. Manchanda and *S. C. Manchanda*—for Appellants.

L. M. Datta—for Respondents.

Currie, J.—The parties to this case are Jats of the Jullundur Tahsil of the Jullundur District who migrated to the Lyallpur District. Indar Singh had acquired some land at Chak No. 113 G. B. He was succeeded by his widow, and on her death in 1932 mutation was effected in favour of the daughters of Indar Singh. Nagina Singh, a collateral in the fourth degree, brought a suit against these women in which he impleaded other reversioners as defendants. His suit was decreed and the appeal by the daughters was dismissed. The learned District Judge granted a certificate for second appeal under S. 41 (3), Punjab Courts Act. The sole question for decision in this case is whether daughters succeed to property left by a sonless proprietor to the exclu-

3. Krishna Behary v. Corporation of Calcutta, (1904) 31 Cal 993=8 C W N 745.

4. Bhupendra Narayan v. Chandramoni Gupta, 1927 Cal 277=100 I C 286=53 Cal 987.
1936 L/95 & 86

sion of collaterals in respect of non-ancestral property.

The riwajiam of the Jullundur District is clearly in favour of the collaterals. According to the answer to question 45-A in the Jullundur Tahsil among Jats daughters are excluded by collaterals up to and including the fifth degree, while the answer to question 45-B states that no distinction is drawn between ancestral and non-ancestral property. The instances cited in the riwajiam are not sufficiently detailed to afford any assistance. There are instances in which daughters were allowed to succeed, but there is nothing to show whether there were collaterals of the fifth degree or not. They are described as being "in favour" and from the preface it is clear that this is to be interpreted as "in favour of the custom as stated." Before turning to instances cited in the present case certain general arguments advanced on behalf of the appellants may be considered. It has been argued that very little weight should be attached to the entry in the riwajiam as the riwajiam of the Jullundur District has been adversely criticized and has been held to be incorrect in certain cases. This argument to my mind carries little weight as there are cases in which this riwajiam has been accepted, e. g., 15 Lah 586 (1) and 1934 Lah 580 (2). A further argument advanced against the entry was that it is opposed to the general custom of the province.

But that in itself is no ground for holding that the answer is wrongly recorded especially as there are cases in which a similar custom excluding daughters even from inheritance of non-ancestral property was upheld in the neighbouring Amritsar District. Another general argument advanced is that as the appellants are women the onus lies lighter on them as women are not present at the time of the attestation of the riwaj-i-am. That argument does not appeal very strongly to me. There are plenty of sonless proprietors who will be ready to put forward the custom to the benefit of their daughters and there are also the husbands of such women who would not hesitate to put forward the custom if it existed. To turn now to the instances

cited in the present case. Mr. Manchanda relied on the first four instances cited in the judgment of the District Judge. The first of these certainly supports the appellants' case. Mt. Attri is stated to have succeeded to the self-acquired property of her father Jowala Singh in the Lyallpur District in the presence of collaterals within the fifth degree. The collaterals are said to have brought a suit which was subsequently withdrawn. This instance rests on oral evidence, no copies having been produced. The second instance cited by the learned District Judge, which was sub judice at the time of his judgment, is now concluded by the decision reported in 1935 Lah 607 (3), in which the decision went in favour of the daughters. This also was a case from Lyallpur. The third instance, also from Jaranwala Tahsil, shows that Mt. Kishan Kaur, widow of Kartar Singh, gave the land to Mt. Prito, her daughter, a minor. The mutation Ex. D-9 was sanctioned despite the objections of the reversionary heirs, who stated that the donor was merely an owner for life and had no right to make the gift. The Revenue Officer, however, held that the property was self-acquired and these objections must be decided by civil Courts. The exact degree within which the collaterals came is not mentioned. Limitation has not yet expired.

The fourth instance related to Maida Singh. He was succeeded by his widow Mt. Ralli, who got two-thirds share, and his daughter-in-law Mt. Kishen Kaur. On the death of Mt. Ralli the mutation of the two-thirds share held by her was sanctioned in favour of Mt. Santi her married daughter, on 8th June 1932. This would still be liable to be contested by the reversioners, who do not appear to have appeared before the revenue authorities. The other instances cited have been shown by the learned District Judge to prove nothing and counsel has not attempted to rely on them. In addition reference has been made to a case reported in 1935 Lah 505 (4), from the Jullundur District. But that case proceeded largely on the fact that certain admissions had been made in a previous case between the parties and is not

1. *Narain v. Bhag Singh*, 1934 Lah 280=149 I C 962=15 Lah 586=36 P L R 331.

Chhajji v. Bhagat Ram, 1934 Lah 580=148 I C 862=15 Lah 739=35 P L R 383.

3. *Narain Singh v. Mt. Chand Kuar*, 1935 Lah 607=156 I C 174=37 P L R 220.

4. *Mt. Mahun v. Mt. Rali*, 1935 Lah 505.

of great value as an instance. Two other cases, 1930 Lah 596 (5) and 1931 Lah 641 (6) were also referred to, but these relate to Arains and in view of the well-known tendency of that endogamous tribe to favour daughters are not in my opinion of any weight. A number of instances were cited on behalf of the plaintiffs. Of these Nos. 1, 6 and 11 were held to be irrelevant by the learned District Judge and no reason has been advanced before us for holding to the contrary.

As regards the remaining instances, the learned counsel who appeared for the respondents, was not in a position to state on which he relied. I have however been through these instances and find that none of them is of any value. Nos. 2, 3, 4 and 7 all relate to the succession to occupancy rights which is governed by the Colonization of Government Lands (Punjab) Act, 1912, Ss. 20 and 21. S. 20 provides that in the case of an original grantee, where there are no sons or no widow, an unmarried daughter succeeds until she dies or marries or loses her rights under the provisions of this Act, and this undoubtedly affects the view taken by subordinate revenue officials in deciding the course of succession when any male tenant, who is not an original tenant, dies, or any female tenant dies, marries or re-marries, though S. 21 (b) provides that in such cases the succession devolves on the person or persons who would succeed if the tenancy were agricultural land acquired by the original tenant. The tendency therefore is for the revenue officer to construe the rule as if the daughters' rights were extinguished on marriage.

As regards instances actually cited in No. 2, there was a dispute between the reversioners, but this was settled by mutual agreement and the daughter's name was struck off on her marriage. Instance No. 3 was a case of succession to a widow and it is not clear who was the original grantee. Instance No. 4 was again a case of a daughter's name being struck off on marriage. As she held only one-third of the holding it would appear probable that the original grantee was her grandfather who had two other sons

5. Karim Bakhsh v. Nizamuddin, 1930 Lah 596 129 I C 219.

6. Ghulam Muhammad v. Ralli, 1931 Lah 641= 134 I C 795=12 Lah 412=32 P L R 929.

besides her father. Instance No. 7 was peculiar in that the father of the deceased tenant was still alive and it was in accordance with his wishes that the mutation was effected in favour of his grandsons on the marriage of the granddaughter. These instances therefore are of little or no value in the present case. In instance No. 5 two brothers owned the land jointly and the one who died sonless was succeeded by his brother to the exclusion of married daughters. There is nothing to show that the land was the self-acquired property of the deceased. On the contrary the fact that he was holding jointly with his brother would point to the fact that it had come down to them from their father. Instance No. 8 (Ex. P-13) relates to ancestral property. In instance No. 9 there is nothing to show whether the property was ancestral or self-acquired, and this instance is of no real value. In instance No. 10 the property was apparently ancestral. Instance No. 12 related to Kambohs of Jullundur who give the same answer as Jats. Instance No. 13 depends solely on oral evidence.

Thus there are four instances in which the daughters have excluded the collaterals in respect of the self-acquired property of their father. On the other hand, there is only one instance dependent solely on oral testimony in which the collaterals are said to have excluded the daughters. This was an instance of the Jullundur District and rests purely on the evidence of D. W. 10. It must be remembered that these people have left their own district and migrated to a canal colony where they may have acquired more liberal views towards the rights of daughters than those held by the more stay-at-home portion of the tribe in the Jullundur District. In the present case I would hold that the daughters have discharged the onus that lay upon them and shown that in the Lyallpur District among Jats, emigrants from the Jullundur District, daughters of male proprietors, who die without male lineal descendants, exclude collaterals from the succession to the self-acquired property of their fathers. I would therefore accept the appeal and dismiss the plaintiff's suit with costs throughout.

Bhide, J.—I agree.

B.D./R.K.

Appeal allowed.

* A. I. R. 1936 Lahore 276

JAI LAL J.

Shanti Lal—Appellant.

v.

Lyallpur Bank, Ltd. (in liquidation),
Lahore—Respondent.

Misc. First Appeal No. 1196 of 1935,
Decided on 18th November 1935, from
order of Dist. Judge, Lahore, D/- 27th
March 1935.

(a) **Company** — Company authorized to
manage estate can act as liquidator—Com-
pany appointed and acting as liquidator—
Legality of appointment cannot be questioned
in proceedings of payment order under S. 186,
Companies Act.

Where the Memorandum of Association shows
that one of the objects of the company is to
manage estates, it entitles the company to act
as a liquidator of another company and once
the company having been appointed a liquidator
and having accepted the position the legality of
the appointment cannot be questioned in pro-
ceedings of a payment order under S. 186 of
Companies Act. [P 276 C 2]

* (b) **Limitation**—A executing pro-note in
favour of B—A selling some immoveable pro-
perty to B and asking him to appropriate the
sale price towards part payment of pro-note—
Document though unregistered can be relied
upon as acknowledgment and part-payment
of liability and can save limitation of pro-
note.

A executed a pro-note in favour of B. After
certain time A sold certain of his immoveable
property to B and asked him to appropriate the
sale price in part payment towards the pro-note.
The document of sale if it is not registered can-
not be relied upon by B to prove his title to the
immoveable property purchased. But when the
document is relied upon to serve as an ac-
knowledgment and part payment of A's liability,
it is relied upon to serve a collateral purpose
and so can be relied upon to save limitation of
the pro-note under S. 19, Lim. Act. [P 277 C 2]

(c) **Limitation**—Acknowledgment—Actual
amount need not be mentioned—Acknowledg-
ment of liability written and signed by debtor
is required.

It is not necessary that the actual amount
due should be mentioned so long as there is an
acknowledgment of liability in writing signed
by the debtor. [P 278 C 1]

Iqbal Chand and *Amin Chand Mehta*
—for Appellant.

Madan Gopal—for Respondent.

Judgment.—Shanti Lal appeals against
a payment order made by the District
Judge in charge of liquidation work at
Lahore directing him to pay Rupees
1,37,557-10-3, principal and interest there-
on, as the legal representative of the late
Lala Jairam Das, who has executed a
promissory note for 'Rs. 1,11,500-8-0 in
favour of the Lyallpur Bank Ltd., in
liquidation, on 1st July 1928. The Bank

went into liquidation in 1932 and the
Punjab Co-operative Bank Ltd. and
Lala Banwasi Lal were appointed joint
liquidators; the liquidation was under
the supervision of the Court. An ap-
plication was made by the Lyallpur Bank
Ltd., in liquidation on 22nd May 1933
under S. 186, Companies Act, for a pay-
ment order. It was signed by Banwasi
Lal and one Daulat Ram who did not
describe himself, but in the evidence it
transpired that he was the manager of
the Punjab Co-operative Bank Ltd. Three
main objections to the order passed by
the District Judge has been raised before
me: firstly that the application on which
the payment order has been made was
not made by persons competent to make
an application of this description; se-
condly that the application was time-
barred; and thirdly that no payment
order could be made because the promis-
sory note executed by Lala Jairam Das
in favour of the Lyallpur Bank Ltd., was
payable in the office of the Bank either
at Lyallpur or in Dera Ismail Khan,
and therefore it being payable at a speci-
fied place, presentment of the promissory
note for payment was necessary on matu-
rity before the maker could be held liable
thereon.

With regard to the first objection re-
ference was made to the Memorandum
of Association and Articles of Association
of the Company, that is to say, Punjab
Co-operative Bank Ltd., and it was con-
tended (a) that the bank was not com-
petent to act as a liquidator and (b) that
the appointment of Daulat Ram had not
been legally made to represent the bank
in the liquidation proceedings. In fact it
was suggested that the bank was not com-
petent to delegate its authority to an-
other person as it has done by professing
to appoint its manager Daulat Ram to act
for it in the liquidation proceedings. I
need refer to the Memorandum of Associa-
tion only to show that one of the objects
of the bank is to manage estates and it is
contended by the respondents' counsel
that this entitles the bank to act as a
liquidator of another company. But in
my opinion this objection is not open to
the appellant. The Bank having been
appointed a liquidator and having accept-
ed the position the legality of the ap-
pointment cannot be questioned in these
proceedings. Regarding the appointment
of Daulat Ram there can be no question

of delegation in the sense in which delegation of duties is prohibited by law. A Bank can function only through its directors, agents, or representatives and if it can be found that Daulat Ram was authorised either by power of attorney or the Articles of Association or otherwise to act in this matter on behalf of the Punjab Co-operative Bank Ltd., he would be competent to present the application. If the proposition is correct that by its Memorandum of Association the Punjab Co-operative Bank Ltd. is entitled to act as a liquidator, then the work of liquidation would fall within the ordinary functions of the Bank and the manager of the Bank by virtue of the Articles of Association and the power of attorney that he holds, which authorised him to manage the affairs of the bank, would be entitled to present the application in question. I do not, however, express any opinion on the question whether the Bank was entitled by its Memorandum of Association to act as a liquidator, but there is no doubt that the Bank did act as a liquidator after having been appointed by the share-holders first and subsequently by the Court. There is a resolution of the Directors of the Bank which was passed on 31st July 1932 by which Daulat Ram was authorised to manage the work of liquidation and to generally act on behalf of the Bank and to sign documents connected with the liquidation proceedings on behalf of the Bank. This resolution was duly communicated to the District Judge and was noted by him.

Under these circumstances it must be assumed that Daulat Ram is the recognised agent of the Bank in matters of liquidation and as such is entitled to act on their behalf in all proceedings in the Court. The application is defective in form because Daulat Ram has not stated the capacity in which he signed the application, but this is merely a formal defect which does not vitiate the proceedings. His position was made clear subsequently. The application, it may be mentioned, was made through an Advocate, Lala Madan Gopal, and signed by him and he was authorised both by Banwasi Lal and Daulat Ram to do so. In my opinion there is no force in the first objection. As regards limitation the application was admittedly made when the normal period for instituting a suit for

the recovery of the debt due under a promissory note had expired, but in the application the liquidators claimed exemption by virtue of a document dated 28th February 1931 signed by Lala Jairam Das. By this document he sold certain immovable property to the Bank for Rs. 16,000 and directed the Bank to credit the sum of Rs. 16,000 to the promissory note account. The appellant contends that the document really purports to transfer the property in favour of the Bank but is not registered. Assuming that the document requires registration the liquidators do not rely upon it in order to establish their title to the immovable property sold to the Bank; on the other hand they rely upon it to prove acknowledgment of liability under the promissory note for the purpose of extending time under S. 19, Limitation Act, and also in order to establish part payment of the amount due under the promissory note in question the fact of which payment appears to be in the handwriting of the debtor. This in my opinion is clearly a collateral purpose and the document is admissible in evidence for the purposes mentioned above.

As to the payment it appears that the sum of Rs. 16,000 was credited to the account of Lala Jairam Das by the liquidators on 28th September 1932 and not by the Bank before it went into liquidation on 28th February 1931. The reason for this delay, as explained by the liquidators, is that the amount was credited to the account of Lala Jairam Das only when the mutation was sanctioned in their favour. It appears from the mutation proceedings that a report was made to the Patwari of the sale of the immovable property in favour of the Bank in August 1931 and it was on 28th September 1932 that the Assistant Collector recommended to the Collector that the mutation be sanctioned. It was on that date that the amount was credited to the account of Lala Jairam Das. The learned District Judge has allowed no interest on the promissory note from 28th February 1931 to 28th September 1932, he has thus taken the payment to have been made on 28th February 1931, as that was the date on which, according to the document, Lala Jairam Das got the credit of Rs. 16,000 made in his promissory note account. I am also of opinion that the receipt does amount to an acknowledgment of liability

under the promissory note for the purpose of S. 19, Lim. Act. It is not necessary that the actual amount due should be mentioned so long as there is an acknowledgment of liability, under the promissory note in writing signed by the debtor. The conclusion of the learned District Judge on this matter also is correct.

The question of presentment does not arise. In the first instance it has been held as a matter of fact on the evidence which has been believed by the learned District Judge that the document was presented to Lala Jairam Das for payment. Beyond contending that the witnesses have not given the actual date on which the presentment was made but merely stated that it was made in the month of April or May 1933, the learned counsel for the appellant did not criticise the evidence led by the Bank. In my opinion there is no substance in this contention. I also consider that in the circumstances disclosed in this case no presentment was necessary. The promissory note is payable on demand and it has been found that Rs. 16,000 are paid by Lala Jairamdas to the Bank in 1931, or in any case, in 1932. By virtue of S. 76 (c), Negotiable Instruments Act, no presentment would be necessary. I am doubtful if presentment is necessary at all under S. 76 to charge the maker of the promissory note in this case. There is therefore no force in this appeal and I dismiss it with costs.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 278

YOUNG, C. J. AND MONROE, J.

Abdul Sattar—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 803 of 1935, Decided on 30th October 1935 from order of Sess. Judge, Delhi, D/- 2nd July 1935.

Criminal Trial — Confession recorded under S. 164, Criminal P. C. — Confessor should not be returned to police custody.

Where confession of a person has been validly recorded under S. 164, Criminal P. C., such person should not be returned to police custody. Procedure of sending confessor to police custody is wholly improper and may damage the whole case. [P 279 C 2]

Abdul Aziz—for Appellant.

Ram Lal—for the Crown.

Judgment.—In this case Abdul Sattar, his brothers Abdul Ghaffur and Raushan Din were charged with the murder of one Ram Partap. Abdul Sattar was convicted and sentenced to death: the other two were acquitted.

Some years ago in Delhi there was a notorious character, a Brahman, named Ram Partap. He dealt in opium and cocaine and had been convicted of dacoity. He had friends, also interested in crime, among others being an advocate of Delhi named Gulal Chand. It is alleged that the accused, in collaboration with Gulal Chand, the advocate, and others, murdered Ram Partap in pursuance of a conspiracy to obtain from Ram Partap a promissory note of Rs. 25,000, and after the death of Ram Partap to collect the money. On 8th March 1931, Ram Partap left his house. After that day he has not been seen alive by anyone, neither has his corpse been discovered. Investigation was started on the complaint of Mt. Bibbo, the wife of Ram Partap. The investigation proceeded and Abdul Sattar, the appellant, was actually arrested in 1931 in connexion with the murder. He was detained for some days, but eventually the proceedings were ended by the discharge of Abdul Sattar. It is said by the approver in this case that the reason given by the appellant for the abortive proceedings in 1931 was the payment of Rs. 2,000 by the appellant to the police. Other people were also suspected and charged in 1931, and they, too, in their turn were discharged.

After the death, or disappearance, of Ram Partap, Gulal Chand, advocate, proceeded upon the promissory note. He obtained an ex parte decree in Bombay against Ram Partap for Rs. 28,000 odd. Gulal Chand commenced proceedings in Delhi to execute his decree. This not unnaturally excited the widow, Mt. Bibbo, to action, and she filed a declaratory suit alleging that Gulal Chand had murdered her husband and that the decree had been obtained in pursuance of the conspiracy. On the evening of 29th July 1934, just after the filing of the declaratory suit, Gulal Chand was discovered murdered in his car in the suburbs of Delhi. Investigation was again commenced, with the result that the police obtained a clue to Abdul Qayyum, who is the approver in this case, a statement was taken from him and subse-

quently he made a confession recorded under S. 164, Criminal P. C., the result of which was the arrest of the present accused for the murder of Ram Partap in 1931.

In this case we are dealing solely with the murder of Ram Partap. The question of the murder of Gulal Chand will be considered in the next case before us. The statement of the approver only applies to the actual murder and what happened after the disposal of the body. The rest of the story has come from the witnesses. It is alleged that Ram Partap left his house on the morning of 8th March 1931 to go to the office of the Advocate Gulal Chand. There Abdul Sattar was present. Abdul Sattar, as pre-arranged, took Ram Partap and Gulal Chand to his workshop. Other members of the conspiracy were there present. When Ram Partap sat down on a sofa in his house with Gulal Chand, he was seized by the various persons there collected and strangled. The question then arose as to the disposal of the body. According to the approver, Abdul Sattar procured a hired taxi driven by one Ganga Singh, who has been called as a witness in this case, placed in the back of the car a box containing the body of the deceased, hung a curtain round the car and then went to collect his wife (or mistress), Mt. Hussaini who lived near the Jama Masjid. The party then proceeded in this pardah car to village Akbarpur where Hussaini was left with the wife of a man called Firoze, and Firoze was taken on in the car by Abdul Sattar. It is alleged that Abdul Sattar told Firoze that the box contained some contraband opium which had gone bad and that he wished the assistance of Firoz in order to get rid of it. They drove first to a canal in the neighbourhood of Bulandshahr. It was too early as it was light and the car was driven back again to Akbarpur. Later on, they returned to the canal. The box was taken out, placed upon the running board of the car and the car was driven to a suitable place near the canal. Firoz and Abdul Sattar took the box to the canal and emptied the contents into the water. Firoze was extremely surprised when the box was opened to see therein not contraband opium, but the face of his old friend Ram Partap. The contents of the box were promptly emptied and the car returned. Mt. Hussaini was collected

in the village and the car was driven back to Delhi. There is some further evidence, not material to this case, but thereafter Abdul Sattar proposed a dacoity at Ram-Partap's house, but that project was abandoned.

In the first place, we have to consider whether the story of Abdul Qayyum, the approver, is in itself worthy of credence. In this connexion the learned Government Advocate, who appears for the Crown, concedes that this approver is worse than most others. He had been a warder in a jail and according to his own statement, had, in jail, engaged in many illegal practices. He was a friend of opium and cocaine smugglers in Delhi and was quite prepared, for a reasonable sum of money, to enter into this conspiracy to murder Ram Partap. We have it also on record that the approver was in police custody from the day of his arrest, 19th October 1934, that although his statement under S. 164, Criminal P. C., took some six or seven days to complete, he was returned to police custody after every instalment was made, and that after the confession was complete, he was returned to police custody and stayed there for a considerable time. We have continually pointed out, and it appears necessary for us to continue to do so, that this procedure is highly improper and may damage the whole case in which such a confession is used. It may be that this being a Delhi case, the remarks of this Court have not been noticed by the Delhi authorities. As far as this approver is concerned therefore not only have we the fact that he is a very bad type of man but that the police control to which he has been subjected is sufficient to cast suspicion upon his statement.

The first point that we notice about the evidence is that all the witnesses are persons of very bad character. There is Hussaini, who for many years was a prostitute, lived with Abdul Sattar for a certain time, and then apparently went back to the bazar. There was Firoze, a most important witness, who is a bad-mash on register No. 10. There is Ganga Singh, the driver of the car, another important witness, who was the employee of one Dhanna Lal who has been in prison on various charges. There is Rahim Ali, a casual witness, who is a relation and friend of Firoze. The evidence of witnesses of this character in view of

what hereinafter appears, could not be expected to command a great deal of confidence.

Another fact which, in view of the character of these witnesses, cannot fail to impress us is that we are satisfied that the evidence of Qasim Ali has been deliberately procured by the prosecution. In many cases we are told that the prosecution has produced false evidence in a doubtful case in order to secure conviction. It is often impossible—although there may be suspicion of such a practice—to be able to say definitely that this has occurred. In this case we do not doubt that Qasim Ali is a false witness and that he was produced to say that four years ago he was present in a field adjacent to the canal in which the dead body is alleged to have been thrown; that he saw a motor car on the bridge in itself a common object—that he went there to find out whether a Canal Officer had arrived; that he recognised Firoze and that near Firoze there was another person who was dressed in shorts and a topi, that is, in European costume. Qasim Ali said he remembered that, four years ago, he asked Firoze who this individual was and he was told that it was Abdul Sattar of Delhi. We cannot believe that this incident could have impressed itself upon the mind of Qasim Ali or—if it were true that Abdul Sattar's name was mentioned—that he remembered the name four years later.

What is worse however is that this witness was produced by the prosecution four years later as a person who had identified Abdul Sattar in a parade in Delhi jail where Abdul Sattar was mixed with twenty other prisoners. Abdul Sattar four years ago was clean shaven; Abdul Sattar in the identification parade had a beard. Abdul Sattar four years ago was wearing a topi and shorts, Abdul Sattar in the jail parade was wearing Indian clothes. We consider that it is beyond the bounds of possibility under these circumstances for any person to identify a man whom he had seen four years ago for a very short time. It is obvious that this witness had identified Abdul Sattar with the assistance of some one in the jail. We are informed that this practice is termed "padding." It is in fact a most serious offence which may result in innocent persons being hanged. Persons indulging in it are engaged in a conspiracy

which may result in murder by judicial process.

The learned Government Advocate admits that this evidence of identification is "too tall." We say it is false and manufactured. When we are satisfied that the prosecution has produced a false witness for the purposes of procuring a conviction, this fact must affect our minds as to the rest of the evidence, and when the other witnesses are, as we have pointed out, easily amenable to police influence, the effect will be greater. We consider on this ground alone—though the evidence otherwise is weak—that it would be extremely unsafe for this Court to act upon any of the evidence in this case. We therefore have no hesitation in coming to the conclusion that the prosecution has failed to prove the guilt of Abdul Sattar. We must therefore accept this appeal. We set aside the conviction and the sentence of death imposed upon him. We direct that a copy of this judgment be sent to the Chief Secretary, Punjab Government, and to the Chief Commissioner, Delhi.

B.D./R.K.

Order accordingly.

*** A. I. R. 1936 Lahore 280**

AGHA HAIDAR, J.

Manohar Dass—Plaintiff—Petitioner.

v.

Birandari Sheikhpurain—Defendant—Respondent.

Civil Revn. No. 427 of 1935, Decided on 23rd October 1935, from order of Senior Sub-Judge, Amritsar, D/-9.5-1935.

*** Civil P. C. (1908), O. 17, Rr. 2 and 3—Hearing—On date of hearing of suit Judge should either take evidence or hear arguments or do something enabling adjudication—Date of return of Commissioner's report is not date of hearing.**

By the hearing of the suit is meant the hearing at which the Judge would be either taking evidence or hearing arguments or would have to consider questions relating to the determination of the suit which would enable him finally to come to an adjudication upon it.

In a case where a Commissioner is appointed and is asked to submit his report by a certain date and the Commissioner before that date files an application praying for an extension of time, it is for the Court to extend the time which the Commissioner asks for or it can refuse it. The parties have nothing to do with the matter. The date on which the Court expected the report of the Commissioner is not "the date of the hearing"; 1920 Pat 595, Foll.; 1927 All 749 and 16 All 342, *Applied*.
[P 281 C 2]

Qabul Chand and Shamair Chand—for Petitioner.

Order. — One Mahant Manohar Das, brought a suit for possession of a certain building. The defendant filed objections that the court-fee on the plaint was not sufficient. On 18th November 1934, the Court ordered that the point of court-fee should be argued first as it was admitted that the property was wakf. On 14th December 1934, the Court held that the building in dispute was not a temple and that the plaintiff should have paid an ad valorem court-fee on the market value of the property in suit. The Court also appointed Lala Parmeshri Das, retired Subordinate Judge, as Commissioner and directed him to find out the market value of the property. Lala Parmeshri Das was to submit his report on 15th January 1935. The parties paid a sum of Rs. 20 to Lala Parmeshri Das as his remuneration. On 13th January 1935, Lala Parmeshri Das made an endorsement on the precept which was issued to him saying that he had received the same along with the plan and asked that the date for submitting his report may be extended. On 15th January 1935 the case came up before the Court. The defendant and his counsel were present while the plaintiff and his counsel were absent. The Court, purporting to act under O. 9, R. 8, Civil P. C., dismissed the suit of the plaintiff for default. He apparently treated 15th January 1935 as the date for hearing. The plaintiff filed an appeal against the order of the trial Court before the learned Senior Sub-Judge. The Senior Sub-Judge dismissed the appeal in limine without issuing notice to the respondent. The plaintiff has now come up to this Court in revision.

The matter really turns on as to whether 15th January 1935 was the date of hearing. From what has been stated above, Lala Parmeshri Das, the local Commissioner, had asked for an extension of time. The Court might have extended the time or if it was not inclined to do so it could have fixed a date for the hearing of the case in the ordinary course. There was no date of hearing on 15th January 1935 as understood in legal parlance. The phrase "hearing of the suit" was considered by a Division Bench of the Patna High Court in 57 I C 748 (1). The learned Chief Justice

who delivered the judgment of the Court observed that :

Order 17, Rr. 2 and 3 apply only to cases where the actual hearing of the suit has been adjourned and by the hearing of suit is meant the hearing at which the Judge would be either taking evidence or hearing arguments or would have to consider questions relating to the determination of the suit which would enable him finally to come to an adjudication upon it. But in cases where it was clearly never intended that there should be a hearing of the suit in the ordinary sense of the word, but merely some interlocutory matter decided between the parties as to the future conduct of the suit, the provisions of these rules have no application.

This is a perfectly sound exposition of law and I have no hesitation in accepting it. There was a case, 1927 All 749 (2), where it was laid down that when a commission is ordered, the Court should wait for the return of the commission before proceeding to hear and determine the case. It is perfectly true that in this case the parties were present, but the decision of the Court below was held to be erroneous on the ground that it did not wait for the return of the commission which had been issued by it. This case is based upon an earlier decision of the same Court in 16 All 342 (3). There a Division Bench held that the intention of the Code of Civil Procedure is that when a Court deems it necessary on the application of a party or otherwise that a commission for local investigation should be issued, the return to that commission should be before the Court, before it can proceed to hear and determine the case.

In the present case it was for the Court to extend the time which the commissioner asked for or it could refuse it. The parties had nothing to do with the matter. The date on which the Court dismissed the plaintiff's suit was not "the date of the hearing" and in my opinion the order of the Court in dismissing the plaintiff's suit, on the facts narrated above, was without jurisdiction. I would therefore allow this application, set aside the order passed by the two Courts below and remand the case to the trial Court for disposal according to law. The respondent is not represented. Un-

1. Balmukand v. Lachmi Narain, 1920 Pat 595 = 57 I C 748.

2. B. Bindhachal Singh v. Nand Prasad, 1927 All 749 = 100 I C 29.

3. Madho Singh v. Kashi Singh, (1894) 16 All 342 = 1894 A W N 112.

der all the circumstances I make no order as to the costs of this application.

B.D./R.K.

Application allowed.

*** A. I. R 1936 Lahore 282**

DALIP SINGH AND BHIDE, JJ.

Hari Ram—Appellant.

v.

Secy. of State—Respondent.

First Appeal No. 692 of 1931, Decided on 14th January 1935, from decision of Sub-Judge, 1st Class, Gujrat, D/- 24th January 1931.

*** Master and Servant—Government servant—Contract of service made under Government of India rules—Service is not at His Majesty's pleasure.**

Where a contract of service is made under the authority of the Government of India rules which are presumably made under the delegated authority by the Secretary of State in Council, the tenure of office of such a servant is not at His Majesty's pleasure but is regulated by the terms of the rules under which he was recruited and served: 1934 *Mad* 516, *Dissent.*; *Denning v. Secy. of State*, 37 *T L R* 138, and *Re De'Donise v. Queen*, 3 *T L R* 114, *Ref.*

[P 283 C 1, 2]

Badri Das and T. L. Kapur—for Appellant.

Ram Lal and Anant Ram Khosla—for Respondent.

Dalip Singh, J.—The plaintiff in this case sued the Secretary of State for damages for wrongful dismissal. The claim was for Rs. 79,990.0.0. The Court decreed the suit only to the extent of Rs. 2,658-4-0 against the defendant, Rs. 1,188-4-0 of this sum is arrears of pay between the 26th September 1927 till the 4th January 1928, the period during which the plaintiff was suspended. Rs. 1,470 is pay for three months from the 4th January, the date on which the plaintiff was dismissed, the Court holding that under the terms of the contract entered into between the plaintiff and the Secretary of State, the plaintiff was entitled to three months' notice. (See p. 141 of the printed paper book.) The Court held that the Secretary of State had failed to prove any misconduct or unsatisfactory work on the part of the plaintiff. The facts of the case have not been found and the unsatisfactory nature of this method of decision of the case is apparent and has been made more apparent by the argument before us. But it appears to have been due entirely to the learned counsel for the Crown who insisted on issue 2 being decided without

any evidence being led on the point, contending that it was a purely legal issue. The issues are at p. 23, and issue 2 was:

Is the plaintiff not entitled to his pay for three months after the 3rd January 1928 at the same rate, namely Rs. 490 per month.

By so insisting, it appears to me that the Crown obviously waived any right to prove that the plaintiff had been dismissed for misconduct or for unsatisfactory work. The plaintiff has come in appeal and the defendant, Secretary of State, has filed a cross-appeal as regards a portion of the sum decreed, namely Rs. 1,470, three months' pay. The plaintiff has appealed for the balance of the sum originally claimed by him. It appears to me that the plaintiff's appeal must fail except on points mentioned hereafter on the short ground that taking all the findings of fact in his favour, no case whatsoever is made out for anything more than what has already been allowed him by the Court below, namely, three-fourths arrears of pay from 26th September to 4th January, and three months' pay subsequent to 4th January in lieu of the notice to which he was entitled under the contract. The learned counsel has not been able to show to me that any suit lies for a declaration that the plaintiff was wrongfully dismissed, nor that there should be any measure of damages other than the three months' pay, for admittedly the plaintiff's employment was of a temporary nature and could be terminated at any time without any reasons given. The only other point argued was that the date of dismissal should be 11th February 1928 instead of 4th January 1928, because of the later date the words terminating the plaintiff's services were altered from "dismissal" to "dispensing with his services." There seems to be no force whatsoever in this argument. The last point contested was that interest should have been allowed on the sum found due, namely Rs. 2,658-4-0 from 4th January 1928 up to the date of payment, at 6 per cent per annum. Notice was given of the claim. Interest was claimed at the rate specified, which is not unreasonable and I can see no reason why the plaintiff should not get this interest, subject of course to the result of the appeal by the Secretary of State. So far as the plaintiff's appeal is concerned, therefore I would dismiss it with the exception of

the question of interest at 6 per cent per annum on Rs. 2,658-4-0 from 4th January 1928 to date of payment.

So far as the appeal of the Secretary of State is concerned, I have already held that the Secretary of State is now precluded from arguing the question that the plaintiff is proved to have been dismissed for unsatisfactory work or misconduct. The learned Government Advocate has contended that the special contract between the Local Government and the plaintiff cannot bind the Crown, on the authority of certain rulings, namely 1934 Mad 516 (1), 37 T L R 138 (2) and 3 T L R 114 (3). His contention is that all public servants of the Crown hold office during pleasure, unless it is otherwise specifically provided by statute and that a contract to the contrary though made with the authority concerned, is of no binding effect as against the Crown. The English authorities cited by him certainly support this contention, but so far as the law in India is concerned it appears to me to be governed by S. 96-B, Government of India Act, and the only ruling which supports the learned Government Advocate is 1934 Mad 516 (1), which appears to hold that even in India all public service is at His Majesty's pleasure and that the words in the Act "subject to the provisions of this Act and of rules made thereunder" cannot qualify the rest of the section which states that every person in the Civil Service of the Crown in India holds office during His Majesty's pleasure. There are two Rangoon authorities, one cited in this ruling to the contrary and one in 12 Rang 556 (4); and a Calcutta ruling 54 Cal 44 (5) appears also to hold the contrary view. As at present advised, I consider that 1934 Mad 516 (1) was not correctly decided, in so far as it holds that the rules made by the Secretary of State cannot qualify the tenure of Civil Servants in India. I would hold that the present contract was made under the authority of the

Government of India rules which were presumably made under the delegated authority by the Secretary of State in Council and that therefore the tenure of office of the present plaintiff was not at His Majesty's pleasure but was regulated by the terms of the rules under which he was recruited and served. I would therefore hold that the plaintiff was rightly held entitled to three months' pay from 4th January onwards.

I would therefore dismiss the appeal of the Secretary of State. I would accept the appeal of the plaintiff to the extent of allowing him interest on Rupees 2,658-4-0 at 6 per cent from 4th January 1928 to date of payment. The appeal would otherwise be dismissed. The Secretary of State will pay the costs of his appeal to the plaintiff, and as the plaintiff's appeal has been practically dismissed except to a very small extent, he should pay the costs of the Secretary of State in his appeal.

Bhide, J.—I agree.

B.D./R.K.

Order accordingly.

A. I. R. 1936 Lahore 283

TEK CHAND AND COLDSTREAM, JJ.

Ram Rup—Plaintiff—Appellant.

v.

Sarn Dayal and others—Defendants—Respondents.

First Appeal No. 1534 of 1934, Decided on 18th June 1935, from decree of Senior Sub-Judge, Delhi, D/- 2nd June 1934.

(a) Trust—Person for whose benefit trust is created is interested in its maintenance—Such person can sue for declaration that property is wakf without sanction under S. 92, Civil P. C.

Persons intended to benefit under a trust are interested in its maintenance and are competent to sue for a declaration to the effect that a property is wakf and may do so without the sanction required by S. 92, Civil P. C.: 1928 P C 16 and 1920 Lah 455, Foll. [P 285 C 1]

(b) Specific Relief Act (1877), S. 42 — Plaintiff claiming for declaration of right in suit property—Defendant denying title of plaintiff—Property being trust plaintiff cannot ask for possession—Suit is maintainable under S. 42.

A plaintiff for whose benefit an alleged trust has been created claimed a right in the suit property, and this right the defendants were interested to deny and did deny. He was therefore entitled to sue for a declaration under S. 42, Specific Relief Act. The proviso to the section will not in this case preclude the passing of a decree. The plaintiff cannot ask for possession, for he is not entitled to possession, not being a

1. R. T. Rangachari v. Secy. of State, 1934 Mad 516=154 I O 884=57 Mad 857=67 M L J 128.
2. Denning v. Secy. of State, (1920) 87 T L R 188.
3. Re De'Dohse v. Queen, 3 T L R 114.
4. Secy. of State v. D'Attalides, 1934 Rang 881=154 I C 212=12 Rang 556.
5. Satish Chandra v. Secy. of State, 1927 Cal 811=101 I C 581=54 Cal 44.

trustee. Nor can he ask for any relief under S. 92 (1) until he establishes that the property is a trust. [P 285 C 2]

(c) **Mahomedan Law — Wakf — Writing not necessary in Punjab.**

For the creation of a valid wakf, no writing is required in the province of the Punjab.

[P 286 C 1]

Kishen Dayal, Bishamber Dayal and Bishan Narain—for Appellant.

Mehr Chand Mahajan, Hem Raj Mahajan and Nawal Kishore—for Respondents.

Coldstream, J.—Shambu Dayal, son of Prabhu Dayal, his brother Din Dayal and Din Dayal's son Jai Dayal, residents of the Sabzi Mandi quarter of Delhi City, carried on a joint family business under the name of Moti Ram Jamna Das. In 1902 the firm was adjudged insolvent. One of the properties taken possession of by the Receiver was a building in Sabzi Mandi. Objection to the inclusion of this building among the firm's assets was taken by Mt. Chui, widow of Prabhu Dayal and mother of Din Dayal and Shambhu Dayal. Her allegation was that it had been dedicated for the purpose of a public charity by Prabhu Dayal sometime before his death in 1875. This application having been dismissed on the ground that Mt. Chui had not come forward as a trustee, Mt. Chui submitted another application in which she declared that she was manager of the trust property inasmuch as a dedication had been by her husband and by herself. That petition was dismissed in default. A third petition upon the same ground was submitted by Jai Dayal, one of the insolvents, on 12th January 1903. In this Jai Dayal prayed that the management of the property might be entrusted to some third person if it was found after enquiry that it was the subject of a trust. The Insolvency Judge ordered an enquiry into the nature of the property to be made by a Local Commissioner. The Commissioner, on 21st February 1903, reported that he had seen the books of firm Moti Ram Jamna Das for the years 1896-1897, and that they showed that a separate account had been kept of the expenditure on this property and its income, and that the income had been spent wholly on repairs to the house itself and for the purposes of a piao (public drinking place), for which purpose the income of the property itself had not been sufficient. The Insolvency

Judge was satisfied that the house had for long been properly dedicated to charity and, on 4th March 1903, he ordered the receiver to relinquish it. On 6th August 1930 Mt. Basanti, wife of Jai Dayal, who had died in 1925, sold a portion of this house to Mangla and Dal Chand (defendants 3 and 4), and on 9th July 1932, one Ram Rup, a Sahukar of Sabzi Mandi, Delhi, instituted in the Court of the Senior Subordinate Judge, Delhi, against Saran Dayal and Gobind Lal, sons of Shambhu Dayal, two minor sons of Gobind Dayal and the alienees Mangla and Dal Chand, the suit from which the present appeal arises for a declaration that the property alienated was wakf and did not belong to the vendor or the vendees. The plaint purported to be presented by Ram Rup on behalf of the general public in Delhi, and the Court ordered notice to be issued under the provisions of O. 1, R. 8, Civil P. C. The suit was resisted by all the defendants on numerous grounds, and the following issues were struck for trial upon the pleadings:

1. Whether S. 92, Civil P. C., bars this suit.
2. Whether S. 42, Specific Relief Act, does not bar this suit as the plaintiff is admittedly not in possession of the property in suit.
3. Was the property in suit validly dedicated; if so, when?
4. Have the plaintiffs any locus standi to bring the suit?
5. Is the suit within time?
6. Whether defendants are estopped from questioning the validity or the factum of trust?
7. Have defendants, Mangla and Dal Chand, made any improvements in the property in suit; if so, how does this question affect the case?
8. Should a declaration be made in plaintiff's favour as prayed for?
9. Relief.

The learned Senior Subordinate Judge decided that S. 92, Civil P. C., did not bar the suit which was maintainable without the sanction required by that section. He held it proved that there had been a valid dedication of the property some time before 1875, when Parbhu Dayal died, that the object of the trust created was the maintenance of a public drinking place, that the suit was within time, and that the plaintiff was a person interested in the trust and competent to sustain the action. He also held that Saran Das and Gobind Dayal were estopped from claiming that the property was not wakf by their previous conduct in procuring its release from attachment by

the decision in the insolvency proceedings and that Mangla and Dal Chand had failed to prove that they were entitled to compensation for improvements. He dismissed the suit, however, on the ground that S. 42, Specific Relief Act, forbade the grant of a mere declaration as the plaintiff omitted to ask for further relief which he was able to seek. Against this decision the plaintiff Ram Rup has appealed. It is contended before us by Mr. Kishan Dayal on behalf of the appellant that the lower Court's decision that S. 42, Specific Relief Act, is a bar to the suit is erroneous. It is not seriously contended before us that a suit for a declaration that the property in suit is wakf requires the sanction of the Collector under S. 92, Civil P. C. The view expressed by the Allahabad Court in 67 I C 659 (1) that all suits founded upon any breach of trust for public purposes of a charitable nature irrespective of the relief sought must be brought in accordance with the provisions of that section was definitely rejected by the Privy Council in 55 Cal 519 (2). The judgments of the Punjab Chief Court and this Court have consistently followed the principle that persons intended to benefit under a trust are interested in its maintenance and are competent to sue for a declaration to the effect that a property is wakf and may do so without the sanction required by S. 92, Civil P. C.: see for instance 66 P R 1892 (3), 2 L L J 457 (4), 1929 Lah 740 (5) and 8 Lah 111 (6).

The Subordinate Judge in support of his decision that S. 42, Specific Relief Act, precludes the grant of a decree in this case has relied upon 1928 Rang 143 (7). In that case, however, the Court found that it was open to the plaintiffs to pray for any one of the reliefs mentioned in sub-s. (1) of S. 92, Civil P. C. That judgment was dissented from by the Additional Judicial Commissioner,

Nagpur, in 1934 Nag 277 (8), where it was pointed out that until the declaration sought for had been obtained, a suit could not be brought under S. 92, as the defendants denied the existence of the alleged trust. The same reasoning is applicable in the present case. Clearly the plaintiff, as a resident of the Sabzi Mandi quarter, and one for whose benefit the alleged trust had been created, claimed a right in the suit property, and this right the defendants were interested to deny and did deny. He was therefore entitled to sue for a declaration under S. 42, Specific Relief Act. The proviso to the section will not in this case preclude the passing of a decree. The plaintiff cannot ask for possession, for he is not entitled to possession, not being a trustee. Nor can he ask for any relief under S. 92 (1) until he establishes that the property is a trust. Obviously, he cannot ask for a mandatory order against the vendees, nor can the other defendants be compelled to maintain a piao while disclaiming any obligation as trustees. It is true that the plaintiff might properly have asked expressly for a declaration that the alienation by Mt. Basanti was invalid, but such a declaration would not be a relief distinct from the declaration for which the plaintiff has expressly sued. A declaration that the suit property was wakf and not the private property of the defendants must of necessity itself invalidate the alienation.

It follows that the appellant was entitled to a decree on the Subordinate Judge's findings that the property was wakf and the suit was not barred by limitation. It is contended, however, by counsel for the respondents that the finding that the property was the subject of a trust was wrong. Mr. Mehr Chand's argument which is adopted by counsel for the vendees Mangla and Dal Chand, is that the oral evidence is wholly discrepant and unreliable and that there is no satisfactory direct evidence to prove when and for what exact purpose the alleged trust was created and that in the circumstances of this case no evidential value could be attached to the admissions by the members of Prabhu Dayal's family which admissions ought to have been disregarded.

1. Ali Jafar v. Fazal Hussain Khan, 1922 All 349=67 I C 659=44 All 622=20 A L J 557.
2. Abdur Rahim v. Abu Mahomed Barahat Ali, 1928 P C 16=103 I C 361=55 Cal 519=55 I A 96 (PC).
3. Sewa Singh v. Budh Singh, (1892) 66 P R 1892.
4. Nihal Shah v. Mt. Malan, 1920 Lah 455=99 I C 755=2 L L J 457.
5. Paras Ram v. Sant Ram, 1929 Lah 740=120 I C 161.
6. Miran Bakhsh v. Allah Bakhsh, 1927 Lah 350=99 I C 756=8 Lah 111=28 P L R 486.
7. Thewar v. Samban, 1928 Rang 143=110 I C 595=6 Rang 183.

8. Krishna Vithoba Sali v. Shriram Tukaram, 1934 Nag 277=153 I C 496.

It is true that the oral evidence is mostly of a worthless description. The only piece of it to which any weight can be attached is the statement of Saran Dayal himself as D. W. 9, that a piao used to exist as alleged by the plaintiff and his witnesses. It is also true that the admissions of Din Dayal and Saran Dayal, that the property was wakf were made for their own purpose, and that their conduct between 1903 and 1926 has not always been consistent with the existence of the alleged trust. In 1923 Jai Dayal mortgaged a part of the property. He died in 1926 and in the same year Saran Dayal and Gobind Dayal sued Mt. Basanti and the mortgagees for a declaration that the property was a public trust, and in the alternative for possession of their share by partition. The Subordinate Judge who tried the suit decided that the property was private of the family and passed a decree for partition. Basanti alone appealed, but the appeal was compromised in the High Court and the decree was not executed. Ram Pershad sued on his mortgage and was granted a decree against Basanti for sale of the property. Basanti was permitted to sell it privately and effected the sale in favour of Mangla and Dal Chand. Saran Dayal and Gobind Dayal filed a suit contesting the sale, during the pendency of which Basanti died, and on 9th January 1932, the case was compromised, Saran Dayal and Gobind Dial taking Rs. 700 from the vendees and allowing their suit to be dismissed. It is argued that the decision in the suit of 1926 was final and settled the question whether the property was or was not the subject of a valid trust. That decision will not however, bind the present plaintiff and was superseded by a compromise of the terms of which we are not aware.

After giving careful consideration to all the evidence, I am of opinion, that it justified the decision of the lower Court that the property was wakf, although there is no contemporary documentary evidence of its creation or its purpose.

For the creation of a valid wakf, no writing is required in this province. That there did exist a wakf administered by Prabhu Dayal's successors is, in my opinion, proved by the manner in which the accounts relating to this property had been kept, as reported by the Commissioner appointed by the Insolvency Court

in 1903 for a period during which the family is not shown to have had any motive for creating false evidence about the matter. The fact that when Jai Dayal, Din Dayal and Shambhu Dayal petitioned to be adjudicated insolvent, they omitted this building from the list of their property, is also important and the decision of the Insolvency Court, that it was wakf and not their private property, is relevant and good evidence on the point. The admissions of Mt. Chui in 1902, Jai Dayal in 1903 and of Saran Dayal and Gobind Dayal in 1926, are also substantive evidence supporting the plaintiff's case. All this evidence satisfies me that there had been a dedication of the building in suit for the purpose of a public charity and in my opinion justifies a presumption that the dedication was effective and valid. On this finding it becomes unnecessary to go into the question whether Saran Dayal and Gobind Dayal were estopped from questioning the fact or validity of the dedication.

The vendee defendants had notice of the claim that the property they purchased was the subject of the trust, for with their sale-deed they were given a copy of the Commissioner's report of 21st February 1903, and their Counsel admits that he cannot contend that his clients are bona fide purchasers without notice. Nor is he able to show that they have proved what amount they had spent on improving the property. Neither of them has come into the witness-box and all they have put forward in proof of the alleged expenditure is an estimate of the present value of the building. Their claim was therefore rightly dismissed by the Subordinate Judge. The result is that this appeal is accepted, the judgment appealed against is set aside and the plaintiff is granted the decree he seeks with costs throughout.

Tek Chand, J.—I agree.

B.D.

Appeal allowed.

*** A. I. R. 1936 Lahore 286**

JAI LAL AND SALE, JJ.

Malan Devi—Appellant.

v.

Amritsar National Bank, Ltd. and others—Respondents.

First Appeal No. 1275 of 1929, Decided on 27th June 1935, from decree of Senior Sub-Judge, Lahore, D/- 15th February 1929.

* (a) Provincial Insolvency Act (1920), S. 28 — Defence of want of sanction not taken in lower Court—Objection deemed to be waived and cannot be pressed later.

Where a defence as to want of leave under S. 28 of the Provincial Insolvency Act is not specifically taken in the lower Court the proper order is to rule that the objection has been waived and cannot be pressed later: 1929 *Mad* 323, *Foll.*; 1919 *Mad* 167 and 1930 *Rang* 317, *Ref.* [P 288 C 2]

* (b) Transfer of Property Act (1882), S. 53 — Intention of parties to defeat creditors of donor—Gift is voidable at instance of creditor of donor—Transferee from donee must suffer unless protected by S. 53.

Where there is a gift, but the intention of both parties to the gift is to defeat and delay creditor of the donor, the gift is voidable at the instance of the creditor and the transferees from donee must suffer unless protected under S. 53, T. P. Act. [P 289 C 2]

J. G. Sethi and J. N. Aggarwal—for Appellant.

Shamair Chand and Yashpal Gandhi for *Fakir Chand*—for Respondents.

Sale, J.—In execution of a decree for Rs. 97,476 with costs, against Kirpa Ram insolvent, the Amritsar National Bank in liquidation attached, as the property of the judgment-debtor, 94 bighas of agricultural land and three houses bearing Nos 980, 981 and 1081. This property had been the subject of a gift made by Kirpa Ram to his wife Mt. Malan on 22nd May 1924. By a sale deed dated 6th January 1927 Mt. Malan sold houses Nos. 980 and 981 to Durga Das. As regards house No. 1081 Mt. Malan held under this deed of gift a half share which by a deed dated 7th January 1927 she mortgaged with possession to her husband's brother Ram Rakha Mal who already claimed ownership of the other half of this house on a partition from Hira Lal, the third brother. The attachment of this property led to separate objections by Mt. Malan, Durga Das and Ram Rakha Mal. The objections of Mt. Malan and Durga Das were allowed by the executing Court and the Bank in liquidation instituted a declaratory suit under O. 21, R. 63, Civil P. C., in respect of the land and houses Nos. 980 and 981. The objections of Ram Rakha Mal were dismissed and he instituted a similar suit in respect of house No. 1081.

The trial Court has held that the gift by Kirpa Ram in favour of Mt. Malan on 22nd May 1924 was not genuine but a sham transaction intended merely to defeat and defraud the claims of Kirpa

Ram's creditors and as such is void against the Bank. As regards the sale to Durga Das the trial Court held that it was for consideration; while the validity of the mortgage in favour of Ram Rakha Mal was not in contest; but in view of the finding that the gift by Kirpa Ram in favour of Mt. Malan was void, the trial Court held that Mt. Malan had no title to sell or mortgage any of the property and found throughout in favour of the Bank. From these decisions Mt. Malan and Durga Das have preferred appeals Nos. 1275 and 1276 of 1929 while Ram Rakha Mal has preferred Appeal No. 1402 of 1929. These three appeals can be conveniently decided by the same judgment. It is material here to state the facts leading up to the decree obtained by the Amritsar National Bank in liquidation, the execution of which has given rise to the present suits. On 26th August 1918 S. Balwant Singh was alleged to have executed a pronote for Rs. 40,000 in favour of Kirpa Ram who, on 26th July 1922, endorsed it to the Amritsar National Bank. The Bank issued notice to S. Balwant Singh who immediately repudiated the pronote as a forgery. Subsequently, in May 1923, the Bank went into liquidation and on 31st July 1923 the liquidators served Kirpa Ram as the endorser of the pronote with a notice of demand. This notice was followed by a suit instituted by the Bank in liquidation on the pronote against Kirpa Ram and Balwant Singh. As against Balwant Singh the claim was dismissed; but the suit was decreed against Kirpa Ram on 20th October 1926, the decree being confirmed on appeal by a Division Bench of this Court on 18th March 1935.

It was held in this suit both by the trial Court and by the High Court in appeal that though there was no proof that the pronote had been executed by Balwant Singh for consideration, it had been transferred for valid consideration by Kirpa Ram to the Bank, the consideration being a fixed deposit receipt for Rs. 40,000 bearing interest at six percent per annum. The main point for determination, common to all these appeals, is the validity of Kirpa Ram's gift to his wife Mt. Malan in May 1924 and its effect on the title of Mt. Malan, and of Durga Das and Ram Rakha Mal, who claim through her. But in the course of his

arguments on behalf of Mt. Malan Mr. Sethi also urged that the suit by the Bank in liquidation, in respect of the landed property in Mt. Malan's possession, is not competent and before considering the validity of the gift to Mt. Malan it is necessary to decide this objection. Kirpa Ram was on his own petition adjudicated insolvent on 21st March 1928, and Mr. Sethi urges that the suit by the Bank in liquidation, which was instituted on 29th April 1928, (that is after Kirpa Ram's adjudication order) was not competent in the absence of permission by the Insolvency Court under S. 28, Provincial Insolvency Act. It was objected on behalf of the Bank that this was a new point not raised either in the Court below or in the grounds of appeal, but was agitated for the first time in arguments. So far as the suit by the Bank is concerned, I am of opinion that Mr. Sethi has attempted to agitate a new point in appeal. In the lower Court's judgment at p. 39 of the paper-book relating to Mt. Malan Devi's case the following passage occurs :

The Amritsar National Bank is under liquidation, and it is further pleaded on their behalf that the suit did not lie without the sanction of the Insolvency Court. My learned predecessor, Pt. Devi Dayal Joshi, by his order dated 4th May 1928, decided the last mentioned plea holding that as Kirpa Ram was adjudicated an insolvent after the institution of the suit sanction of the Insolvency Court was not necessary.

In this paragraph the Senior Sub-Judge was dealing with the case of Ram Rakha Mal v. the Official Receiver of the Amritsar National Bank in liquidation. It is a fact that in Ram Rakha Mal's case, which was instituted on 3rd December 1927, (that is before the adjudication of Kirpa Ram as insolvent), an objection was taken on behalf of the Amritsar National Bank in liquidation that Ram Rakha Mal could not institute his suit against the Official Receiver without the permission of the Insolvency Court. The Sub-Judge then in charge of the case rejected this preliminary objection on the ground that as Ram Rakha Mal, the plaintiff, was not a creditor the case was not governed by the provisions of S. 28, Insolvency Act, which only applies to suits brought by creditors with respect to debts provable by them and that, in any case, the provisions of S. 28, so far as they render the leave of the Insolvency Court essential,

came into effect only after the order of adjudication, whereas the suit had been commenced before the order was passed. So far as the suit brought by the Amritsar National Bank against Mt. Malan Devi is concerned I am satisfied that no objection was taken in the lower Court either in issues or in arguments, to the effect that the permission of the Insolvency Court was a condition precedent to the institution of the suit. Nor has this point been taken in the grounds of appeal. In point of fact, as would appear from an order of the Insolvency Judge printed at p. 67 of Mt. Malan Devi's paper-book, an application was made by the Amritsar National Bank in liquidation under S. 28, Insolvency Act and permission was duly granted to implead the Official Receiver as a party. This order by the Insolvency Judge can only mean that the Insolvency Court did give permission for the suit to proceed. But Mr. Sethi goes further and urges that such leave is a condition precedent to the institution of the suit and that it should have been obtained before the institution of the suit. In support of his arguments Mr. Sethi relies mainly on 42 Mad 684 (1) and 9 Rang 7 (2). As a matter of fact, there is a conflict of authority on this point; and if Mr. Sethi had raised this defence in the lower Court it would have been necessary to consider in some detail the rulings for and against this proposition. But it is clear that this defence was not raised in the lower Court, nor was it mentioned in the grounds of appeal and in these circumstances I consider that the objection must be deemed to have been waived. The authority for this view is 1929 Mad 323 (3), Letters Patent appeal (which also distinguishes 42 Mad 684 (1), on which Mr. Sethi has relied), wherein it was held that where a defence as to want of leave under a section corresponding to S. 428, Provincial Insolvency Act, is not specifically taken in the lower Court the proper order is to rule that the objection has been waived and cannot be pressed later:

1. Vasudeva Kamath v. Lakshminarayana Rao, 1919 Mad 167=52 I O 442=42 Mad 684=36 M L J 453.
2. Mahomed Adjum v. E. M. Chettyar Firm, 1930 Rang 317=128 I O 382=9 Rang 7.
3. Subramanniam v. Narasimham, 1929 Mad 323 =119 I O 46=56 M L J 489.

There is not really any inherent want of jurisdiction. The prohibition is merely a restraint on the exercise of jurisdiction, and is a matter of procedure.

With this view, I agree; without, therefore, deciding whether a suit instituted without permission can be validated by obtaining permission subsequently, I would hold that the objection must be deemed to have been waived in the present case. Turning now to the validity of the gift by Kirpa Ram to his wife in May 1924, it has been urged in appeal that the object which Kirpa Ram had in view in making the gift was to provide for his wife and two sets of sons in the face of a family dispute and that no intention to defeat or defraud his creditors can be inferred. There is undoubtedly evidence that prior to this gift there had been a family dispute which culminated in a reference to arbitration and an award given on 17th October 1923 on which a decree was passed on 25th June 1924. The trial Court finds, however, that this award was collusive and that, in any case, the points in dispute, if any, were settled by the award and that Kirpa Ram could have had no motive, other than to defeat his creditors, in making another settlement on 27th May 1924 by which he gifted all his immovable property to his wife. With this view I am in agreement. It is undeniable that Kirpa Ram was in debt in May 1924. Besides the claim by the Amritsar National Bank in liquidation (subsequently decreed) he was indebted to the Jain Bank for Rs. 3,000. It is true that no money passed between the Amritsar National Bank and Kirpa Ram, on the pronote, but he had been granted by the Bank in consideration thereof a fixed deposit receipt for Rupees 40,000 (a sum considerably less than the amount then due on the face value of the pronote). Since the defendant Bank had recently gone into liquidation Kirpa Ram must even in 1924 have had a shrewd idea that he might be held liable to the Bank for a much larger sum than he could hope ever to recover from the Bank. His assets and liabilities at the time of his adjudication in 1928 shew that it was mainly this heavy liability to the Amritsar National Bank (in liquidation) which made him insolvent. These considerations taken in conjunction with the admitted fact that by the gift in 1924 which followed a demand from the Am-

ritsar National Bank on the pro-note he alienated all his immovable property, lead me to hold that his intention in making this gift was in fact to defeat and delay his creditors and I have no doubt that his wife Mt. Malan Devi was a party to this fraud.

The question next arises whether in these circumstances this gift was, as the lower Court has held, void ab initio or merely voidable. It is not denied that a gift was in fact made in 1924. There is evidence that this gift was followed by a mutation of the land in favour of Mt. Malan Devi and that a lease deed of this land also was subsequently executed in her favour by a tenant. In these circumstances, I do not agree with the view of the trial Court that the gift was a sham transaction and void ab initio. But there was a gift; but as the intention of both parties to the gift was to defeat and delay Kirpa Ram's creditor, it is clear that the gift is voidable at the instance of the creditor, and that the transferees from Mt. Malan Devi must suffer unless protected under S. 53, T. P. Act. Turning now to the case of the transferees, the trial Court has found and the finding has not been contested in appeal that the sale to Durga Das was for consideration. Similarly the validity of the mortgage of another part of the gifted property to Ram Rakha Mal has not been contested. In these circumstances, it is fair to presume that the transferees in each case took all reasonable care and acted throughout in good faith. It follows therefore that both transferees Durga Das and Ram Rakha Mal are protected by the provision in S. 53, T. P. Act, to the effect that nothing shall impair the rights of a transferee in good faith and for consideration.

I am of opinion therefore that both Durga Das and Ram Rakha Mal must succeed in their objection to the attachment of the property in their possession. So far as Ram Rakha Mal is concerned it is true that he acquired only a half of house No. 1081 from Mt. Malan Devi, but there is un rebutted evidence on the record that the remaining half of the house came to him by partition from his brother Hira Lal who had himself inherited this half from his father Moti Ram (vide Hira Lal, P. W. 3, at p. 24, of Ram Rakha Mal's paper-book). The title of Ram Rakha Mal as the son of Moti Ram

to a portion of this house by inheritance was not denied in the lower Court and in rejecting the evidence of the Cantonment Register in proof of their title the lower Court was led by special pleading into establishing a case which was not the case of the respondent. It is clear that all three brothers Kirpa Ram, Ram Rakha Mal and Hira Lal had a share in house 1081. There is no reason to disbelieve the evidence of Hira Lal that his share had gone to Ram Rakha Mal by partition. Kirpa Ram gifted his half to his wife Mt. Malan Devi. The validity of the mortgage of this house to Ram Rakha Mal has not been contested. In these circumstances I consider that Ram Rakha Mal has established his claim that the whole house should be released from attachment.

I would, therefore, accept the appeal of Ram Rakha Mal, set aside the order of the lower Court and grant him a declaratory decree with costs. I would similarly accept the appeal of Durga Das, set aside the declaration granted to the Amritsar National Bank (in liquidation) in respect of the property sold to him and, dismissing the Bank's suit pro tanto direct the release from attachment of this property with costs. As regards the land gifted to Mt. Malan Devi, I am of opinion that the Bank must succeed. I have given reasons for holding that Mt. Malan Devi in accepting the gift was a party to a fraud perpetrated by her husband Kirpa Ram to defeat and delay the creditors. The gift is voidable at the instance of the creditors under S. 53, T. P. Act, and the present declaratory suit instituted by the Bank must be deemed to have the effect of avoiding it. In respect, therefore, of 94 bighas of agricultural land, I would dismiss the appeal of Mt. Malan Devi and confirm the Bank's decree. In the circumstances of the case I would leave the parties to bear their own costs.

Jai Lal. J.—I agree.

B.D./R.K. *Order accordingly.*

A. I. R. 1936 Lahore 290

ADDISON AND DIN MOHAMMAD, JJ.

Mohammad Ali and another—Defendants—Appellants.

v.

Ghulam Nabi—Plaintiff—Respondent.

Letters Patent Appeal No. 48 of 1932,
Decided on 13th December 1934,

(a) Punjab Redemption of Mortgages Act (2 of 1913), S. 12.—Co-sharer mortgagors—Co-mortgagor redeeming property—Other co-sharer proceeding under the Act—Co-sharer held not mortgagee and he could not claim adverse possession.

Plaintiff and defendant were co-mortgagors of a plot of land. Plaintiff redeemed the mortgage and was in possession of the land to the exclusion of the defendant. Defendant on two occasions made infructuous attempts to regain that land under Punjab Redemption of Mortgages Act. In partition proceedings of the land between the parties, the defendant claimed ownership of the land contending that the plaintiff was not entitled to deny his ownership of the land under law, and also that he had gained a title by adverse possession against the plaintiff.

Held: that there could be no question of adverse possession between co-sharers:

Held also: that the defendant could not under any circumstances be regarded as a mortgagee so as to attract the operation of Punjab Redemption of Mortgages Act. [P 291 C 1]

(b) Adverse possession—One co-sharer defraying charge on property—Such co-sharer denying right of others for joint possession until they pay their share of charge—Such denial implies recognition of title when proportionate charge is paid and so cannot amount to adverse possession.

A co-sharer who purely denies the right of the other co-sharer to enter into joint possession until they have paid to him their share of the charge of the property which he had defrayed should not be considered to hold "adversely" to the others. Such denial does not obviously imply any repudiation of the title of the other co-sharers but rather implies willingness to recognise their title provided the charge in question is defrayed: 1923 Lah 311 and 1926 Lah 238, *Dissent.*; 1931 Lah 744, *Foll.* [P 291 C 2]

(c) Appeal—Judgment appealed from not referring to point of adverse possession—Inference is of its having been given up and cannot be allowed to be raised.

Where the point of adverse possession does not appear in the judgment under appeal, it should be taken to have been given up there and cannot be allowed to be raised: 1924 Lah 107, *Foll.* [P 291 C 2]

S. L. Puri for *Mukand Lal Puri*—for Appellants.

Abdul Karim—for Respondent.

Judgment.—This is a Letters Patent Appeal from the decision of a Judge of this Court. The material facts are these. The appellants and the respondent were co-mortgagors of a plot of land measuring 27 kanals, 19 marlas. Some time before 1914 the respondent redeemed the whole land and since then had been in possession to the exclusion of the appellants. In 1914 the appellants made an infructuous attempt under the Redemption of Mortgages Act, 1913, and again in 1928 they proceeded under same Act but failed. In 1929, when proceedings for the parti-

tion of land, including this area, commenced between the parties, the respondent claimed ownership of the area in dispute, mainly contending that the appellants were not entitled under the law to deny right of his ownership. He was referred to a civil Court. Both the trial Court and the District Judge dismissed his suit but on appeal the learned Judge of this Court came to the conclusion that the appellants having twice taken action under the Redemption of Mortgages Act and failed, could not be allowed to re-open the same matter in the present suit as an order passed by the Collector under S. 12, Redemption of Mortgages Act, was conclusive between them. We are not, however inclined to agree with this view of the law.

In the first place, we are doubtful whether the respondent could, under any circumstances, be deemed to be a mortgagee of the land so as to attract the operation of the Redemption of Mortgages Act, his legal position being merely that of a charge-holder. Secondly, all that the appellants claimed from the Revenue authorities under the provisions of the Redemption of Mortgages Act was an adjudication of the rights of co-mortgagors inter se and all that the Revenue authorities decided was, that such complicated questions would be better decided in a regular suit. We have, therefore no hesitation in holding that the decision of the learned Judge was erroneous in law. It was further strenuously contended before us that the respondent had acquired a good title by prescription, inasmuch as on both the previous occasions before the Collector, he had asserted a title which was hostile to the appellants and as the first occasion when this was done was in 1914 and as the appellants took no steps within time to regain the possession of the land from the respondent, their rights in the land in suit had been extinguished. In support of this contention, reliance was placed on 71 I C 847 (1) and 92 I C 980 (2). But both these decisions have been dissented from by a Bench of this Court in 135 I C 506 (3), which in our view lays down the correct law on the point. As remarked by the learned Judges in that case.

1. Wazir v. Girdhari, 1923 Lah 811=71 I C 847.
2. Narain Das v. Saraj Din, 1926 Lah 288=92 I C 980=27 P L R 65.
3. Jhandu v. Nur Mohammad, 1931 Lah 744=135 I C 506=12 Lah 671=32 P L R 622.

It is really difficult to understand why a co-sharer who purely denies the right of the other co-sharer to enter into joint possession until they have paid to him their share of the charge of the property which he had defrayed should be considered to hold "adversely" to the others. Such denial does not obviously imply any repudiation of the title of the other co-sharers but rather implies willingness to recognise their title provided the charge in question is defrayed.

Besides, the point of adverse possession does not appear in the judgment under appeal and should be taken to have been given up there. If any authority is needed for this proposition, reference may be made to 77 I C 398 (4). We therefore accept this appeal and dismiss the plaintiff's suit so far as it relates to 27 kanals 19 marlas of land, entered in khatas Nos. 42 and 43. The respondent will pay the costs of the appellants before us.

B.D./R.K.

Appeal accepted.

4. Harji Mal v. Devi Ditta Mal, 1924 Lah 107=77 I C 398=4 Lah 364.

A. I. R. 1936 Lahore 291

AGHA HAIDAR, J.

Mt. Gangi—Defendant—Appellant.

v.

Atma Ram—Plaintiff—Respondent.

Second Appeal No. 1295 of 1935, Decided on 30th October 1935.

(a) Partition Act (1893), S. 4—Undivided family does not mean only joint Hindu family—Person belonging to undivided family can claim advantage of S. 4.

Words "an undivided family" in S. 4 are perfectly clear and they are not confined to a joint Hindu family. They simply connote that there is a family the members of which have not divided their property. Where a person belongs to an undivided family and owns half a share in the house in dispute, and this share has not yet been divided, the person should be permitted to take advantage of the provisions of S. 4, Partition Act: 30 All 324 (F B); 12 C L J 525 and 1934 Cal 202, *Foll.* [P 292 C 2]

(b) Partition Act (1893), S. 4—"Transferee" includes auction purchaser—S. 4 affects auction purchaser also.

The word 'transfer' is of the very widest import and it is not confined only to a transferee from the judgment-debtor. In fact, on general principles, the auction purchaser is a transferee of the right, title and interest of the judgment-debtor and his position is not outside the operation of S. 4, Partition Act. [P 293 C 1]

Achnru Ram—for Appellant.

Muhammad Sharif—for Respondent.

Judgment.—This is a defendant's appeal, arising out of a suit for possession by partition of half a share in a certain house. The house originally belonged to four brothers, namely, Nathu Ram, Labhu Ram, Mela Ram and Dogar. Mela

Ram and Dogar died issueless and the house became the property of their surviving brothers, Nathu Ram and Labhu Ram, in equal shares. Nathu Ram died and Mt. Gangi, his daughter, succeeded him. In execution of a decree, Labhu Ram's half share in the house was put up for sale and purchased by Atma Ram on 24th June 1933. The sale was confirmed on 27th March 1934. On the strength of the sale Atma Ram brought a suit for possession by partition of half a share in the house. In Para. (1), the plaintiff clearly stated that he had purchased half a share in the house on 24th June 1933 at the auction sale and had obtained formal possession. In para. (2) the plaintiff admitted that defendant 1, namely, Mt. Gangi, was the proprietor of half a share and that in this way the plaintiff and defendant 1 became owners and possessors of the house in two moieties. The decree-holder, Rattan Lal, and Labhu Ram, judgment-debtor, were originally impleaded as defendants but were subsequently given up by the plaintiff.

Mt. Gangi, defendant 1, pleaded that the house could not be partitioned in view of the provisions of S. 4, Partition Act (Act 4 of 1893). She further pleaded that she had effected certain improvements and was entitled to be reimbursed for the costs she had thus incurred. There was also a plea that the suit could not proceed in the absence of the judgment-debtor and the decree-holder who had been given up by the plaintiff. This last plea was given up. The trial Court held that no improvements had been proved and that the defendant Mt. Gangi could not invoke in aid the provisions of S. 4, Partition Act, inasmuch as the house did not belong to an undivided family as contemplated by that section. It accordingly granted the plaintiff a preliminary decree for the partition.

Mt. Gangi went up in appeal and the learned District Judge took up an entirely new line of reasoning and held that Mt. Gangi was not a share-holder in the house in question as the whole property in the house on the death of Nathu Ram must be taken to have devolved upon Labhu Ram by the rule of survivorship. He held in the alternative that if Labhu Ram and Nathu Ram had separated, the provisions of S. 4, Partition Act, could hardly be applied because the family no longer remained undivided. He also

held that there was no evidence to support the plea raised by Mt. Gangi that she had executed certain improvements on the house in suit. The District Judge on these findings confirmed the decree of the trial Court and dismissed the appeal. I may note in passing that the District Judge has used the unscientific expression reject for "dismiss." This should be avoided. Mt. Gangi has come up to this Court in second appeal. In ground No. 2 of the memorandum of appeal it was rightly pointed out that, inasmuch as the plaintiff had himself distinctly admitted the title of Mt. Gangi to the extent of half a share in the house, the District Judge was in error in holding that she had no title and was in possession only by sufferance. I have already given the substance of paras. 1 and 2 in which the plaintiff had clearly admitted that Mt. Gangi was the owner and in possession of half a share in the house. On this finding it was unnecessary to enter into the question as to whether the family consisting of Labhu Ram and Nathu Ram was joint or divided.

The pleadings of the parties constitute the foundation of the case and, in view of the allegations contained in the plaint the possession of Mt. Gangi as a co-sharer to the extent of half a share in the house is unassailable. This being so, the whole question is, whether, under the circumstances, she is entitled to claim the benefit of the rule of law contained in S. 4, Partition Act. There are two important expressions in S. 4, Partition Act, which require consideration. In the first place we have to see whether the house belongs to "an undivided family." These words are perfectly clear and they are not confined to a joint Hindu family. They simply connote that there is a family the members of which have not divided their property. Such is the case before us. Mt. Gangi undoubtedly belongs to the family of Labhu Ram and owns half a share in the house in question, and this share has not yet been divided. Therefore she can ask the Court that she should be permitted to buy the share of the plaintiff. There is ample authority in support of this view, but I would only refer to the Full Bench decision in 30 All 324 (1).

This case was followed in two subse-

1. Sultan Begum v. Debi Prasad, (1903) 30 All 324=5 A L J 352=1908 A W N 126 (F B).

quent decisions of the Calcutta High Court in 12 C L J 525 (2) and 1934 Cal 202 (3). Secondly, it was argued by the learned counsel for the plaintiff-respondent that the plaintiff, being an auction purchaser, cannot be treated as a person to whom a share in the house has been transferred within the meaning of S. 4, Partition Act. The argument is that the plaintiff had purchased the house at a Court sale and the expression "transferred" was confined only to a voluntary sale which had been effected by means of a written conveyance. I do not appreciate this distinction which is sought to be drawn by the learned counsel. The word 'transfer' is of the very widest import and I do not think it is confined only to a transferee from the judgment-debtor. In fact, on general principles, the auction purchaser is a transferee of the right, title and interest of the judgment-debtor and his position is not outside the operation of S. 4, Partition Act.

No arguments have been addressed to me on the question of improvement. The result therefore is that I allow the appeal, and setting aside the judgments of the two Courts below, hold that the defendant Mt. Gangi is entitled to claim the benefit of S. 4, Partition Act. I therefore remand the case to the trial Court under the provisions of O. 41, R. 23, Civil P. C., with directions to dispose of the case according to law giving the plaintiff the benefit of the provisions of S. 4, Partition Act. The defendant-appellant shall be entitled to refund of the court-fee paid in this Court. In view of the fact that the plaintiff came with a straightforward claim into Court, and it was the learned Judges who went on a wrong track, I order that the parties bear their own costs throughout. The question of costs after remand is left open.

B.D./R.K.

Case remanded.

2. Kashirode Chunder v. Saroda Prosad Mitra, (1910) 12 O L J 525=7 I C 436.

3. Latifannessa Bibi v. Abdul Rehman, 1934 Cal 202=149 I C 1088=58 C L J 174.

A. I. R. 1936 Lahore 293

AGHA HAIDAR, J.

Girdhari Lal—Plaintiff—Petitioner.

v.

Rattan Chand — Opposite Party.

Civil Revn. No. 822 of 1935, (formerly Civil Appeal No. 1216 of 1935), Decided on 28th October 1935.

(a) Appeal—Proper presentation—Claim decreed only in part—Both parties appealing—Lower appellate Court dismissing appeal by plaintiff while allowing appeal by defendant thus dismissing plaintiff's claim in entirety—Plaintiff appealing against dismissal of his appeal in lower Court but filing copy of decree of defendant's appeal in lower Court—Held there was no proper presentation of appeal under O. 41, R. 1, Civil P. C.

A person filed a suit against another for recovery of certain money advanced and for recovery of damages for breach of a contract. His suit was decreed only for recovery of advance while claim for damages was dismissed. He appealed against this dismissal of his claim for damages. The defendant appealed against the decree against him for recovery. Both appeals were separately numbered and the lower appellate Court dismissed the plaintiff's appeal and allowed the defendant's appeal thus dismissing the plaintiff's claim entirely. The plaintiff came in second appeal and along with his memorandum of appeal he filed a copy of the decree of the lower appellate Court where the defendant was an appellant and not the decree in appeal by him which was really appealed from.

Held: that there was no proper presentation of second appeal inasmuch as the plaintiff should have appealed against a decree dismissing his appeal under O. 41, R. 1, Civil P. C., to the lower Court and should have filed a decree of that appeal [P 294 C 1]

(b) Civil P. C. (1908) S. 102 — Cases covered under S. 102—Court is not in favour of entertaining revisions.

As a rule, the Court is not in favour of entertaining revisions from orders of the lower appellate Courts in cases which are covered by S. 102, Civil P. C. These orders are intended by the Legislature to be final and to allow an appeal against such orders amounts to circumventing the policy of the Legislature [P 294 C 2]

Where a second appeal was filed from a suit of a Small Cause nature and the appeal was sought to be treated as a revision:

Held: that it could not be so treated. [P 294 C 2]

Chiranjiva Lal Aggarwal—for Petnr.*Hem Raj Mahajan*—for Opp. Party.

Order.—The plaintiff brought a suit for the recovery of a sum of Rs. 200, Rs. 150 being the amount of damages claimed for the breach of a contract and Rs. 50 representing the amount of earnest money which the plaintiff had paid to the defendant and of which the plaintiff wanted a refund. The trial Court dismissed the plaintiff's suit for Rs. 150 damages and decreed his claim for Rs. 50. Both parties filed appeals. The plaintiff's appeal was registered as No. 73 of 1935 and defendant's appeal as No. 44 of 1935. The lower appellate Court dismissed the plaintiff's appeal and allowed the defendant's appeal with the result that the plaintiff's suit was dismissed in toto. Two separate decrees were drawn up.

The decree in the plaintiff's appeal, No. 73 of 1935, was as follows :

It is ordered that the appeal be dismissed and the decree in this appeal to follow the one passed in cross Appeal No. 44 of 1935:

The decree in Appeal No. 44 of 1935 was as follows :

The appeal is accepted to this extent, that the decree of the lower Court decreeing plaintiff's suit is reversed and the plaintiff's suit is dismissed.

The plaintiff came up to this Court and filed a petition of second appeal. Along with his memorandum of appeal he filed the decree of the lower appellate Court in Appeal No. 44 of 1935, which was the defendant's appeal, and not of his own Appeal No. 73 of 1935. It need hardly be stated that the decree of the lower appellate Court in Appeal No. 44 of 1935 contained the grounds of appeal which the defendant had filed in that Court and not those which were filed by the plaintiff in his appeal. The position of the parties as appellant and respondent in the decree in Appeal No. 44 of 1935 would not be the same as in the plaintiff's Appeal No. 73 of 1935 and would naturally be reversed. The decree in Appeal No. 73 of 1935 is not on the record. Mr. Hem Raj Mahajan, counsel for the respondent, has raised two preliminary objections. In the first place his objection is that there was no proper appeal because, under the terms of O. 41, R. 1, Civil P. C., the memo. of appeal should be accompanied by a copy of the decree appealed from. In the present case the copy of the decree which was really appealed from was in Appeal No. 73 of 1935 in which the plaintiff was the appellant and not the decree in Appeal No. 44 of 1935 in which the defendant was the appellant and the plaintiff the respondent. This being so there is no proper appeal in this Court and the preliminary objection prevails.

Another preliminary objection was raised by Mr. Hem Raj Mahajan for the respondent that the suit is for the recovery of a sum of money and was of a small cause nature and, therefore, no second appeal lay. This objection, too, seems to be well founded. The plaintiff came into Court alleging that the defendant had failed to carry out the terms of the contract into which he had entered with the plaintiff and for this reason the plaintiff has suffered damages and was also entitled to the refund of Rs. 50

which he had paid by way of earnest money. The defendant's plea was that the plaintiff had entered into a contract with his eyes open and had backed out of it without any legal justification and, therefore, he was not entitled to any damages or to the refund of the earnest money. The lower appellate Court has accepted the contention of the defendant and has dismissed the plaintiff's suit in toto in appeal. In my opinion the suit was of a small cause nature and no second appeal lay. The learned Counsel for the appellant asked this Court to treat his petition of appeal as a revision under S. 115, Civil P. C. In the first place I am not, as a rule, in favour of entertaining revisions from the orders of the lower appellate Courts in cases which are covered by S. 102, Civil P. C. These orders are intended by the Legislature to be final and to allow an appeal against such orders amounts to circumventing the policy of the Legislature. In any event the judgment of the lower appellate Court appears to be correct and I am not disposed to disturb it in revision. The application, therefore, fails and is dismissed with costs.

B.D./R.K. *Application dismissed.*

A. I. R. 1936 Lahore 294

AGHA HAIDAR, J.

Lala Panna Lal—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 1056 of 1935,
Decided on 21st October 1935.

(a) Criminal Trial—Cross-cases—Judgment—Two separate trials—Judgment only one document—Decisions separate and distinct—Findings in each based on evidence in each—Judgment in one case based on its own evidence—Procedure held not illegal and accused not prejudiced thereby.

There were two separate trials and two appeals therefrom before the Sessions Judge. The judgment however was one continuous document, but the decisions in the two cases were quite separate and distinct from each other. The findings in one case were not based on the evidence recorded in the other case. The judgment in one case was based upon its own oral and documentary evidence :

Held : that the procedure was not illegal and the accused was not prejudiced thereby : 1924 Lah 104; 1925 Lah 149; 1928 Lah 380 and 1933 Mad 367 (F B), *Disting.* [P 295 C 2 ; P 296 C 1]

(b) Defamation—Election campaign—Accused issuing poster against rival Barrister, headed "Hollowness of Mr.—'s capacity as Barrister is exposed"—Accused held not justified in giving publicity to rival's position as Barrister and calculated to lower him in

public eye—Hence was not within Excep. 9 to S. 499, I. P. C.

In the course of an election campaign the accused issued a poster against his rival candidate who was a Barrister and which was titled "the hollowness of Mr.—'s capacity as a Barrister has been exposed."

Held: that the accused had no justification whatever in dragging his rival's position as a Barrister into the limelight of publicity in a language which amounted to a serious aspersion upon his professional status and was calculated to lower him in the eyes of the public as a Barrister. Hence the protection laid down in Excep. 9 to S. 499, I. P. C., could not be afforded to the accused: *Harrison v. Bush*, 5 El & Bl 344, *Rel. on.* [P 296 C 1, 2]

(c) **Defamation—Vulgar and abusive epithets not sufficient in themselves for criminal prosecution.**

Vulgar and abusive epithets are not sufficient in themselves to be the foundation of a criminal prosecution. [P 296 C 2]

Ram Lal Anand II—for Petitioner.

Duni Chand, Bishan Narain for Govt. Advocate—for the Crown.

Order.—There was an election contest between R. B. L. Panna Lal and Mr. Tek Chand, both of whom were candidates for the membership of the Punjab Legislative Council. Mr. Tek Chand issued a poster on 5th March 1933 (Ex. P. G. 1). On 7th March 1933 R. B. L. Panna Lal issued and published, broadcast the poster Ex. P. G. which is the subject-matter of this prosecution. R. B. L. Panna Lal brought a criminal action against Mr. Tek Chand and L. Duni Chand, his father, on the basis of Ex. P. G. 1 on 28th March 1933. On 30th March 1933 Mr. Tek Chand and L. Duni Chand brought a criminal action against R. B. L. Panna Lal on the basis of the poster Ex. P. G. There were two separate trials, and by two separate judgments the trying Magistrate convicted both sets of accused persons and imposed sentences of fine upon them. Both sides appealed. The Sessions Judge acquitted Mr. Tek Chand and L. Duni Chand and upheld the conviction of R. B. L. Panna Lal and maintained the sentence of Rs. 1,000 fine which had been imposed upon him. R. B. L. Panna Lal has come to this Court in revision. The case was argued for the best part of two days. Counsel for the petitioner invited the attention of this Court to 4 Lah 376 (1), 1925 Lah 149 (2) and 1928 Lah 380

(3), and argued that the learned Sessions Judge was in error in hearing the two appeals, as his mind must have been prejudicially influenced in deciding the appeal of R. B. L. Panna Lal by the evidence and findings in the case in which an appeal had been filed on behalf of Mr. Tek Chand and Duni Chand. I do not think there is any force in this contention. 4 Lah 376 (1) was a case in which two Sessions trials, which arose out of two cross-riots, were in substance tried as one joint trial and only prosecution evidence in each case appeared on the record. Counsel for the parties were heard in both cases and the assessors who appear to have been common to the two cases were not asked to give their opinion until both cases had been closed. Only one set of findings was recorded in respect of both cases and ultimately one common judgment was delivered. In fact, there was a single trial to all intents and purposes. This procedure, which certainly is contrary to the law as laid down in the Criminal Procedure Code, was disapproved by this Court in spite of the fact that both the counsel and the accused had given their consent to it. The matter came up before a Full Bench of the Madras High Court 56 Mad 159 (4). In this case also the Court had to consider the question of the desirability of the Sessions Judge hearing two cases separately with the assistance of different sets of assessors and afterwards pronouncing judgments in both. The Full Bench held that there was nothing objectionable in such a procedure so long as the Sessions Judge tried one case quite independently of the facts of the other.

They, however, emphasised that the trials must be separate, i. e., before different assessors and separate judgments delivered, and that the conclusions in each case must be founded on the evidence in each case. These cases, therefore, have nothing whatever to do with the present case. There were two separate trials before the Magistrate and there were two appeals before the Sessions Judge. Although the judgment is one continuous document, the decisions in the two cases are quite separate and distinct from

1. *Allu v. Emperor*, 1924 Lah 104=75 I C 980=25 Cr L J 63=4 Lah 376.

2. *Muhammad v. Emperor*, 1925 Lah 149=81 I C 39=25 Cr L J 551.

3. *Hayat v. Emperor*, 1928 Lah 380=107 I C 766=29 Cr L J 282.

4. *In re M. Mounaguruswami*, 1933 Mad 367=1933 Cr C 550=141 I C 539=34 Cr L J 175=56 Mad 159 (F B).

each other. None of the findings in the present case is based upon the evidence recorded in the other case only. The judgment before me is a self-contained document and is based upon its own oral and documentary evidence. I therefore, overrule this objection. The document (Ex. P-G), which forms the basis of the prosecution runs as follows :

The hollowness of Mr. Tek Chand's capacity as a Barrister has been exposed. He has stooped to false and mean personal attacks. Mr. Tek Chand has issued a poster in Urdu in which he has made baseless and extremely filthy, false and mean attacks upon me. It may not be against the Congressite mentality of L. Duni Chand to take shares of a slaughter-house, but for me it is a question of Dharam (religion). I do not want to say anything more than this : that the abovesaid statement of Mr. Tek Chand is extremely odious and unfounded. Similar is the statement in which it has been said that I stopped the procession of the Vaish Conference in Ambala city, and so on and so forth.

The learned counsel for the petitioner admits that the statement is defamatory, but he relies upon Excep. 9 to S. 499, I. P. C. S. 105, Evidence Act, clearly lays down the general law on the subject, that the party who wants to take the benefit of a certain exception, must bring his case within the four corners of that exception, and the burden is upon him to do so. There cannot be any doubt that the heading: Mr. Tek Chand *ki barristri ki pol khul gai* means that the unsoundness of Mr. Tek Chand's knowledge or capacity as a Barrister has been exposed. This imputation undoubtedly is calculated to lower in the estimation of others the intellectual qualities and the aptitude for his profession as a Barrister in Mr. Tek Chand. Now coming to the exception which is invoked by the petitioner, it is important to note that it relates to private communications which one party makes in good faith to another for the protection of his own interest. In fact, this exception gives legislative sanction to the law as laid down by Lord Campbell in 5 El & Bl 344 (5), (not cited by any party) :

A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains crimimatory matter, which, without this privilege, would be slanderous and actionable.

5. Harrison v. Bush, (1857) 5 El & Bl 344=25
L J Q B 25=3 W R 474=1 Jur N S 846.

"Duty" in this context is not confined to legal duty, but includes moral and social duties of imperfect obligation. Good faith is defined in S. 52, I. P. C., which says that :

Nothing is said to be done in good faith which is done or believed without due care or attention.

In the present case, in the course of the election campaign, the accused had no justification whatever in dragging Mr. Tek Chand's position as a Barrister into the limelight of publicity in a language which amounted to a serious aspersion upon his professional status and was calculated to lower him in the eyes of the public as a Barrister. The profession of a Barrister is a highly honourable one and to say that Mr. Tek Chand's position as a Barrister is hollow and has been exposed in a poster which was broadcast throughout the length and breadth of the constituency does not afford the protection laid down in Excep. 9 to S. 499, I. P. C. The rest of the poster consists of vulgar and abusive epithets, but I do not think that they are sufficient in themselves to be the foundation of a criminal prosecution. In my opinion, the order of the learned Sessions Judge was correct and the petitioner was rightly convicted. The sentence of the fine of Rs. 1,000 is, however, excessive. I think Mr. Tek Chand was only anxious to vindicate his character, and in this he has succeeded. Under all the circumstances I think that a fine of Rs. 250 would meet the ends of justice. With this modification the petition is dismissed. If the fine has been fully paid, the petitioner shall be entitled to a refund of the balance of Rs. 750.

S.R./R.K.

Petition dismissed.

A. I. R. 1936 Lahore 296

ADDISON AND ABDUL RASHID, JJ.

Beli Ram and others—Plaintiffs—Appellants.

v.

Municipal Committee, Pindigheb and others—Defendants—Respondents.

Letters Patent Appeal No. 64 of 1935, Decided on 10th October 1935, from decree of Agha Haider, J., Lahore, D/- 4th March 1935.

(a) **Municipality—Powers of—Municipality can exercise powers conferred on it by Act—Municipality cannot bind itself by contract beyond its scope.**

Municipalities can exercise powers, but only those conferred on them by the Act by which

they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. A Municipality cannot bind itself by any contract beyond the scope of its powers which are prescribed by statute or charter.

[P 297 C 2]

(b) Punjab Municipal Act (3 of 1911)—Ss 18, 56 (g) and 169 (g)—Powers of disposal given by these sections—Agreement restricting rights of Committee is ultra vires.

There is no provision in the Punjab Municipal Act giving the Municipal Committee other powers of disposal except as given by Ss. 18, 56 (g) and 169 (g) in respect of a public street or allowing it to contract with respect to its rights in public streets. So an agreement in dispute by which the committee acknowledges the maliks of a town to be the owners of the land adjacent to the public streets and that they will have rights to recover customary dues called haq buha (door tax) and that if the Municipal Committee leases it for consideration, the maliks will be entitled to a half share of the proceeds and that the Committee will have no power to transfer any part of the public streets or thoroughfares without consideration unless the maliks agree is null and void and ultra vires of the powers of the Committee.

[P 297 C 1 P 298 C 1]

Manohar Lal—for Appellants.

Malik Mohd. Amin—for Respondents 2 and 7.

Addison, J.—Three plaintiffs, who are residents of Pindigheb in Attock District, brought a suit against the Municipal Committee of Pindigheb as defendant 1, and defendants 2 to 7, who are maliks of the town. Defendant 2 was also, at the time when the agreement in dispute was entered into between the Municipal Committee and the maliks, the Secretary of the Municipality. The agreement in dispute is dated 18th July 1929. By this agreement the Committee acknowledged the maliks to be the owners of the land adjacent to the public streets and that they would have rights to recover customary dues called 'haq buha' (door tax). It was further stipulated that if the Municipal Committee leased a portion of a public street or in any other way transferred it for consideration, the maliks would be entitled to a half share of the proceeds. It was also provided that the Committee would have no power to transfer any part of the public streets or thoroughfares without consideration unless the maliks agreed, etc.

The plaintiffs considered that this agreement was ultra vires and void and against the interests of the residents of the town and they have accordingly brought the present suit to get it set

aside. They failed in the Court of the Subordinate Judge and their appeal to the District Judge also failed. A second appeal to this Court was dismissed and against the decision of the learned Judge, who decided the second appeal, this Letters Patent appeal has been admitted. Reliance was placed upon S. 48 (1), Punjab Municipal Act, which runs as follows :

If any member, officer or servant of a Committee or of a joint Committee, without the previous permission in writing of the Commissioner voluntarily renders himself interested in any contract made with that Committee, or if within one month of his becoming interested in any such contract he neither resigns nor obtains the permission in writing of the Commissioner for his remaining a member, officer or servant of the Committee in spite of his interest in such contract, he shall be deemed to have committed an offence under S. 168, I. P. C.

This made it an offence for defendant 2, who was then the Secretary of the Municipality, to enter into such a contract without the previous permission in writing of the Commissioner and it is not disputed that this permission has never been given. As however such a contract was not specifically declared void, the learned Judge, who heard the second appeal, was of the opinion that it could not be altogether ultra vires and that was his main reason for dismissing the appeal. This however is not the way to look at cases of this description. A Municipal Corporation possesses and can exercise the following powers only : 1. Those granted in express words under the statute or charter creating it. 2. Those necessarily implied in or incidental to powers expressly granted. And 3. those essential to the accomplishment of the declared objects of the Municipality, not simply convenient, but indispensable. If there is any doubt as to whether the power exists, the power is denied by the Courts. Every act must be authorized by the statute or charter creating it or by some legislative Act applicable thereto. In other words Municipalities can exercise no powers but those conferred on them by the Act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. A Municipality cannot bind itself by any contract beyond the scope of its powers which are

prescribed by statute or charter. By reason of S. 18, Punjab Municipal Act, every committee shall have power, subject to the provisions of the Act or of any rules made thereunder, to transfer any property held by it and to contract and to do all other things necessary for the purposes of its constitution.

Under the provisions of S. 56 (g), Punjab Municipal Act, all public streets and the pavements, stones and other materials thereof, and trees growing on and erections, materials, implements and things provided for, on such streets, shall vest in and are under the control of the Committee to be held and applied by it for the purposes of the Act; but in no other way as already stated. Under S. 169 (g) the Committee may, subject to the provisions of any rule, lease, sell or otherwise dispose of any land used by the Committee for a public street and no longer required therefor. There is no other provision in the Act giving the Committee other powers of disposal in respect of a public street or allowing it to contract with respect to its rights in public streets. It follows from the principle enunciated that the agreement in question is null and void and ultra vires of the powers of the Committee. We accordingly accept this appeal with costs throughout and grant the plaintiffs a decree for: (1). A declaration to the effect that the agreement dated 18th July 1929 is null and void and incapable of being acted upon in any way; and (2). a permanent injunction to issue against defendants 2 to 7 not to accept any benefit under the agreement and against defendant 1 not to give any benefit to them thereunder.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 298

BHIDE AND CURRIE, JJ.

Committee of Management for Gurdwara Nankana Sahib—Plaintiff—Appellant.

v.

Hira Dass, Chela of Gobind Das—Defendant—Respondent.

First Appeal No. 773 of 1932, Decided on 29th October 1935, from decree of Sukh Gurdwaras Tribunal, Lahore, D/- 18th December 1931.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 25-A (as amended by S. 4 of Punjab Act 3 of 1930)—Section introduced to implement

decisions reached by Tribunals—Successful party can lodge suit for possession.

The obvious intention of the legislature in introducing S. 4 of the Sikh Gurdwaras (Amendment) Act (3 of 1930) was that a successful party as soon as the decision was reached by the tribunal would be at liberty to sue for possession. The whole section was introduced owing to the difficulty that had been experienced owing to the lack of any provision in the original Act for implementing the decisions reached by the tribunal in cases under Ss 5 and 10 of the Act. S. 25-A was introduced to provide a cheap and speedy method of giving effect to the decisions of the Tribunal. It is obvious that the proper course for the successful party would be to lodge his suit and if the opposite party had preferred an appeal in the High Court, for that party to obtain an order staying the proceedings, if necessary. [P 299 C 1, 2]

(b) Interpretation of Statutes—Courts should not discover intention of Legislature but should endeavour to interpret the Act.

It is not for the Court to try to discover what the intention of the legislature is when the Act is passed. Courts have only to deal with the clear language of the Act as passed and endeavour to interpret it. The business of the interpreter is not to improve the statute; it is to expound it. The question for him is not what the legislature meant, but what its language means; i. e., what the Act has said that is meant. [P 299 C 2]

(c) Punjab Sikh Gurdwaras Act (1925), S. 25-A (as amended by Punjab Act 3 of 1930)—S. 25-A applies only to cases where recording of evidence before Tribunal is not complete before commencement of Act.

The only possible interpretation of S. 11 of the amending Act is that it makes S. 4 (now S. 25-A of the original Act) only applicable to those claims, petitions and suits in which the recording of evidence has not been concluded before the Tribunal at the commencement of the Act. The meaning is clear and the interpretation placed upon it as above is the only possible one. [P 299 C 2]

Bhagat Singh—for Appellant.

Har Gopal—for Respondent.

Currie, J.—This order will dispose of three appeals Nos. 773 and 1154 of 1932 and 739 of 1933 in which the same point regarding the interpretation of S. 25-A of the Sikh Gurdwaras Act has arisen.

In the present case the Committee of Management for the Gurdwara Nankana Sahib in Nankana Jagir of Okara Tahsil brought a suit for possession of certain lands on the basis of a decision in their favour by the Sikh Gurdwaras Tribunal in proceedings on a petition under S. 5 (1) of the Act. The suit was dismissed by the Tribunal on the ground that that decision had been passed before the amending Act which introduced S. 25-A into the original Sikh Gurdwaras Act came into force. The decision of the

Tribunal was dated 21st June 1928. An appeal in the High Court was dismissed on 11th May 1931 and the suit was instituted on 26th August 1931. The Sikh Gurdwaras (Amendment) Act, 1930, (Punjab Act 3 of 1930) came into force from 1st November 1930. S. 4 of that Act contains what is S. 25-A of the Sikh Gurdwaras Act, which runs as follows:

25-A. (1) When it has been decided under the provisions of this Act that a right, title or interest in immoveable property belongs to a Notified Sikh Gurdwara, or any person, the Committee of the Gurdwara concerned or the person in whose favour a declaration had been made may, within a period of one year from the date of the decision or the date of the constitution of the Committee, whichever is later, institute a suit before a tribunal claiming to be awarded possession of the right, title or interest in the immoveable property in question as against the parties to the previous petition, and the tribunal shall, if satisfied that the claim relates to the right, title or interest in the immoveable property which has been held to belong to the Gurdwara, or to the person in whose favour the declaration has been made, pass a decree for possession accordingly; (2) notwithstanding anything contained in any Act to the contrary, the court-fee payable on the plaint in such suit shall be five rupees.

Section 11 of the amending Act which deals with the question of the retrospective effect to be given to the amendments made by Ss. 2, 3 and 4 of this amending Act shall be applicable to all claims, petitions and suits in which the recording of evidence had not been concluded before the Tribunal at the commencement of this Act. It is in view of this section that the Tribunal came to the conclusion that they had no jurisdiction to deal with this suit. For the appellants Mr. Bhagat Singh has argued on the assumption that S. 25-A is to be read by itself without reference to S. 11 of the amending Act. He contends that the limitation of the suit dates from the final decision of the appeal and thus the case was within time. To my mind there is no force in this argument. It appears to me that the obvious intention of the legislature was that a successful party as soon as the decision was reached by the Tribunal would be at liberty to sue for possession. The whole section was introduced owing to the difficulty that had been experienced owing to the lack of any provision in the original Act for implementing the decisions reached by the Tribunal in cases under Ss. 5 and 10 of the Act. S. 25-A was introduced to provide a cheap and speedy method of giving effect

to the decisions of the Tribunal. It is obvious that the proper course for the successful party would be to lodge his suit and if the opposite party had preferred an appeal in the High Court, for that party to obtain an order staying the proceedings, if necessary. I am therefore of opinion that there is no force in this part of the argument. It is unnecessary to discuss it further in view of the conclusion at which I have arrived regarding the retrospective effect of S. 11 of the amending Act, which must obviously be read along with S. 4 which it governs in express terms.

Mr. Bhagat Singh has urged further that the inclusion in S. 11 of the amending Act of S. 4 is erroneous and due to some oversight. He points out that, while Ss. 2 and 3 of the amending Act, which introduced amendments regarding the definition of Sikh (S. 2, Sikh Gurdwaras Act), and in S. 16 of the Act, were of such a nature that effect could be given to them immediately in cases in which the evidence had not been concluded; there was no reason for limiting the effect of S. 4 to cases in which the record of evidence had not been concluded, at the time the Act came into force. It is not for us however to try to discover what the intention of the legislature was when the amending Act was passed. We have only to deal with the clear language of the Act as passed and endeavour to interpret it. To quote Maxwell on the Interpretation of Statutes, Edn. 7, p. 6

The business of the interpreter is not to improve the statute; it is to expound it. The question for him is not what the legislature meant, but what its language means, i. e., what the Act has said that is meant.

Now in the present case there cannot be the least doubt that the only possible interpretation of S. 11 of the amending Act is that it makes S. 4 (now S. 25-A of the original Act) only applicable to those claims, petitions and suits in which the recording of evidence has not been concluded before the Tribunal at the commencement of the Act. The meaning is clear and to my mind the interpretation placed upon it by the Tribunal is the only possible one. I would therefore dismiss the appeal with costs.

Bhide, J.—I agree.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 300

BACKET, J.

Balak Nath — Defendant—Appellant.
v.*Charanjit Rai* — Plaintiff — Respondent.

Second Appeal No. 590 of 1935, Decided on 15th July 1935, from decree of Dist. Judge, Amritsar, D/. 19th December 1934.

Will—Construction—Trust created by will—Direction that succession to trusteeship should pass to descendants of trustee—Succession cannot pass to collaterals—Relatives not having powers to interfere with bequest—Line of trustee coming to an end—Trust reverts to original founder.

Where a direction in a trust that the succession is to pass to the descendants of the original trustees is quite clear, succession cannot be extended to include their collaterals, in whom there is no reason to suppose that the testator would have been included to repose any particular confidence. [P 301 C 1]

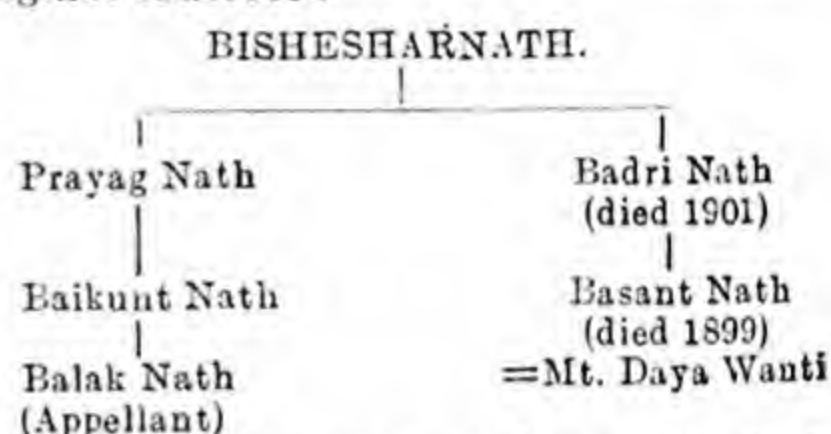
Where a clause in a will creating a trust provides that none of the relatives of the trustees are to have any right of interfering with his bequest and that any claim put forward by them is to be rejected, proper construction of the clause is that this clause is intended to apply to any claim of the relatives to succeed to the property in their personal capacity or to claim any right of interfering with the management of the property during the lifetime of the trustees appointed by the founder or in the presence of any of their descendants. The testator does not thereby intend to provide that the management of the trust should not revert to his own family, according to the ordinary rule in case the line of succession which he had prescribed should die out. [P 301 C 1]

Kanwar Sain—for Appellant.

Nawal Kishore—for Respondent.

Judgment.—In 1894 one Raja Ram founded a trust by will in favour of a Hindu temple or shiwalaya, endowing the temple with lands and appointing trustees to manage the property. The first trustees were Badri Nath and Basant Nath and it was provided that the management of the trust should pass to their descendants. Basant Nath died in 1899 and Badri Nath died in 1901, when the office of the manager was taken over by Basant Nath's widow, Mt. Daya Wanti, in the absence of any living descendants of the original trustees. A suit for her removal from the management was brought in 1921 by Harcharan Das, a nephew of Raja Ram, and one of his sons. They were granted a decree on 8th December 1923, but Mt. Daya Wanti died during the course of the appeal, whereupon the suit was dismissed as having automatically come

to an end. Harcharan Das then had himself entered in the revenue records as trustee and took over the management on the ground that the trusteeship had reverted to the founder's line on the extinction of the line of succession laid down by Raja Ram. His right to the management was attacked by Balak Nath, a collateral of the original trustees, who succeeded in having the revenue entries reversed, but Balak Nath did not succeed in taking over the management. Harcharan Das then brought the present suit for a declaration of his right to manage the temple and the attached property, joining another of his sons as plaintiff. Harcharan Das himself has died, and the present plaintiff is his son Charanjit Rai. The suit is against Balak Nath. The trial Court granted a decree in favour of the plaintiff, which was confirmed on appeal to the District Court. The defendant has instituted a second appeal. The following pedigree table shows the defendant's position in relation to the original trustees :



The first argument put forward is that the office of trustee should devolve according to the ordinary rule of succession, and that the reference in Raja Ram's will to the descendants of Badri Nath and Basant Nath should not be taken as limiting the succession to his direct descendants. The general rule as laid down in S. 421 (3) of Mulla's Hindu Law is as follows :

Where the founder has prescribed a line of succession to the office of shebait, but the succession to the office has entirely failed, the right of management reverts to the founder and his heirs.

But in a trust of this nature, the gift is to the idol, and not to the so-called trustees, and the founder is making an appointment rather than a gift so far as his first trust of the original manager and his family are concerned. In 29 Cal 716 (1), there was a provision that the office should be held by the founder's daughter

1. Gopal Chunder Eose v. Kartick Chunder Dey, (1902) 29 Cal 716 (P C).

and her husband and their male children successively. It was held that on the death of the last surviving son of the daughter, the succession of shebait failed and the shebaitship reverted to the heirs of the testator. In the present instance the direction that the succession is to pass to the descendants of the original trustees is quite clear and I do not think that it can be extended to include their collaterals, in whom there is no reason to suppose that the testator would have been inclined to repose any particular confidence. The next argument is that Raja Ram intended to exclude his own relatives from taking any part in the management of the trust. This is based on a clause in his will which provides that none of his relatives are to have any right of interfering with his bequest and that any claim put forward by them is to be rejected. I agree with the lower appellate Court that this clause is intended to apply to any claim of the relatives to succeed to the property in their personal capacity or to claim any right of interfering with the management of the property during the lifetime of the trustees appointed by the founder or in the presence of any of their descendants. It does not appear that he was intending to provide that the management of the trust should not revert to his own family, according to the ordinary rule in case the line of succession which he had prescribed should die out.

A third argument is that the present suit is barred by the rule of *res judicata* on account of the previous litigation, in which the present defendant was impleaded as the legal representative of Mt. Daya Wanti after her death. This argument is based on the fact that the plaintiff never put forward any claim to succeed to the office of shebait during the lifetime of Mt. Daya Wanti, even when he was suing for her removal from the office which she held. It is true that the present claim might have been made a matter of attack in the previous suit, but it is also apparent that the previous suit was brought against Mt. Daya Wanti in a personal capacity, and I do not think that the former pleadings can be taken as amounting to an admission or decision that the present respondent has not a better right than the defendant at the present moment to hold the post of shebait. The last argument is that the suit

is time barred, because Mt. Daya Wanti entered upon the management in 1901 and her possession was clearly adverse to the present claim of the plaintiff. The plaintiff and his father however succeeded in entering upon the management after Mt. Daya Wanti's death, and this was sufficient to break the period of adverse possession, even if Mt. Daya Wanti's tenure of the office be regarded as adverse possession of a nature which could benefit the present appellant. For the above reasons the appeal fails and is dismissed with costs.

B.D./R.K.

*Appeal dismissed.***A. I. R. 1936 Lahore 301**

AGHA HAIDAR, J.

Jan Mohammad—Defendant—Petitioner.

v.

Amolak Ram and another—Defendants and another—Plaintiff—Respondents.

Civil Revn. No. 171 of 1935, Decided on 14th February 1935, from decree of Sub-Judge First Class, Lahore, D/- 31st May 1934.

(a) Practice—Revision—Appeal incompetent under O. 47, R. 7, Civil P. C.—It may be treated as revision.

Where an ordinary appeal does not lie in view of the restrictive provisions of O. 47, R. 7 the Court may nevertheless treat the appeal as revision: 1927 *Lah* 435; 1933 *Lah* 169 and 1926 *Lah* 379, *Rel. on.* [P 302 C 2; P 303 C 1]

(b) Practice—Restoration of proceedings—Review—Court cannot set aside its own judgment on reconsideration of same materials.

The Court has no jurisdiction to set aside its own judgment on a reconsideration of the same materials which were present before it on the former occasion: 1922 *P C* 112 and 1933 *Mad* 290 *Foll.* [P 303 C 2]

(c) Precedents—Conflicting rulings—Method of application—Only cases which really touch matter under consideration should be cited.

When discussing authorities on a particular provision of law a counsel must cite cases which really touch the matter for consideration before the Court. It is always more or less dangerous when discussing authorities on a particular provision of law to cite cases upon entirely different provisions of law by way of mere analogy. [P 303 C 2]

(d) Practice—Revision—Arbitration—Award—Binding nature of—Cases arising out of arbitration form class by themselves—Aggrieved party cannot take recourse to ordinary remedies by revision or appeal.

A reference to arbitration means the abandoning of the regular tribunals set up by the State and presided over by trained Judges and

referring the matters in controversy to a domestic tribunal which may consist of laymen. Cases arising out of law of arbitration form a class by themselves. The aggrieved party thereupon cannot have recourse to the ordinary remedies either by way of revision or appeal when the verdict of the tribunal of his own choice has gone against him: 1933 *Lah* 426 and 29 *Cal* 167 (*P C*) *Rel. on.* [P 304 C 1]

(e) **Court fees—Refund—Power of Court—Fees paid on presentation of memorandum of appeal—Appeal converted into revision—Fees can be refunded.**

Where a person pays court-fees into the Court at the time of presenting an appeal, which does not lie and appeal is converted into revision, court-fees can be refunded to the party: 34 *P L R* 1 *Rel. on.* [P 304 C 2]

Barkat Ali and Abdul Aziz—for Petitioner.

Achhru Ram, R. P. Kosla, Amar Nath Monga and S. N. Bali — for Respondents.

Order.—On 17th July 1929 a deed of partnership, Ex. P/1, was executed. The names of three persons, namely Amolak Ram, Niamat Ali and Sheikh Jan Mohammad appeared as partners. Their shares were specified and their rights and liabilities were mentioned. It bore the signatures of Niamat Ali and Amolak Ram, but it was not signed by Sheikh Jan Mohammad. It had the signature of a man named Sheikh Allah Ditta. The partnership business was named and styled as the Royal Motor Transport Company. On 4th November 1929 another deed of partnership, Ex. P/2, was drawn up. This document was almost similar in its terms to Ex. P/1 with this difference that it was signed by Sheikh Jan Mohammad himself. The name of the firm as given in Ex. P/1 was retained in this newly created partnership. A suit was brought by the plaintiffs against Amolak Ram, Niamat Ali and Jan Mohammad for the balance of the price of certain motor trucks, which had been supplied by them on 7th August 1929, to the Royal Motor Transport Company. Defendant 1 Amolak Ram practically admitted the plaintiff's claim; Jan Mohammad and Niamat Ali denied that they were partners on the date of the purchase of the trucks and further pleaded that the Lahore Courts had no jurisdiction to entertain the suit. Five issues were framed, but we are concerned only with the first two, namely: (1) Whether the Lahore Courts are vested with jurisdiction to hear the suit; and (2) whether defendants 2 and 3 were not part-

ners of the Royal Motor Transport Company, Hoshiarpur, at the time of the transaction in question. The trial Judge, Mr. Harnam Singh, proceeded to record his finding on the question of jurisdiction and on 15th March 1933 held that the suit was cognizable by the Court of the Subordinate Judge, First Class, at Lahore. The parties then went to trial and ultimately on 4th October 1933, the Subordinate Judge, Mr. Harnam Singh, decreed the claim against Amolak Ram and Niamat Ali and dismissed it against Jan Mohammad on the ground that on the date on which the trucks were supplied he was not a member of the partnership.

On 18th December 1933, the plaintiffs made an application in the Court of Mr. Harnam Singh for review of judgment on the ground that there was a mistake or error apparent on the face of the record which had led to the dismissal of the suit against Jan Mohammad. Mr. Harnam Singh issued the usual notice. The matter came up before another Subordinate Judge, namely, Mr. G. R. Mehta, who allowed the application of the plaintiff and granted the review on exactly the same materials which were before Mr. Harnam Singh. He was further of opinion that Mr. Harnam Singh in his order dated 15th March 1933, while deciding the issue as to jurisdiction had expressed the opinion that Jan Mohammad was liable under the terms of Ex. P/1. Jan Mohammad came up in appeal to this Court paying Rs. 375 as court-fee. At the time of argument Mr. Achhru Ram raised a preliminary objection that neither an appeal lay nor a revision was entertainable in this case. The learned counsel for Jan Mohammad clearly admitted that as the scope of an appeal against the order granting review was limited under the provisions of O. 47, R. 7, Civil P. C., he could not press the appeal; but he strenuously urged that a revision lay and that the memorandum of appeal should be treated as an application for revision. He relied upon 8 *Lah* 617 (1) where a learned Judge, while observing that an ordinary appeal did not lie in view of the restrictive provisions of O. 47, R. 7, Civil P. C., nevertheless held that in the circumstances of

1. *Sikandar Khan v. Baland Khan*, 1927 *Lah* 435=107 *I C* 596=8 *Lah* 617=29 *P L R* 81.

the case, he could treat the appeal as a revision. There is a more direct authority of another learned Single Judge of this Court in 34 P L R 88 (2).

This case completely covers Mr. Barakat Ali's argument. I took time to consider this case in the light of the authorities quoted by the learned counsel on both sides. I find that there is no escape from the conclusions arrived at by the learned Judge who decided 34 P L R 88 (2). It is necessary to give the facts of 34 P L R 88 (2) in some detail. A suit was brought for a substantial sum of money in the Court of the Subordinate Judge. It was dismissed for default under O. 9, R. 8, Civil P. C. An application was made on behalf of the plaintiff for the restoration of the case but this application was rejected. Subsequently an application was made for review of the order of dismissal passed on the application for restoration. This application for review was founded on exactly the same material as the previous application for the restoration of the case. The Court granted the application for review and set aside the order which it had passed dismissing the application for restoration and restored the suit which had been dismissed for default. Against this order the defendant, as in the present case, filed an appeal in this Court. As the appeal could not be entertained in view of the provisions of O. 47, R. 7, Civil P. C., the defendant's counsel asked that his petition of appeal may be treated as revision. It was objected on behalf of the plaintiff-respondent as in the present case that the order of the Court below was an interlocutory order and, therefore, it could not be challenged by way of revision in this Court. But, on the authority of 7 Lah 161 (3) this contention was repelled and the application for revision against the order granting the review was entertained.

The learned Judge referred to the leading case on the subject, namely 3 Lah 127 (4) and held, that in view of this Privy Council authority the Court below had no jurisdiction to set aside its own judgment on a re consideration of

the same materials which were present before it on the former occasion when the application for restoration was dismissed. With this line of reasoning I entirely agree. Mr. Harnam Singh's judgment might have been erroneous, as to which I express no opinion, but in that case the plaintiffs had their remedy and could have filed an appeal, but surely they could not ask his successor-in-office to set aside that judgment in review on a re-consideration of the same materials which were before Mr. Harnam Singh. As regards the inconsistent findings to which Mr. G. R. Mehta refers, I may point out that the order dated 15th March 1933 was a finding on the question of jurisdiction alone and did not purport to decide the liability of Jan Mohammad in view of the language of the particular issue. The remark which is attributed to Mr. Harnam Singh in this order was in all probability part of the argument of the counsel for the plaintiffs or a mere casual observation while recording the finding on the issue of jurisdiction. That this was so is put beyond doubt by the fact that the learned Judge had framed a specific issue, No. 2, for the purpose of determining the liabilities of defendants 2 and 3 and while recording his finding on issue 2, he held that Jan Mohammad was not liable. On the merits a Court of appeal might have come to a different conclusion, as to which I express no opinion; but surely, in view of the clear language of O. 47, R. 1, read in the light of 3 Lah 127 (4), Mr. G. R. Mehta had no jurisdiction to grant the review on a reconsideration of the case on exactly the same materials. I may here refer to the interpretation which has been put on the Privy Council case by a learned Judge of the Madras High Court in 1933 Mad 290 (5) and I respectfully follow it.

The learned counsel for the respondents cited a number of decisions, but they do not really touch the matter which is before me for consideration. It is always more or less dangerous, when discussing authorities on a particular provision of law to cite cases upon entirely different provisions of law by way of mere analogy. But the case which was most strenuously relied upon by Mr.

2. Kanshi Ram v. Diwan Chand, 1938 Lah 169 = 141 I C 188 = 34 P L R 88.

3. Piroj Shah v. Qarib Shah, 1946 Lah 379 = 95 I C 124 = 7 Lah 161 = 27 P L R 321.

4. Chajju Ram v. Neki, 1922 P C 112 = 72 I C 566 = 49 I A 144 = 3 Lah 127 (P C).

5. Mottai Goundan v. P. S. Ramaswami Ayyangar, 1933 Mad 290 = 141 I C 391.

Achhru Ram, the learned counsel for Amolak Ram, respondent, was 14 Lah 165 (6). That was a case in which an appeal was filed against a decree passed by the Court below in certain arbitration proceedings under Sch. 2, para. 16 (2), Civil P. C., but the learned Judges held that an appeal could not be entertained in view of the restrictions placed by Sch. 2, para. 16 (2). It was urged by the counsel for the appellants that his appeal may be treated as a revision. On this the learned Judges observed that

The whole law of references, awards and decrees following upon the awards is highly technical and a very limited right of appeal is conceded.

In view of the restrictions on the appeal contained in the abovementioned paragraph, the door for a revision must be deemed to have been closed. Now so far as that case is concerned I entirely agree. There is a higher authority than that decision, namely the leading Privy Council case on the subject, 29 Cal 167 (7). There, their Lordships of the Privy Council in dealing with the case of a decree passed on an award were pleased to observe that a revision in such a case would be more mischievous than an appeal. In this connexion I may observe that a reference to arbitration means the abandoning of the regular tribunals set up by the State and presided over by trained Judges and referring the matters in controversy to a domestic tribunal which may consist of laymen. The aggrieved party, therefore, cannot have recourse to the ordinary remedies either by way of revision or appeal when the verdict of the tribunal of his own choice has gone against him. Therefore cases arising out of law of arbitration form class by themselves and have no application to the present case. In my opinion the Court below had no jurisdiction to grant the application for review. I therefore treat this appeal as a revision. I accept the revision, set aside the order of Mr. G. R. Mehta, dated 31st May 1934, granting the review and restore the judgment and decree of Mr. Harnam Singh. Petitioner shall get his costs. Plaintiffs may proceed against that judgment in the manner provided by the law, as to

which I express no opinion one way or the other.

The applicant had paid a court-fee of Rs. 375 in this Court. That court-fee minus Rupees four (Rs. 4) would be refunded to the applicant. The parties are agreed as to this course being adopted and there is also the authority of 34 P L R 1 (8).

R.W./R M.

Revision accepted.

8. Jwala Singh v. Ghulam, 1933 Lah 351=142 I C 633=34 P L R 1.

A. I. R. 1936 Lahore 304

MONROE AND RANGI LAL, JJ.

Bhagwan Singh and another—Defendants—Appellants.

v.

Balbir Singh and another — Plaintiffs and others—Defendants—Respondents.

Second Appeal No. 254 of 1934, Decided on 15th January 1935, from decree of Dist. Judge, Ludhiana, D/- 13th November 1933.

Custom (Punjab) — Alienation — Ancestral property—Legal necessity—Debt raised by agriculturist by mortgage of ancestral property for carrying on manufacture of sugar is one for legal necessity.

No hard and fast rule can be laid down that ancestral property can never be alienated by an agriculturist for the purpose of providing funds for trade or business. [P 305 C 1]

A debt raised by an agriculturist by mortgage of ancestral property for the purpose of carrying on manufacture of sugar in the village is one for legal necessity. The manufacture of sugar by an agriculturist in his own village cannot be said to be looked upon with disfavour by village local custom: 1924 Lah 41; 1926 Lah 515 and 1932 Lah 179 Rel. on; 1914 Lah 247 Not Foll. [P 305 C 1]

Dev Raj Sahny—for Appellants.

Ram Lal Anand I—for Respondents.

Rangi Lal, J.—This second appeal arises out of a suit to challenge a mortgage of ancestral land on the usual ground of want of consideration and necessity. The plaintiffs are the sons of the mortgagors. The learned District Judge found that the mortgagors were engaged in the manufacture of sugar in the village and that the whole debt was raised for that purpose, but on the authority of 24 I C 361 (1), he came to the conclusion that the debt could not be held to be raised for legal necessity. The decree of the trial Court granting the declaration prayed for by the plaintiffs was therefore

6. Sat Bharai v. Jamiat Rai, 1933 Lah 426=143 I C 585=14 Lah 160.

7. Ghulam Khan v. Mohammad Hussain, (1902) 29 Cal 167=29 I A 51=8 Sar 154 (P C).

1. Santa Singh v. Waryam Singh, 1914 Lah 247=24 I C 361=19 P R 1915.

confirmed. The mortgagees have filed a second appeal to this Court. In 24 I C 361 (1) the loan in question was raised for buying merchandise for a shop started in the village. The loan was not held to be for legal necessity because the learned Judges were of opinion that village custom would not look with favour upon the conversion of a Jat agriculturist into a shop keeping trade and would not countenance an alienation of ancestral land in order to enable such agriculturist to carry on the business of his shop. This view, even if it was correct at that time, has not been adopted in the later decisions of this Court. In 74 I C 451 (2), an alienation of a sarai by an agriculturist for the purpose of raising money to engage in trade was upheld and it was remarked that 24 I C 361 (1) could not have intended to lay down that under no circumstances could a member of an agricultural tribe alienate ancestral property for the purposes of engaging in trade. In 95 I C 433 (3) it was held that money borrowed by a Jat agriculturist for trading in cattle was for valid necessity and it was remarked that the application of 24 I C 361 (1) must be restricted to the exact facts of that particular case. In 136 I C 265 (4), Sir Shadi Lal, who was a party to 24 I C 361 (1), himself remarked that the scope of the latter ruling must be restricted to its own facts and that no hard and fast rule could be laid down that ancestral property could never be alienated by an agriculturist for the purpose of providing funds for trade or business. In that case the alienor had for many years ceased to do the work of an agriculturist and had been living out of India carrying on trade and sending money to his sons. It was held that the money borrowed constituted a valid necessity for the sale of an ancestral house. In the present case it cannot possibly be said that the manufacture of sugar by an agriculturist in his own village would be looked upon with disfavour by village custom. It is a matter of common knowledge that most agriculturists grow sugar-cane and manufacture gur for sale.

It is admitted that the business has

2. Muhammad Husain-ud-Din v. Saif Ali Shah, 1924 Lah 41=74 I C 451=4 Lah 122.

3. Taj Din v. Dula, 1926 Lah 515=95 I C 498.

4. Natha v. Ganesh Singh, 1932 Lah 179=136 I C 265=13 Lah 524=33 P L R 46.

not resulted in any loss to the mortgagors. It would be ridiculous to suggest that an agriculturist should not improve his financial position by starting an industry allied to agriculture and which he can carry on in his own village. He is not thereby converting himself into a shop-keeper, as was the case in 24 I C 361 (1). The finding of the learned District Judge that the debt was not raised for legal necessity cannot therefore be maintained. The finding that the whole debt amounting to Rs. 4,448 was raised for the manufacture of sugar was not and could not be challenged in second appeal. I would therefore accept the appeal and dismiss the suit with costs throughout.

Monroe, J.—I agree.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 305

ADDISON AND DALIP SINGH, JJ.

Sonepat Co-operative Society, Ltd.—
Plaintiff—Appellant.

v.

Kapuri Lal and others—Defendants—
Respondents.

First Appeal No. 2210 of 1929, Decided on 25th October 1934, from decree of Senior Sub-Judge, Rohtak, D/- 21st June 1929.

Contract—Surety—Mere laches or non-exercise of right of superintendence or gratuitous agreement on part of obligee does not release surety.

Mere laches of the obligee, or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve the sureties. Mere non-exercise by the obligee of their rights of superintendence does not discharge the sureties from their liability as sureties. So also a mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety.

[P 306 O 1, 2]

Vishnu Datta and Achhru Ram for
Badri Das—for Appellant.

Shamair Chand and Qabul Chand—
for Respondents.

Addison, J.—The Sonepat Co-operative Society, Limited, sued Kapuri Lal, their Accountant, as principal, for the recovery of Rs. 6,086 embezzled by him and also sought to make Sri Ram and Ram Chandar liable as sureties. Kapuri Lal absconded and an ex parte decree with costs has been passed against him. The two sureties were absolved from liability. Against this decision the plaintiff society has appealed claiming that the sureties should also at least have been

held liable for the sum of Rs. 3,873-3-0 with costs on that amount. The case is simple one. Kapuri Lal was the Accountant of the Union and was authorised to receive and disburse moneys. On 23rd December 1925, Sri Ram became surety on his behalf for the faithful discharge of his duties in the amount of Rs. 2,000. The bond stated that even though Kapuri Lal might be promoted to some higher post, the surety would be liable to the extent indicated if Kapuri Lal showed any neglect or dishonesty in the discharge of his duties. On 27th May 1927, the Union demanded security to the extent of Rs. 5,000 and this was furnished by defendant 3, Ram Chandar, the terms of the bond being the same as those of the bond given by Sri Ram. It has been found (and this was not contested before us) that Kapuri Lal embezzled the following amounts:

Rs.	a.	p.	
2,700	0	0	on 18th October 1926
600	0	0	on 31st January 1927
732	8	0	on 1st April 1927
1,873	3	0	on 1st August 1927

Total 5,905 11 0

Interest to the extent of Rs. 180-5-0 was also claimed. The sureties accused the Society of negligence and added that as it allowed Kapuri Lal to run away, it could not enforce any liability against them. Sri Ram also pleaded that his security bond had, as a matter of fact, been discharged and that he was not liable for any of the sums embezzled. The Court below held that the bond of Sri Ram had been completely discharged and that he was thus not liable for any amount. It further held that the Union was negligent in superintending the work of Kapuri Lal and waiting from 2nd March 1928, to 12th March 1928, before reporting the matter to the Police. For the reasons given both sureties were held not liable. The appeal must succeed. It has been held in 22 Q B D 394 (1), that mere laches of the obligee, or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve the sureties. It was found in that case that the plaintiffs had permitted the collector to retain moneys in his hands for

a longer period than a week (which was contrary to statute and to a resolution passed by the plaintiffs) and also that the plaintiffs had permitted the collector to mix the proceeds of the different rates. It was held that the plaintiffs' acquiescence in the collector's irregular mode of accounting was not such connivance as to discharge the sureties; and that upon the facts proved and on the findings there was no defence to the action. This case applies with full force to the case of the two sureties before us, except of course as regards the special plea of Sri Ram that his security bond was discharged. There is another case reported at p. 494 of 2 Q B D (2). In this case the plaintiffs had the right of superintending the works of their contractor through their engineer who ultimately gave a final certificate upon which the contractor was paid. The plaintiffs then sued the sureties for the contractor and it was found that there was an omission on the part of the plaintiffs properly to superintend the works which led to the scamping of it. It was held that the mere non-exercise by the plaintiffs of their right of superintendence did not discharge the defendants from their liability as sureties; and also, that they were not discharged by the fact that the plaintiffs' engineer had given his final certificate.

Lastly, it was held in 22 All 351 (3) that a mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety. In the present case all that was alleged was that there was negligence in supervision, that the sureties should have been informed on 2nd March 1928, when the Assistant Registrar became fully aware of the embezzlement, and that the matter should have been reported to the Police on that date instead of 12th March 1928, by which time Kapuri Lal had absconded. On the authorities quoted, none of these things are sufficient to discharge the sureties. It is also clear that Sri Ram's security bond was not completely discharged when the new surety bond for Rs. 5,000 was taken from Ram Chand on 27th May 1927. The trial Court has based its finding as to this fact princi-

2. Mayor, Alderman and Burgesses of Kingston Upon Hull v. Harding, (1892) 2 Q B D 494.

3. Damodar Das v. Muhammad Hussain, (1900) 22 All 351=1900 A W N 106.

1. The Mayor, Alderman and Citizens v. Durham Fowler, (1899) 22 Q B D 394.

pally on the circumstance that Sri Ram had in his possession the security bond and produced it in Court. There is however good evidence to the effect that all documents were kept by Kapuri Lal who must have given back the bond to Sri Ram when Sri Ram resigned his Directorship on 27th May 1927, and the new security bond was taken. To rebut this evidence Sri Ram did not himself go into the witness box. This society is not run in the regular way employed by Banks, the work being for the most part superintended by honorary workers. There is no resolution of the society cancelling completely Sri Ram's security bond when fresh security to the extent of Rs. 5,000 was taken from Ram Chandar on 27th May 1927. Of course it was discharged on that date but his liability for past acts remained.

All that can be held is that on the date in question Sri Ram ceased to be liable on his security bond and Ram Chandar commenced to be liable on his. This means that Sri Ram must be held liable as surety to the extent of Rs. 2,000 for the embezzlements prior to 27th May 1927. Ram Chandar obviously can only be held liable to the extent of embezzlements subsequent to the date of his security bond. There was only one embezzlement of Rs. 1,873-3-0 after that day. It must therefore be held that he is liable to that extent. In the result I would accept the appeal and, in addition to the decree already given against Kapuri Lal, I would grant a decree for Rs. 2,000 against Sri Ram as surety and a decree for Rs. 1,873-3-0 against Ram Chandar as surety. The two sureties will be jointly and severally liable for the costs of this appeal and will be similarly liable along with Kapuri Lal for half the costs of the plaintiffs in the Court below.

Dalip Singh, J.—I agree.

B.D./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 307

MONROE, J.

on difference between

ADDISON AND AGHA HAIDAR, JJ.

Gopal Das—Defendant—Appellant.

v.

Sakina Bibi—Plaintiff and another—
Defendant—Respondents.

First Appeal No. 2371 of 1929, Decided on 28th May 1934.

Registration — Hiba-bil-iwaz—Transfer in favour of wife in lieu of dower—Value of property transferred and not consideration of transfer determines necessity for registration.

M, a Mahomedan, executed a mortgage in favour of one *G*. The mortgage included half a share in a house which was already conveyed to one *S*, who was *M*'s wife in lieu of her dower. This hiba-bil-iwaz was an unregistered document executed long before the mortgage deed in favour of *G*. *G* brought a suit on his mortgage and after obtaining decree put the half house for sale. *S* brought a suit for a declaration that the half house belonged to her by virtue of the hiba-bil-iwaz and was not liable to be sold. The property transferred in the hiba-bil-iwaz was over Rs. 100 in value. Though the consideration for the dower was not stated in the document yet it was alleged to be less than Rs. 100. It was contended that the document purporting to be hiba-bil-iwaz was inadmissible in evidence for want of registration:

Held: (Per *Monroe* and *Addison, JJ.*, *Agha Haidar, J.*, *contra*).—Where the amount of the consideration was not mentioned in the deed, the enquiry must be what was the value of the property and not what was the amount of the dower; whether the document required registration or not must be determined by the value of the property transferred and not by the value or amount of the consideration for the transfer and as the value of the property transferred far exceeded Rs 100, the deed of transfer required registration and that not having been registered, it was not admissible in evidence and the mortgage prevails: 1921 Nag 84, and 90 P L R 1904, *Rel. on*; 15 W R 558, *Disting and Disapproved*; 1915 Lah 251, *Dissent*. [P 316 C 2]

Per *Agha Haidar, J.*—A gift, by the husband of landed property in lieu of dower in favour of his wife was tantamount to a sale and consequently such a deed of gift when the dower was less than Rs. 100, did not require registration although the value of the immoveable property thus transferred exceeded Rs. 100 and as such was admissible in evidence. The Court in which the document is produced cannot ordinarily undertake an investigation into the price of the interest in immoveable property sought to be assigned, as against the value which the contracting parties had agreed to put upon it. The necessity for registration must be determined by the consideration mentioned in the document: 15 W R 558 and 90 P L R 1904, *Foll.* [P 314 C 2]

Badri Das and Bodh Raj Sawhney—
for Appellant.

Zafarullah Khan, Bashir Ahmad and Asadullah Khan—for Respondents.

Addison, J.—(6th March 1934).—Shah Muhammad, defendant 2, executed a mortgage-deed for Rs. 5,300 on 22nd September 1926, in favour of Gopal Das, defendant 1. One of the properties hypothecated was half a house. There was a subsequent mortgage-deed between the same parties executed on 31st January 1927, but this transaction fell through.

and we are not concerned with it. Gopal Das sued on his mortgage and obtained a decree. When in execution of his decree he was about to sell the half house mentioned, Mt. Sakina Bibi, wife of the mortgagor Shah Muhammad, instituted a suit on 21st July 1928, for a declaration that the half house belonged to her and was not liable to be sold in execution of the mortgage decree. Her case was that this half house as well as another house were given to her by her husband by an unregistered deed on 20th July 1921, in lieu of dower. Her suit was confined to the half house affected by the mortgage-deed in question and she did not ask for a declaration in respect of the other house. Gopal Das pleaded that the hiba-bil-iwaz was never acted upon and was executed in bad faith in order to defeat the rights of the husband's creditor. He also pleaded that the property was worth much more than Rs. 100, in value and that the hiba-bil-iwaz was therefore compulsorily registrable. To this the plaintiffs' counsel replied that the half house was certainly worth more than Rs. 100 when the deed was executed but that as the amount of dower due was Rs. 90, this did not matter.

Three issues were struck: (1) Whether the document sued on is admissible in evidence though unregistered? (2) Whether the house in suit belongs to plaintiff? (3) Whether the alienation in plaintiff's favour is fictitious and collusive? The trial Judge, who only heard the evidence of defendant 1, found that the deed did not require registration and that the alienation was a good one and could not be impeached by Gopal Das whose deed was subsequent to the hiba-bil-iwaz. He therefore decreed the plaintiff's claim and Gopal Das has appealed. The first question arising is that of the value of the property included in the hiba-bil-iwaz. Admittedly it is much more than Rs. 100. Muhammad Sharif (P. W. 1), a cousin of the husband, has stated that the husband has no other property and that the house may be worth Rs. 200 or Rs. 400. His evidence is interested. One Nihal Chand (P. W. 3), who was the scribe of the hiba-bil-iwaz, has stated that the whole house was worth Rs. 5,000, and the half house in dispute about Rs. 1,500. Karam Ilahi, one of the witnesses to the hiba-bil-iwaz, (P. W. 4) has stated that the bigger house is worth

Rs. 3,000, or so and the half house Rs. 1,000. The other marginal witness Abdul Qadir (P. W. 5) has said that the property was worth Rs. 800. As will appear later, this witness has given false evidence in another matter; so his testimony can be neglected. According to another, Nihal Chand (D. W. 1), the brother of Gopal Das, he is prepared to pay Rs. 5,000, for the two houses. Jai Ram (D. W. 2), who in other respects has given evidence in favour of the plaintiff, has stated that the property is worth between Rs. 5,500 and Rs. 6,500. Sant Ram (D. W. 3) values the property at Rs. 6,000 or Rs. 7,000. Gopal Das, as his own witness, stated that he was prepared to pay Rs. 7,000 for the property. On this evidence I have no hesitation in holding that the property transferred is worth between Rs. 5,000 and Rs. 6,500.

It is also admitted that the husband has no other property and is now insolvent. No change of possession took place the husband and wife continuing to live as before in the house in dispute. The children of the marriage live with their parents there. On the other hand the plaintiff has given evidence that her dower was Rs. 90, the proportion of prompt and deferred dower not being defined. The amount of the dower was not stated in the deed. The plaintiff herself was examined as a witness before the issues were framed. She could not state what amount was fixed as prompt dower and how much as deferred dower. She stated that there was no writing about dower and that her marriage took place some 22 years before in Jammu. She did not know the names of the vakils of the other witnesses to the marriage. There was thus no opportunity given to Gopal Das to summon independent witnesses. Two other witnesses with respect to dower being fixed at Rs. 90, were examined, namely two brothers, Muhammad Sharif and Muhammad Said (P. Ws. 1 and 2) who are the first cousins once removed from the husband. The first stated that dower was fixed at Rs. 90, but that he did not know what proportion was prompt and what deferred. He could not remember what dower was fixed in the case of any other marriage. The second gave similar evidence and added that he did not know what dower was fixed at his own marriage. He could not give any details as to clothes and jewellery presented at

the marriage. These witnesses were not heard by the Judge who delivered the judgment, and in my opinion their evidence is worthless. I am not prepared to hold it proved that the dower was fixed at Rs. 90. As it has not been established that the dower fixed was Rs. 90, while the property is worth between Rs. 5,000 and Rs. 6,500, it follows that the deed was compulsorily registrable under S. 17 (1) (b), Registration Act, which runs as follows :

Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present, or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100, and upwards to or in immovable property.

The words of this clause are clear enough, and where the value is about Rs. 6,000, as in the present case, and the consideration is not proved, it must be held that the document required registration. On this finding alone the appeal must be accepted. Assuming however that the dower fixed was Rs. 90, it must be decided whether the document required registration, the value of the property being about Rs. 6,000. As held in 119 I C 258 (1) a *hiba-bil-iwaz* is tantamount to a sale. Jai Lal, J., observed that it was sufficient to hold that such transactions are not governed by the rules relating to gifts but that they partake of the incidents relating to sales. Though the wording of S. 17 (1) (b), Registration Act is clear enough, it was held by the Calcutta High Court in 15 W R 558 (2) that the necessity for registration must be determined by the value of the consideration stated in the deed. Ainslie, J., remarked :

Who shall say whether the true value of the property is Rs. 99 or 101. There may be no difficulty where one side puts forward a nominal value of Rs. 50, and the other proves a probable value of Rs. 5,000. But the remedy is not by excluding the document, but by using the inadequacy of consideration as an element in the evidence of *mala fides*.

Later on he said :

It may well happen that a man under pressure may consent to take Rs. 90 for what, if free from pressure, he would not sell for Rs. 150. Still the value to him at the time would be the Rs. 90 he could get at once and not what the purchaser under other circumstances might be tempted to give. The purchaser having obtained the property may, in his turn, value it at Rs. 150.

1. *Fateh Ali Shah v. Muhammad Bakhsh*, 1928 Lah 516=119 I C 258=9 Lah 428.

2. *Rohinee Debia v. Shib Chunder*, (1871) 15 W R 558.

This authority amounts to this: that the consideration stated in the deed should be taken as the value of the right, title or interest to or in the immovable property. In cases of forced sales this is no doubt a very convenient rule of evidence and with great respect, I am disposed to agree with this rule in such cases. But even then the words of the clause, to the effect that the test is the value of the right, title or interest to or in the immovable property must not be lost sight of. In ordinary cases it is a convenient rule to adopt for the ascertainment of the value of a right, title or interest to or in immovable property. The first case cited before us was 64 I C 126 (3), a Single Bench decision of the Nagpur Judicial Commissioner, where it was held that a transfer of immovable property in lieu of dower amounts to a sale and can only be effected by a registered document as required by S. 54, Transfer of Property Act, and that when it is not so effected, the transaction conveys no title to the transferee. It was contended on behalf of the plaintiff that this authority did not apply to the present case as it came within the provisions of S. 54, Transfer of Property Act, and not within S. 17 (1) (b), Registration Act. The words in S. 54 are as follows :

A transfer by sale in the case of tangible immovable property of the value of Rs. 100 and upwards can be made only by a registered instrument.

The words "of the value of Rs. 100, and upwards" are the same in the two sections. For this reason it was urged that if a deed is written and the value is over Rs. 100, the position is the same under S. 17 (1) (b), Registration Act, or S. 54, T. P. Act. This appears to me to be correct. Under either Act, if a deed is written, what has to be seen according to the Acts is whether the value of the immovable property is Rs. 100, and upwards. The authority mentioned is thus in favour of the appellant.

A Single Judge of the Punjab Chief Court held in 90 P L R 1904 (4), that a deed of sale by a husband in favour of his wife in lieu of dower requires registration when the interest affected by the document exceeds Rs. 100. This is also directly in favour of the appellant. The

3. *Fahmid-un-nissa v. Hiralal*, 1921 Nag 84=64 I C 126=17 N L R 103.

4. *Bhagan v. Hari Mal*, (1904) 90 P L R 1904.

next case is a Division Bench judgment of the Punjab Chief Court reported in 27 I C 562 (5). That was a case where a husband transferred half of his moveable and immoveable property in lieu of haq mehr sharai. In this document no specific sum was mentioned, but in my judgment haq mehr sharai must be taken to be a specific sum, as it is a sum fixed by law. It is usually taken to be Rs. 32 and certainly it is less than Rs. 100. In the judgment, it is simply remarked that it follows from the facts that the dower was less than Rs. 100, that the deed was admissible in evidence, apart from the value of the property transferred. There is no discussion of the question, or of the section and no authority is mentioned. This judgment was followed in an unreported case of this High Court where also there was no discussion. This case is First Appeal No. 2405 of 1924 (6). Apart from 1 P R 1906 (7), which I do not propose to discuss as it does not seem to me to be in point, no other authority was mentioned at the Bar.

Coming now to the hiba-bil-iwaz in this case, dated 20th July 1924, the amount of dower is not stated in the document. It simply states that the house and half house are transferred by the husband to his wife in lieu of her dower. It follows in my judgment that 15 W R 558 (2), has no application to the present case, as the document does not set out what the property was transferred for. There is no reason, therefore, to depart from the plain words of S. 17 (1) (b) to the effect that it is the value of the right, title or interest to or in the immoveable property that determines whether the document is compulsorily registrable or not; or to take it as a convenient rule that the consideration stated should be taken to be the value of the property; for none is stated. An enquiry has to be conducted and that enquiry should, therefore, be as stated in S. 17 (1) (b), what is the value of the immoveable property transferred. Not only is it an easier enquiry, but it is the enquiry enjoined by the section; 27 I C 592 (5), and Civil Appeal No. 2405 of

1924 (6) are in this view of the case clearly distinguishable. Apart from that, as at present advised, with great respect, I am not prepared to accept the view taken in them; while the reasoning in 15 W R 558 (2) does not in my judgment apply to the case of a hiba-bil-iwaz, which is only tantamount to a sale but has also some of the incidents of a gift. I am further clear that in the present case where there is no amount of consideration mentioned in the document, the enquiry must be as to what the value of the property is or was and not what dower fixed was. Had it been a simple gift, the deed would be compulsorily registrable under S. 17 (1) (a), Registration Act. To hold otherwise in a case like the present, would amount in my judgment to ignoring the law. On this view of the case also, therefore, the appeal must succeed and the plaintiff's suit be dismissed.

The next point taken by the appellant's counsel before us was that under S. 50, Registration Act, the registered mortgage deed must take precedence against the unregistered hiba-bil-iwaz. That is the law as laid down in S. 50, Registration Act, but it was contended on behalf of the plaintiff that this question could not be raised for the first time in appeal as the doctrine of notice of the prior unregistered document has been tacked on to the law by the Courts in India. This is undoubtedly true. At the same time there is much evidence on the record to show that there was no notice and, had it been necessary, I would have been prepared to remand the case to allow the plaintiff an opportunity to prove that there was notice of her prior unregistered document; of course this question only arises if it is held that the hiba-bil-iwaz did not require registration. I would have allowed the appellant to raise this question as it is a mere question of law so far as S. 50, Registration Act, is worded, though of course the Courts have annexed to the section the equitable doctrine of prior notice. Lastly, it was argued on behalf of the appellant that the hiba-bil-iwaz was merely a colourable transaction entered into to defeat the creditors of the husband. The old S. 53, T. P. Act, which applies to the present case, runs as follows:

Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-

5. Nur Muhammad v. Allah Wasai, 1915 Lah 251=27 I C 562=35 P L R 1915.

6. Chiragh Din Muhammad Ismail v. Bakhtawar, F. A. No. 2405 of 1924, decided on 31st October 1928.

7. Ram Sarup v. Mubarak Singh, (1906) 1 P R 1906.

owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed. Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person and such transfer is made gratuitously, or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Ainslie, J., probably had this principle in view when he made the remark, quoted by me, in 15 W R 558 (2). The plaintiff herself admitted that her husband has no other moveable or immoveable property and that she and her family and her husband have continued to live in the house in dispute without any change. It is also obvious that the transfer was made for a grossly inadequate consideration. Further, the husband has all along been treating the property as his own and mortgaging it: for example, on 21st June 1920, the husband executed a mortgage deed in favour of Nihal Chand, the brother of Gopal Das, for a sum of Rs. 2,000 with respect to the whole house mentioned in the hiba-bil-iwaz. From this document it appears that there was a prior mortgage in favour of the same person registered on 19th March 1917. On 22nd February 1922, the husband executed a promissory note in favour of this Nihal Chand for Rupees 1,700 and Nihal Chand has given evidence that he obtained a decree on this promissory note in 1924 the hiba-bil-iwaz being dated 20th July 1924. Nihal Chand's mortgage was with possession and apparently he took a rent deed from the husband. On this rent deed he obtained a decree for Rs. 86 rent and for the ejectment of the husband from the house. This was on 17th July 1923. Apparently, however, he did not take out execution for ejectment. One Jai Ram (D. W. 2) obtained a decree for Rs. 430 with costs amounting to Rs. 73-14-0 on 23rd June 1924 against the husband. Jai Ram has however stated that this decree was paid by the husband on 20th July 1924, i. e., the very day when the hiba-bil-iwaz was executed. It is an important matter to remember that he could not pay his wife's dower of Rs. 90 on a day when he paid over Rs. 500 to Jai Ram. That, in my opinion, shows that the matter was only a colourable transaction intended to protect the property in the future. It is clear from S. 53, T. P. Act, that the term "creditor"

includes not only creditors at the time of the assignment but also those who subsequently become creditors.

After 20th July 1924, the husband effected other mortgages of the property. One was in favour of the same Nihal Chand for Rs. 99 on 2nd February 1926. There was also a mortgage, not the same as the one in suit in favour of Gopal Das for Rs. 1,000 on 4th March 1926. Nihal Chand obtained another ejectment decree together with a decree for Rs. 6 rent with respect to the whole house on 7th June 1927. It is true that Nihal Chand has been paid all the debts due to him prior to 1924, but the husband still owes him a sum of Rs. 2,000. The plaintiff herself stated that she knew that the husband had been litigating for seven or eight years and that he used to tell her that he was going to the Courts to defend cases pending against him. She further stated that she did not ask for dower prior to this though she had been married for 22 or 23 years but that she asked for it when she found that there was an apprehension of her husband's property being ruined. Nihal Chand (P. W. 3), who was the scribe of the hiba-bil-iwaz, has deposed that the husband told him that the deed was written to save the property from creditors and that he should not mention it to anybody. That was why he did not tell Gopal Das when he witnessed the mortgage deed of 22nd September 1926, in favour of Gopal Das on which he brought his suit. Further, this Nihal Chand has said that nobody was present except the husband when the deed was written. This is corroborated by one of the marginal witnesses, Karam Ilahi, (P. W. 4), who said that the document was not written in his presence and that defendant 2 brought it to his house for him to witness. No other person was present at that time. The other witness to the hiba-bil-iwaz, Abdul Qadir (P. W. 5), has said that both the witnesses were present when Nihal Chand wrote it though he could not remember where it was written. He stated that Karam Ilahi arrived before he did when it was being written. He is evidently a false witness.

On this evidence I have no hesitation in holding that the deed was secretly written and that it was merely a colourable transaction intended to protect the property against the creditors of the husband. For

the reasons given, I would accept the appeal and dismiss the plaintiff's suit with costs throughout.

Agha Haidar, J.—(6th March 1934)
—This appeal arises out of a suit for a declaration that the house in dispute is owned and possessed by the plaintiff, Mt. Sakina Bibi, and is not liable to sale in execution of a decree obtained by Gopal Das, defendant 1, against Shah Muhammad, defendant 2. The trial Court decreed the plaintiff's suit and Gopal Das, defendant 1, has come up in appeal to this Court. Shah Muhammad, respondent 2, is the husband of the plaintiff. On 22nd September 1926, Shah Muhammad executed a mortgage-deed, Ex. D-1, in favour of Gopal Das, defendant 1, for Rs. 5,300 mortgaging certain land which formed the subject-matter of a pre-emption suit instituted by him (Shah Muhammad, defendant 2) as a result of the sale by one Sana Ullah, the nephew of Shah Muhammad, in favour of Abdul Aziz. The object of the pre-emption suit apparently was to keep the land which had been sold by Sana Ullah in the family. Besides the pre-empted land, Shah Muhammad also included in the mortgage half a share in a certain house. The pre-emption suit was decreed, but on appeal the amount of consideration was increased by a sum of Rs. 6,200, thus necessitating a further loan from Gopal Das, defendant 1, under a mortgage-deed, Ex. D-3, dated 31st January 1927. With this mortgage we are not concerned. The sum of Rs. 5,300 was not received by Shah Muhammad but was left with Gopal Das for depositing in Court. It was apparently deposited and Counsel for the respondents has made a statement at the Bar that Gopal Das has now taken it out. This is, however, by the way. In the meantime Gopal Das obtained a decree on the foot of the mortgage-deed, Ex. D-1. When he proceeded to execute the decree against the half share in the house mortgaged to him, the plaintiff brought the present suit alleging that on 20th July 1924, her husband, defendant 2 had given to her in lieu of her dower-debt the half share in the house now in dispute and another house with which we are not concerned, and that the mortgage-deed, Ex. D-1, and all the proceedings taken thereunder by defendant 1 cannot affect her proprietary rights in the property.

The main pleas were contained in para.

1 of the written statement filed by defendant 1 who pleaded that the plaintiff was not an owner and in possession of the house in dispute nor had the same been given to her in lieu of dower. It was further pleaded that the document, Ex. P-1, relied upon by the plaintiff, was not in fact acted upon and that if any instrument was executed in bad faith and collusively to defeat the rights of the creditors, the same was not binding upon him. As already stated, in the present litigation we are concerned only with half a share in the house mentioned in the mortgage-deed, Ex. D-1. The statements of the Counsel for the parties were recorded on 6th December 1928. The plaintiff's counsel stated that the house in dispute was more than Rs. 100 in value when the document Ex. P-1 was executed, and, as the amount of dower which formed the consideration for the transfer was Rs. 90 the document did not require registration even though the price of the house was more than Rs. 100. Counsel for the defendant Gopal Das stated that the house was worth more than Rs. 100, and that the document, Ex. P-1, was not admissible in evidence for want of registration even if the consideration for it was less than Rs. 100. The plaintiff was examined on commission. She stated that she had been married to defendant 2 some 22 or 23 years ago and bore him children. She says that the amount of her dower, both prompt and deferred was Rs. 90 and although no writing was executed regarding it at the time of her marriage about four and a half years ago her husband gave her one entire house and half a portion of another house, now in dispute in lieu of her dower (Ex. P-1). She professes ignorance as to the value of the house in suit. She has led evidence as to the amount of her dower such evidence being clearly admissible and the point in fact was not disputed.

Nihal Chand, P. W. 3, is the scribe of the document Ex. P-1. He says that the document is in his handwriting. He further says that the document was written by him at the instance of defendant 2 in favour of the plaintiff. In cross-examination he has stated that the whole house was worth about Rs. 5,000 while the value of the half share in another house was about Rs. 1,500. He has further stated that the amount of the dower was not mentioned in the deed

and, on his enquiring how much it was defendant 2 told him that, if the amount of dower was stated at more than Rs. 100 the document would become registrable. He is also one of the marginal witnesses to the document Ex. D-1, which gave rise to the present suit and he attested it before the Sub-Registrar. He attested the additional mortgage-deed Ex. D-3 as a witness and also the rent deed bearing the same date as Ex. D-3. Then a question was put to the witness as to why the document now in dispute Ex. P-1 was written in spite of the facts stated by him. This question had no point whatsoever because the documents to which the witness had made a reference were all of a date subsequent to Ex. P-1. He however vouchsafed a reply which was all that the counsel for defendant 1 wanted, saying that defendant 2 wished to save the house from creditors and had, therefore enjoined him not to mention Ex. P-1 to anybody and that was the reason why he did not mention it to defendant 1 on any occasion, although he was a witness to the mortgage-deed Ex. D-1. This witness was produced by the plaintiff merely to formally prove the document Ex. P-1, in order to make out that he was not on friendly terms with defendant 1.

The witness in the opening sentence of his cross-examination stated that he along with another man had been tried for murder and that Nihal Chand, brother of defendant 1, had given evidence against him. He does not give the time when he was implicated in the murder charge. Whatever may have been the mutual relation of the witness and defendant 1 at the time of the alleged murder case, about which we know nothing more, the fact remains that he had attested several of the documents in which defendant 1 was very much interested as a marginal witness, so that, if there were any strained relations between the witness and defendant 1, they were a thing of the past and their subsequent relations were confidential and friendly. I have no doubt in my mind that this witness has been won over by defendant 1 and has given his evidence against the plaintiff at his instance. Muhammad Sharif, P. W. 1, and Muhammad Said, P. W. 2, both nephews of defendant 2, have stated that they were present at the marriage of Mt. Sakina Bibi with defendant 2 and that

the amount of dower fixed was Rs. 90. They are both persons who, in the ordinary course of events, were likely to be present at the time of the marriage of defendant 2, and I do not see any reason why their testimony should not be accepted.

As regards the value of the house itself, there is considerable divergence of opinion among the witnesses for the parties. But for the purposes of the present case, I accept the admission of the plaintiff's counsel that the value of the houses transferred under the document Ex. P-1 was more than Rs. 100. The learned counsel for the appellant argued in the first place that this document was executed in order to defeat and defraud creditors. I repeatedly asked counsel to point out any evidence on the record showing that, at the date of the execution of Ex. P-1, Shah Muhammad was indebted to anybody. In fact, two of the defendant's witnesses, namely, Nihal Chand, D. W. 1, and Jai Ram, D. W. 2 have both stated that the decrees, which they had obtained against defendant 2, had been satisfied at or about the time when Ex. P-1 was executed. It is true that defendant 2 had executed a mortgage-deed (Ex. D. W. 1-3) dated 2nd February 1926, for Rs. 99 in favour of Nihal Chand, brother of defendant 1, and another mortgage-deed dated 4th March 1926, for Rs. 1,000 in favour of defendant 1. But these documents were executed long after the date of Ex. P-1 and are therefore of no value for the purpose of proving that defendant 2 had executed Ex. P-1 in favour of the plaintiff in order to defeat or defraud his creditors, for the simple reason that there were no creditors at the time. Stress was laid upon a statement made by Mt. Sakina Bibi in her cross-examination when she said that she had not asked for dower during all these years, but when she found that there was apprehension of her husband's property being ruined, she demanded her dower fearing lest her right in respect thereof might be destroyed. This does not necessarily mean the indebtedness of the husband or that he was financially in embarrassed circumstances at the time.

It may merely mean that the husband was improvident and had been spending money recklessly and, therefore the lady obtained a transfer of property from him

under the document Ex. P/1, in lieu of her dower.

The next contention raised by the counsel for the appellant was that the document, Ex. P-1 required registration under the provisions of S. 17 (1) (b), Registration Act, and that being unregistered, it could not affect any immovable property comprised therein or be received as evidence of any transaction affecting any such property. Reliance was placed upon a single Judge decision reported as 90 P L R 1904 (4) where it was laid down that a transfer by the husband of immovable property to his wife in lieu of dower was a transaction of sale and not gift and that for the purpose of determining whether the document was registrable or not under S. 17, Registration Act 3 of 1877, it was necessary to ascertain the value of the interest sought to be conveyed. On the finding that the value of the property in the case was over Rs. 100 the document was held to be inadmissible in evidence. This case undoubtedly supports the contention of the appellant. Mr. Badri Das also relied upon another single Judge decision reported as 1 P R 1906 (7). In that case there was an assignment of a mortgage of immovable property for a consideration of less than Rs. 100 the original mortgage being for Rs. 225. The learned Judge followed and entirely agreed with the law as laid down in 15 W R 558 (2) (to be presently noted) which he rightly interpreted as laying down that the necessity for registration must be determined by the value of the consideration stated in the deed and not by an enquiry into the value of the property. The learned Judge however went on to observe that an assignment of a mortgage of immovable property where the amount secured on the mortgage was Rs. 225, for a consideration of less than Rs. 100, must be regarded as an assignment of the property covered by the mortgage and of the value stated therein, namely Rs. 225, and as such required registration and was not admissible in evidence under S. 49, Registration Act, if unregistered. With the utmost respect I find it difficult to follow the reasoning and the distinction sought to be drawn here.

There is however a Division Bench decision reported as 27 I C 562 (5) where the learned Judges, while dealing with the provisions of S. 17, Registration Act

16 of 1908, held that according to Mahomedan law, a gift by the husband of landed property in lieu of dower in favour of his wife, was tantamount to a sale and consequently such a deed of gift when the dower was less than Rs. 100 did not require registration although the value of the immovable property thus transferred exceeded Rs. 100, and as such, was admissible in evidence.

In an unreported case Civil Appeal No. 2405 of 1924 (6), decided by a Division Bench of this Court of which I was a member, the view of law as laid down in the last mentioned case was accepted and followed. No other authority has been cited and I do not feel disposed, on the cases placed before the Court, to alter the view which I expressed in the unreported decision and to which I adhere. The case in 15 W R 558 (2), is instructive and the general principles of the relevant law are fully and carefully discussed in it. I entirely agree with the view expressed by the learned Judges and respectfully follow the same. The value of the property fluctuates from time to time and different persons can honestly form very various estimates of it—in the present case they range from Rs. 600 up to Rs. 7,000. Even at the moment when a document of transfer is executed, it is in many cases difficult to decide as to what is exactly the value of the immovable property covered by it. The importunity of the creditor and the pliability of the debtor, combined with their mutual relations, may often prove to be important factors in determining the value of the transferred property by the parties concerned. In such cases the Court in which the document is produced cannot ordinarily undertake an investigation into the price of the interest in immovable property sought to be assigned, as against the value which the contracting parties had agreed to put upon it. This being my opinion the rule enunciated in 15 W R 558 (2) appears to be the correct one and the necessity for registration must therefore be determined by the consideration mentioned in the document. The question of the inadequacy of consideration can only arise in connexion with a dispute as regards the bona fides of the transaction. In the present case nothing has been pointed out by the learned counsel for the appellant to prove that the document Ex. P-1 did not re-

present a bona fide transaction. In fact the absence of any debts due by defendant 2 to anyone at or about the time the document, Ex. P-1, was executed shows that the transaction was a bona fide one.

It was also argued that defendant 2 was living all the time with the plaintiff in the house in question, and that therefore the transaction embodied in Ex. P-1 was a mere paper transaction and was never in fact acted upon. There is no force in this argument. We cannot lose sight of the fact that defendant 2 and the plaintiff are husband and wife and, as such, have to live together. If a husband has no house of his own, surely he can live with his wife in her house without in any way disturbing her proprietary interests in it. The execution of subsequent mortgages after an interval of two years or so, and of a certain rent deed, is of no consequence because there is no evidence whatsoever that the plaintiff was either aware of their existence or her possession of the house in question under Ex. P-1 was in any way ever disturbed.

Lastly, it was feebly urged that the provisions of S. 50, Registration Act, applied and that the document, Ex. D-1, now merged in the decree under execution, should have priority over the unregistered document, Ex. P-1. The short answer to this argument is that it was never foreshadowed either in the pleadings in the Court below or in the grounds of appeal in this Court. If such a plea had been raised at the proper time and in a proper manner it would have been open to the plaintiff to raise the point of notice which again would have been a matter for evidence. It would therefore be extremely unfair at this stage to allow this plea to be raised since it would necessitate the taking of additional evidence bearing in mind that the suit had been instituted on 21st July 1927. This contention therefore cannot be entertained. The result is that I would affirm the decree of the Senior Subordinate Judge, Gujranwala, dated 12th July 1929, and dismiss with costs the appeal preferred by the defendant-appellant.

Monroe, J.—(28th May 1934)—The question which arises in this case is whether a mortgage deed of 22nd September 1926, made by Shah Muhammad, defendant 2, in favour of Gopal Das, defendant

1, for Rs. 5,300 on foot of which Gopal Das had already obtained a decree against Shah Muhammad is to prevail over a transfer of part of the mortgaged property by unregistered deed of 20th July 1924, made by Shah Muhammad in favour of the plaintiff Mt. Sakina Bibi, wife of Shah Muhammad, in lieu of dower. The amount of the dower was not specified in the deed of transfer. Oral evidence was produced to show that the amount of the dower fixed at the time of the marriage between Mt. Sakina Bibi and Shah Muhammad was Rs. 90. Evidence produced by defendant 1 has established that the value of the property in question far exceeds Rs. 100, and this fact is not now contested. This appeal has been heard by Addison, J., and Agha Haidar, J., who have differed on all the points raised in it. The first point of difference is that Addison, J., has held that the deed of transfer was compulsorily registrable under S. 17, Registration Act, on the ground that the value of the property transferred exceeded Rs. 100, and Agha Haidar, J., has held that this deed did not require registration. Now, it is admitted that the transaction effected by the deed of transfer was a sale: see 27 I C 562 (5). The provisions of S. 17, Registration Act, require that every non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether, vested or contingent, of the value of Rs. 100 and upwards to or in immovable property shall be registered. In view of decisions which I shall discuss, I must emphasise that the test is the value of the property transferred and not the amount or value of the consideration for the transfer. The plaintiff however relies on the decisions that I have mentioned, and argues that in the present case the amount of the dower being less than Rs. 100 the section does not apply. The first case is 15 W R 558 (2), decided by a Division Bench of the High Court of Calcutta in 1871 of which the head-note is:

The necessity for registration must be determined by the value of the consideration stated in the deed.

The law in force (Act 20 of 1866) at the date in question was the same as that laid down in the Registration Act now in force. In this case the consideration stated

in the deed was less than Rs. 100. It will be observed that the head-note boldly substitutes the value of the consideration for the value of the property transferred and its phraseology is justified by the text of the judgments. The leading judgment first refers to the fact that in an earlier Registration Act (16 of 1864) there was a provision that the value of any right, title or interest in any immovable property created, declared, transferred or extinguished by any instrument shall be taken to be the value of the stamp affixed thereto, etc. No such provision is contained in the Registration Act now in force and I am therefore unable to see how the question now arising is affected by its previous existence. The first part of the argument in this judgment is entirely unconvincing. The next branch of the argument is based on the inconvenience of making enquiries into the value of property in each case in which this question arises.

The argument *ab inconvenienti* is a dangerous one, if it is to be used as a ground for a refusal to apply the clear direction of a statute. I agree that very often "value of property" and "amount or value of consideration" will be the same; if the legislature had intended 'consideration', that term would have been used, but it seems to me that the term was chosen with ease so that the end desired—the suppression of fraud—might not be evaded in cases such as the present. Finally, the judgment quotes a passage from Story's Equity Jurisprudence which deals with the effect of inadequacy of consideration in equity and which has no bearing on the point at issue. In my opinion the reasoning on which this decision is based is bad; it disregards the clear terms of the statute. In 27 I C 562 (5), a decision of the Punjab Chief Court, the question arose whether registration was necessary of a deed transferring property from a husband to his wife in lieu of dower: the amount of dower was not stated in the deed but being *haq mahr-i-sharai* was less than Rs. 100. The question was not discussed: the learned Judges assumed that because the consideration was less than Rs. 100 the deed was not compulsorily registrable. In Civil Appeal No. 2405 of 1924 in this Court the transfer was held to be in lieu of *sharai* dower, the amount of which is a sum well under

Rs. 100. On the authority of 27 I C 562 (5) it was held that the deed of transfer did not require registration. Against this view is the decision in 90 P L R 1904 (4), the decision of a Single Judge of the Punjab Chief Court, the learned Judge, finding that the interest transferred in lieu of dower exceeded Rs. 100 was content to follow the words of the statute: apparently no cases were cited to him.

It seems therefore that 15 W R 558 (2) is the only case in which any attempt has been made to discuss this question and it has been once followed in this Court with any critical examination of the reasoning. I have no hesitation in making a choice between the mandatory provisions of the statute and the decision in 15 W R 558 (2). It is not our province to substitute another test for that laid down by the legislature, whether for reasons of convenience or by applying equitable rules evolved for other purposes. I agree with Addison, J., that in the present case where the amount of the consideration is not mentioned in the deed, the enquiry must be what was the value of the property and not what was the amount of the dower, but in my opinion this is only an application of the rule laid down by the statute that whether the document requires registration or not must be determined by the value of the property transferred and not by the value or amount of the consideration for the transfer. As in the present case the value of the property transferred far exceeded Rs. 100, I hold that the deed of transfer required registration and that not having been registered, it was not admissible in evidence and the mortgage of 22nd September 1926 prevails. It is unnecessary for me therefore to consider the other points raised by the appellant, which also Addison, J., has decided in his favour. I would allow this appeal and dismiss the plaintiff's suit with costs in the trial Court and of this appeal.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 316

ADDISON AND ABDUL RASHID, JJ.
Dhani Ram and another—Appellants.
v.

(Firm) *Sri Gopal-Lachhman Das and another*—Defendants—Respondents.

First Appeal No. 2001 of 1928, Decided on 28th May 1934, from decrees of Senior Sub-Judge, Amritsar, D/- 21st May 1928.

Partnership—Partnership dissolved — Notice of dissolution not given—Person having dealing with undissolved firm advancing money to partner in the name of firm—Such person not having any notice of dissolution—Retired partner is also liable for such advance—Notice on old customer and new customer, difference between.

Where after a dissolution of partnership, the business is continued in the firm name, a partner who has retired at the dissolution is liable upon a contract made by the new firm with a person who has previously dealt with the old firm unless that person has received notice of the dissolution. Even though public notice by advertisement has been given, an additional personal notice is necessary in the case of old customers, while in the case of the new customers a public notice would be quite sufficient: 1929 P C 132, *Rel. on.* [P 318 C 2]

M. C. Mahajan and Mehr Chand Sud
—for Appellants.

Kishen Dayal and Shamsheer Bahadur
—for Respondents.

Abdul Rashid, J.—This appeal arises out of an action brought by the firm Dhani Ram-Mani Ram against the firm Sri Gopal-Lachhman Das for recovery of Rs. 5,318-14-0 on the basis of a promissory note. The allegations of the plaintiffs were that on 22nd November 1923, the firm of the defendants borrowed a sum of Rs. 4,879 from the plaintiffs, and agreed to pay interest at the rate of Re. 1 per cent per mensem, that the defendants had repaid Rs. 1,000 only and that a sum of Rs. 5,318-14-0 was due from them. Sri Gopal defendant pleaded, inter alia, that there was no firm known as Sri Gopal-Lachhman Das in existence at the time of the institution of the suit, that such a firm had previously existed, but that a dissolution had taken place on 18th February 1921, and that since that day the firm had ceased to exist. It was further pleaded that the fact that he had separated from Lachhman Das in 1921, was known to the plaintiffs as well as other persons. In his statement, recorded before the framing of the issues, Sri Gopal deposed that he was only a sleeping member of the firm, that his brother Chhaju Ram used to check the accounts, and that he also checked the accounts when he was practising as a vakil at Jullunder. According to him the business was carried on by Lachhman Das, but he also used to give some instructions. Lachhman Das did not put in a written statement. He made a statement on 7th January 1927, to the effect that he had executed the

promissory note (Ex. P-1), but had not received any consideration. The trial Court held that the dissolution of the firm Sri Gopal-Lachhman Das had taken place on 18th February 1921, that, after that date Lachhman Das alone was the owner of the firm Sri Gopal-Lachhman Das and that no notice of the dissolution was given to the public. On these findings the suit was dismissed against Sri Gopal and a decree for the full amount was awarded against Lachhman Das. The plaintiffs have preferred an appeal to this Court in order to obtain a decree against Sri Gopal defendant also.

It was strenuously urged on behalf of the appellants that, as the lower Court had held that there was no proof that notice of dissolution was given to the public, or that the dissolution was known to the plaintiffs, it was incumbent on the trial Court to pass a decree against Sri Gopal as well as Lachhman Das. Reliance was placed in this connexion on S. 264, Contract Act, which runs in the following terms:

Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution.

In support of this contention the learned counsel for the appellants invited our attention to the case of 143 I C 589 (1). The present defendants were the defendants in the reported case also, and it was held that had the above firm been a going concern at the time of the execution of the hundi, the mere fact that Sri Gopal had retired from it some years before, would not have absolved him from liability unless the plaintiffs had notice of the dissolution. It was observed however that as Lachhman Das a quondam partner of a defunct firm (which had long ceased to do any business) had raised a new loan, wrongly describing himself as the representative of the firm there was no presumption of implied agency such as was applicable to the case of a going concern. This case is not of much assistance as the observations regarding the liability of Sri Gopal were merely obiter dicta, the loan in that case having been raised when admittedly Lachhman Das had ceased to carry on business in the name of Sri Go-

1. Harbhajan Singh-Sohan Singh v. Sri Gopal-Lachhman Das, 1933 Lah 417=143 I C 589=14 Lah 188=34 P L R 394.

pal-Lachhman Das. In 91 I C 824 (2) it was argued on behalf of the appellants that S. 264 applied only to persons who dealt with the firm before the dissolution, and therefore the plaintiff, who had no dealings with the firm before the dissolution, was not entitled to notice, and he could make liable only those persons who were in fact partners at the time the hundis were executed. This contention was repelled by Sanderson, C. J., who observed as follows:

In the first place the section says 'persons dealing with a firm.' It does not say 'persons dealing with a firm before its dissolution,' and, I see no reason why the words 'before its dissolution' should be interpolated in the section.

Buckland, J. concurred with this interpretation of S. 264, Contract Act. In 59 Cal 40 (3) it was held that persons who were not known to be partners were not excluded from the operation of S. 264, Contract Act, and could not escape liability in the absence of notice. Rankin, C. J., made the following observations at p. 53:

I do not agree with all that was said by Beaman, J., but I am entirely unable to say that there is any sufficient reason to cut down the prima facie and direct meaning of the words of this section so as to exclude from its operation persons who were not known to be partners. It is quite true that the principles of agency to be found in the Contract Act and in S. 115, Evidence Act, would not by themselves take one so far as S. 264, on this footing, takes us. That is very likely why S. 264 was specially enacted with reference to the particular case of partnership. * * * It is to my mind not paradoxical or, in any way, impossible to suppose that the Legislature meant to say that if a firm is dissolved and no notice is given, and people continue to trade with the firm under the old firm's name they are not to be affected by a secret dissolution.

While I find myself in respectful agreement with the observations of Rankin, C. J., I must hold that it is established on the present record that the plaintiffs knew that Sri Gopal was one of the partners of the firm Sri Gopal-Lachhman Das, and that even after the dissolution Lachhman Das carried on business in the name of Sri Gopal-Lachhman Das until 1924. In 115 I C 707 (4) it was

laid down by their Lordships of the Privy Council that where after a dissolution of partnership the business is continued in the same firm name, a partner who has retired at the dissolution is liable upon a contract made by the new firm with a person who has previously dealt with the old firm unless that person has received notice of the dissolution, even though public notice by advertisement has been given. It follows therefore that an additional personal notice is necessary in the case of old customers, while in the case of the new customers a public notice would be quite sufficient.

On behalf of the respondents reliance was placed on 78 P R 1903 (5), 68 I C 932 (6) and 146 I C 847 (7). The case reported as 115 I C 707 (4) is however not of any great assistance to the respondents as in that case it was definitely established that the person who was sought to be charged with liability as a partner had no dealings with the plaintiff's firm prior to the dissolution and also the plaintiff's firm was not even aware that he was a partner in the defendant's firm. In 68 I C 932 (6) it was laid down that the mere fact that the continuing partner was allowed to carry on business in the old firm's name, would not render the retired partner liable for debts contracted by the firm long after his retirement. These observations must however be regarded as obiter as it was found in that case that the plaintiffs had full knowledge of the dissolution and knew as a fact that the partner sought to be made liable had definitely retired from partnership a long time before liability was incurred by the other partner in the name of the firm. 146 I C 847 (7) is a Single Bench ruling, and it was observed therein that even if it was held that S. 264 applied to new customers, the appellants had still to prove that they knew that the objectors were partners in the firm when they started their dealings. This shows that there was no indication in that case that the person sought to be made liable as a partner was known to the plaintiffs to be a partner of the firm at any time. The observations of Bea-

2. Jagal Chandra Bhattacharjee v. Gunny Haji Ahmad, 1926 Cal 271=91 I C 824=53 Cal 214=30 C W N 11.

3. Pramatha Chandra Kuer v. Bhagwan Das, 1932 Cal 236=136 I C 529=59 Cal 40=35 C W N 705=54 C L J 516.

4. Jwaladutt R. Pallani v. Bansilal Motilal, 1929 P C 132=115 I C 707=56 I A 174=53 Bom 414 (P C).

5. Chand Mal v. Ganga Ram (1903) 78 P R 1903.

6. Bichhiah Lal v. Munshi Ram, 1922 Lah 466=68 I C 932.

7. Firm Nanna Mal-Banarsi Das v. Bal Mokand, 1933 Lah 591=146 I C 847=34 P L R 1022.

man, J., in 30 I C 864 (8) have been fully discussed in 59 Cal 40 (3), and it is therefore unnecessary to refer to them in detail. For the reasons given above, I hold that this case is fully covered by the provisions of S. 264, Contract Act, and that the lower Court has erred in dismissing the suit against Sri Gopal.

It was urged by Mr. Mehr Chand Mahajan on behalf of the appellants that it had not been proved that a dissolution of the firm Sri Gopal-Lachhman Das had taken place on 18th February 1921. He maintained that the terms of the deed of dissolution dated 18th February 1921, showed that so long as the sum of Rupees 26,500 due to Sri Gopal was not paid by Lachhman Das, Sri Gopal was entitled to a share in the profits by receiving a lump sum of Rs. 2,000 a year on that account. Mr. Kishen Dayal however contended that the sum of Rs. 2,000 payable to Sri Gopal was merely interest on Rs. 26,500 due to him at the rate of 7 1/2 per cent per annum. As I have already held that Sri Gopal cannot escape liability in the present case in view of the provisions of S. 264, Contract Act, it is unnecessary to determine whether a complete dissolution took place on 18th February 1921. After considering the whole evidence on the record, I am of opinion, that it has not been established that the finding of the trial Court that the dissolution of the firm Sri Gopal-Lachhman Das took place on 18th February 1921, is incorrect. I therefore hold that the firm was dissolved on 18th February 1921, and that thereafter Lachhman Das alone carried on business in the name of the firm Sri Gopal-Lachhman Das. For the reasons already given, I would accept the appeal and decree the claim of the plaintiffs against Sri Gopal also with costs throughout.

Addison, J.—I agree.

B.D./R.K.

Appeal accepted.

8. Gionani Gorio & Co. v. Vallabhdas Kalianji,
1915 Bom 209=30 I C 864=17 Bom L R 762.

A. I. R. 1936 Lahore 319

ADDISON AND DIN MOHAMMAD, JJ.

Lyallpur Bank, Ltd., in Liquidation

—Plaintiff—Appellant.

v.

Gian Chand—Defendant—Respondent.

Second Appeal No. 700 of 1934, Decided on 23rd November 1934.

(a) Award—Difference settled by arbitration—One party held liable to other assigning a pro-note to other—Adjustment in discharge of award—Subsequently obtaining of decree by filing award in Court—Adjustment of award not affected by decree following it—Suit on pro-note assigned during adjustment of award is maintainable.

A bank had a claim against G. Differences arose between them which were referred to arbitration. An award was made holding G liable as surety for the promissory note of one N, which he had assigned to the bank in part satisfaction of his own liability. Some days later he made a full adjustment of the award with the bank. He re-affirmed his liability as surety for H and in discharge of cash liability he assigned to the bank a promissory note that had been executed in his favour by one D. Later on the bank applied to the proper Court to have the award filed and judgment and decree followed in accordance with this award. Afterwards suit was instituted by the bank against both G and D on the basis of the promissory note assigned to the bank:

Held: that the adjustment of award was not in any way affected by the fact that some time later the award of which a full adjustment had been made was filed in Court. This adjustment was quite valid and gave the bank a right to sue on the promissory note in suit: 1921 Lah 248, *Disting.* [P 320 C 1, 2]

(b) Award — *Compromise pendente lite* differs from adjustment of award—Decree on award is decree of domestic Court re-affirmed by Court of law—Award if completely adjusted, bars execution of decree based on it.

A compromise pendente lite does not stand on the same footing as an adjustment made for the satisfaction of an award. Under the provisions of Sch. 2, Civil P. C., a party, as it were obtains a domestic decree in the shape of an award and after having obtained it, is further entitled to move a competent Court to have the award filed in Court. This merely enables such party to have a decree of a domestic Court re-confirmed by a Court of law and if the award has been completely adjusted, it would surely bar the party entitled under the award to re-execute the decree based on it. Even if a compromise pendente lite be liable to be superseded by the decree, the same consideration would not apply to an adjustment made in pursuance of an award if the award was later on made a rule of Court: 1921 Lah 248, *Expl.* [P 320 C 2; P 321 C 1]

Jagan Nath Aggarwal and Shambhu Lal Puri—for Appellant.

Achhru Ram—for Respondent.

Din Mohammad, J.—The Lyallpur Bank, Ltd., in liquidation had a claim for Rs. 5,000 odd against one Gian Chand of Chiniot. Differences arose between them which were referred to arbitration. On 4th December 1929, an award was made holding Gian Chand liable as surety for the promissory-note of one Nazar Muhammad which he had assigned to the

Bank in part satisfaction of his own liability. In addition to this he was required to pay Rs. 2,800 by monthly instalments of Rs. 100 each. On 6th December 1929, he made a full adjustment of the award with the bank. He re-affirmed his liability as surety for Nazar Muhammad and in discharge of his cash liability he assigned to the bank a promissory note dated 24th November 1929, for Rs. 1,900 that had been executed in his favour by one Dost Muhammad. He also paid Rs. 720 cash and secured a remission for the balance. On 2nd June 1930, the bank applied to the proper Court to have the award filed and on 23rd August 1930, judgment and decree followed in accordance with this award. On 22nd November 1932, the present suit was instituted by the bank against both Gian Chand and Dost Muhammad for recovery of Rs. 2,976-9-0 on the basis of the promissory-note dated 14th November 1929. Dost Muhammad did not take any interest in the suit but Gian Chand contested his liability on various grounds. The trial Court rejected his defence and passed a decree for the full amount against both the defendants. On appeal the learned District Judge reversed this decision on the ground that the decree dated 23rd August 1930, declaring the bank entitled to Rs. 2,800 from Gian Chand superseded the previous agreement dated 6th December 1929, and as the assignment of the promissory note formed a part of this agreement, the bank was not entitled to bring a suit on its basis.

I may say at once that the learned District Judge appears to me to have taken an erroneous view of the law. The adjustment dated 6th December 1929 was not in any way affected by the fact that some time later the award of which a full adjustment had been made was filed in Court. Under Art. 178, Lim. Act, an award can be filed within six months of the date when it is made, and if the reasoning of the learned District Judge be allowed to prevail, it would make every adjustment made towards the award in the meantime invalid and illegal, if immediately before the expiry of six months a party somehow or other considers it necessary to file it in Court. The award in this case declared the relative position of the parties on 4th December 1929, and the decree that fol-

lowed could only be construed in terms of the award; were it not so, the bank would be entitled, on the reasoning employed by the District Judge, to ignore and realize again all sums that it had admittedly received in cash from Gian Chand after the award and before the decree. I am convinced, therefore, that this adjustment was quite valid and gave the bank a right to sue on the promissory note in suit.

It only remains to be seen whether 57 I C 153 (1) is applicable to the facts of this case. In that case the plaintiffs brought a suit against the defendant for recovery of money due to the former by the latter. The evidence was closed on 25th January 1910, and the case was adjourned to 10th February, and again to 28th February. On 9th February, the defendant by way of compromise executed a lease in favour of the plaintiffs of certain land under which their claim was to be adjusted. The plaintiffs, however, did not withdraw their suit and on 28th February, the Court passed a decree in their favour. The plaintiffs having failed to recover their claim sued again for the amount due to them under the lease at a time when their decree had become barred by limitation. It was held that the decree superseded the compromise and the plaintiffs could not sue on the lease to recover the sum which they might have obtained by execution of the decree. Chevis, C. J., who delivered the judgment, remarked that the sole question for them to decide was whether the plaintiffs having obtained a decree on 28th February 1910, and having allowed that decree to become time-barred could now fall back on the terms of the lease executed on 19th February 1910, and get a fresh decree.

In the course of his judgment he observed that the plaintiffs could not have the two rights, both to execute the decree and to enforce the deed, and as they had the right to enforce the decree they could not enforce the terms of the lease. In the first place I consider that a compromise pendente lite does not stand on the same footing as an adjustment made for the satisfaction of an award. Under the provisions of Sch. 2, Civil P. C., a party, as it were, obtains a domestic decree in

1. Hem Raj-Bishen Das v. Dost Muhammad, 1921 Lah 248=57 I C 153=1 Lah 445=136 P L R 1920.

the shape of an award and after having obtained it, is further entitled to move a competent Court to have the award filed in Court. This merely enables such party to have a decree of a domestic Court re-confirmed by a Court of law and if the award has been completely adjusted, as in this case, it would surely bar the party entitled under the award to re-execute the decree based on it. Even if a compromise pendente lite be liable to be superseded by the decree, I do not think the same considerations would apply to an adjustment made in pursuance of an award if six months later the award was made a rule of Court. Secondly, it appears from the report of that case that the learned Judges were mainly impressed by the fact that the plaintiff was seeking a remedy after his remedy under the decree was time-barred. This was however, not the case here. I would, therefore, hold that 57 I C 153 (1) did not bar the present suit. For reasons given, I would accept the appeal. The costs of the appeal here and below will be realizable from Gian Chand only but for the costs of the trial Court both Gian Chand and Dost Muhammad will be jointly responsible to the plaintiff.

Addison, J.—I agree.

B.D./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 321

MONROE AND CURRIE, JJ.

Punjab Zamindars Bank, Ltd. Lyallpur—Plaintiff—Appellant.

v.

Madan Mohan Singh and others—Defendants—Respondents.

Second Appeal No. 398 of 1934, Decided on 14th January 1935, from order of Dist. Judge, Lyallpur, D/- 22nd November 1933.

Principal and Agent—Act of Agent ratified after limitation period—Ratification has no effect.

Where the act of an agent is ratified by the principal but the ratification is made after the expiry of the period of limitation, the ratification has no effect: 1932 Lah 388, *Rel. on.*

(P 322 O 1)

M. L. Puri—for Appellant.

R. P. Khosala—for Respondents.

Monroe, J.—Two appeals No. 398 of 1934 and No. 1949 of 1933 involve the same question, which arises out of the Memorandum and Articles of Association of the Punjab Zamindars Bank Ltd., the appellants. The claim in each case was

1936 L/41 & 42

a money claim by the Bank against the defendant: the Bank sued "through Sardar Desa Singh, Manager of the said Bank," and the first issue in each case was whether Desa Singh had authority to institute the suit. The powers of the Manager are defined by Art. 106 of the Bank's Articles of Association. It is very inelegantly drafted, but I think that the construction is free from doubt. It is drawn in clearly defined paragraphs, the first six of which commence with the words "he will" and go on to give various powers of management: in the sixth and seventh paragraphs, the opening phraseology of the paragraph is changed; the present question arises on the construction of the sixth paragraph—it commences with the words:

He, under the previous sanction of the executive board—specially and generally obtained, will,

it gives power in the first place to demand, collect, receive and give effectual bona fide discharges of all debts, advances and claims: following a comma, the clause goes on,

he will have further the power to take and use all lawful proceedings and means for recovering and receiving the said debts and advances and also to commence and to prosecute and to defend at law all actions, etc.

It will be observed that grammatically the words "under the previous sanction, &c.," refer only to the power of demanding, collecting and receiving and in his argument Mr. Puri has argued that we must not extend these words to the later powers: this would lead to the absurdity that the Manager could commence legal proceedings without having power validly to call in the debt sued for. The paragraph must be read as a whole in the first place—in addition the use of the words 'said' before debts, 'further' and 'also' show a close connection between the separate parts of the paragraphs. I hold, therefore, that all the powers conferred by the paragraph are exercisable only under previous sanction and as, admittedly, there was no executive board and hence no previous sanction, it follows that the Manager had not authority by virtue of Art. 106 to institute the suits. Mr. Puri then argued that the acts of the Manager had been ratified by a resolution of the Board of Directors; but the alleged ratification was made after the period of limitation had expired. On the authority

of 1932 Lah 388 (1) the learned District Judge held that the ratification made after such expiry was of no effect. In my opinion, this finding of the learned Judge is correct and is supported by the authority cited and other authorities. As a result of these findings, the suits were dismissed: they were instituted without proper authority and the claims became barred by limitation before ratification by the Directors. Accordingly, I would dismiss both appeals with costs. The respondents in appeal No. 1949 have filed cross objections claiming that the lower appellate Court should have allowed costs of the trial Court to the defendant: but as the learned trial Judge cannot be said to have exercised his discretion improperly in refusing costs, I would dismiss the cross-objections.

Currie, J.—I agree.

B.D. R.K.

*Appeals and
Cross-objections dismissed.*

1. Secy, Notified Area Committee, Okara v. Kidar Nath, 1932 Lah 388=137 I C 258=33 P L R 356.

*** * A. I. R. 1936 Lahore 322**

**YOUNG, C. J., ADDISON AND TEK
CHAND, JJ.**

Bharat Insurance Co., Ltd.—Petitioner.

v.

*Peoples Bank of Northern India, Ltd.
(In Liquidation)*—Opposite Party.

Civil Misc. Petn. No. 767 of 1935, Decided on 17th December 1935, for leave to appeal to His Majesty in Privy Council against the judgment in civil original No. 7 of 1935, reported in 1935 Lah 779.

*** * Privy Council—Leave to appeal—Company wound up by order of Court on petition from creditor of company—Application for leave to appeal against such order—Application not disclosing name of any respondent—Application is bad in law and should be dismissed—Per F. B.; Tek Chand, J., contra.**

A company was dissolved by an order of the High Court passed on a petition made by one of the creditors of the company. The petition for the winding up of the company was properly made under S. 162/166, Companies Act. An application was filed by one of the contributories of the company wound up, for leave to appeal to the Privy Council against the order of compulsory winding up. This application for leave to appeal was framed similar to the application made for the winding up of the company. This application did not specifically disclose the names of any respondent, although notices were

issued to the Official Liquidator and the original petitioner on whose petition the company was wound up. The point of dispute was if application for leave to appeal was properly constituted and good in law:

Held: (Per Young, C. J. and Addison, J.) that an application for leave to appeal to the Privy Council from an order of winding up of a company is not a proceeding in winding up as contemplated by the rules and orders of the High Court, and must comply with the provisions of R. 1 of the Rules and Orders made by the Lahore High Court contained in Vol. 5, Chap. 8 in addition to the requirements of O. 45, R. 3 (1), Civil P. C. As such each person who is sought to be made a respondent ought to be named in the petition. Moreover the company under winding up orders is also a necessary party which should be named in the petition. In all proceedings there should be a right litigated, a person asserting that right, and a person interested to deny it, i. e. an opposite party. If the petition failed to provide the name of even one respondent, such petition would be wholly bad and ought to be dismissed: 1932 P C 1, Applied. [P 323 C 2; P 324 C 1]

Per Tek Chand, J.—It is no doubt true that, as laid down in S. 166, Companies Act, a petition for the compulsory winding up of a company may be made either by the company itself or contributories. But after proceedings have been taken on such petition and a winding up order passed, the person at whose instance the proceedings were initiated has no special locus in the matter. As enacted in S. 167, Companies Act, an order for winding up a company operates in favour of all the creditors and of all the contributories of the company as if made on a joint petition of a creditor and a contributory. The order is for "the benefit of all concerned." The real parties to the proceedings therefore are not merely the petitioning creditor and the company but the entire body of creditors and contributories, and as a winding up order is made appealable by statute, it follows that any creditor or contributory, who feels dissatisfied with it, may take the matter in appeal. But to such an appeal all the creditors and contributories, as persons affected by the order, sought to be appealed from, are necessary parties, and it is not open to the appellant to pick and choose, and implead a few of them as respondents in the appeal, to the exclusion of the others. But while this is so, it is not necessary that the names and addresses of all these numerous persons should appear at the heading of the memorandum of appeal, which attacks the winding up order. There is no provision of the law which lays down that a memorandum of appeal in such case will not be considered valid, unless it contains, or is accompanied by, a list of all the creditors and contributories. The appeal is sufficiently described if it bears the same title as the original petition and also gives the name or names of the person appealing. Notice to the "opposite party" consisting, as it does, of all the creditors and contributories other than the appellants is served by advertisement in the Government Gazette and one or more public newspapers, and by leaving a copy at the Head Office of the Company if there is one in exist-

tence. It is not necessary, even if it were possible, to effect personal service on all the creditors and contributories. The only person who is given personal notice is the liquidator so that he may be ready to inform (the appellate Court) of any facts and circumstances in relation to the affairs of the company, but he is not a respondent to the appeal, in the real sense of the term. It cannot be expected that in the application for leave to appeal to His Majesty in Council the applicant should mention all the creditors *ex nomine* on the title page. Besides by presenting in a High Court an application under Ss. 109 and 110, Civil P. C., accompanied by the "grounds of appeal," the applicant does not lodge the appeal to His Majesty in Council. The application for leave to appeal is not by any means a new and substantive "cause." It is merely a "miscellaneous application" in the case. Such an application is the "assertion" within the period prescribed by law of the applicant's "intention to exercise the right to appeal" which, he claims, is given to him by statute, and all that he asks for is that this Court should certify that the case fulfils the requirements of S. 110, Civil P. C., as regards "value and nature" and is appealable as a right.

[P 325 C 1, 2; P 326 C 1, 2]

In such an application it is not necessary to repeat in detail the names and addresses of all the parties to the "cause" decided by the Court, against whose order the applicant intends to appeal. All that need be done is to give sufficient indication of the particulars of the case so as to fix its identity, and this may be done by giving either its number or its short title. On the presentation of the application, the relevant record is put up and it is obligatory on the Court to direct that notices be served on the other parties to the cause (as disclosed on the record) to show cause why the certificate should not be granted as laid down in O. 45, R. 3 (2). Omission to give in detail the names of all the parties in applications under S. 109 should not be considered a fatal defect. [P 326 C 2; P 327 C 1]

Achhru Ram—for Petitioner.

Madan Gopal—for Opposite Party.

Bhagwat Dayal—for Official Liquidator.

Young, C. J.—These are two applications under Ss. 109-B and 110, Civil P. C., for leave to appeal to His Majesty in Council against the order of a Full Bench of this Court winding up the Peoples Bank of Northern India, dated 22nd May 1935. The petitioner in one case is Lala Harkishan Lal and in the other the Bharat Insurance Company Ltd.

The petition by Lala Harkishan Lal (No. 796 of 1935) can be dealt with shortly. It was filed by Mr. Dev Raj Sawhney. The power of attorney filed in favour of this Advocate is signed by Mr. Jiwan Lal Gauba as attorney for Lala Harkishan Lal, but there is nothing on the record of this Court to show that Mr. Jiwan Lal Gauba had any authority

from the petitioner to authorise the filing of this petition by Mr. Dev Raj Sawhney. Today Mr. Dev Raj Sawhney has produced what purports to be a copy of a power of attorney signed by Lala Harkishan Lal in favour of Mr. Jiwan Lal Gauba. We cannot however look at this document. Mr. Jiwan Lal Gauba and Mr. Dev Raj Sawhney both had notice that this point would be taken today and the original power of attorney has not been produced. We cannot therefore hear Mr. Dev Raj Sawhney with regard to this petition and it is dismissed. In my opinion the petition of the Bharat Insurance Company, Ltd., must also be dismissed. The petition names no one as respondent. It completely fails to comply with the rules of this Court in Ch. 8, of Vol. 5, of the Rules and Orders. R. 1, is as follows :

An application for leave to appeal to His Majesty in Council shall comply with the requirements of R. 3(1), O. 45, Civil P. C., and contain the following particulars : (a) the name and address of each applicant ; (b) the name and address of each person whom it is proposed to make a respondent ; (c) the High Court in which, and the name of the Judge by whom, the decree complained of was made ; (d) the date when such decree was made ; (e) the value of the subject-matter in dispute in appeal ; and (f) the relief sought by such application ; and shall be signed by the applicant or by some Advocate or Vakil on the rolls of the Court on his behalf.

It has been argued by counsel for the petitioner that these rules have not the force of law and that, therefore they are not binding and that we ought to ignore them. He further argues that under Vol. 2, Ch. 1, Rules and Orders of the High Court, the rules are laid down for proceedings in winding up a company in the High Court and that the heading of this petition is in accordance with the heading given in that Chapter. In my opinion an application for leave to appeal to the Privy Council is not a proceeding in winding up as contemplated by the Rules and Orders of the High Court. If on the other hand it is a proceeding in winding up then R. 95, Vol. 2, would apply. That rule is :

The general practice of the Court shall, in cases, not provided for by the Indian Companies Act, or these rules, and so far as the same is not inconsistent with the said Act or these rules, apply to all proceedings for winding up a company in any Court.

This rule, if applicable, would make the rules framed by the High Court in Vol. 5, Ch. 8, have the force of law and a

petition to His Majesty therefore would have, according to law, to be in the form laid down in that rule. In my opinion, however the winding up rules do not apply. It is difficult to follow the argument of counsel that the rules laid down by the High Court should be ignored. Counsel in support of this argument argues that it would be impossible to make each of the persons, who ought to be a party to this appeal, respondents. The rule however does not make anything impossible. It merely says that among other particulars to be given must be the name and address of each person whom it is proposed to make a respondent. It would have been possible for the petitioner in this case to have made the petitioner in the winding up proceedings a respondent in this petition.

Another obvious respondent was the company (through the Directors), the Privy Council having held in 55 Mad 180 (1) at pp. 192-193 that an appeal had been properly instituted in the company's name. In fact, the company is most affected by a winding up order. Besides, it is elementary that in all proceedings there should be a right litigated, a person asserting that right, and a person interested to deny it, i. e. an opposite party. That respondents must be named is also shown by the provisions of O. 45, R. 3 (2), Civil P. C., which enacts that notice must be served on the opposite party to show cause why the certificate referred to in sub-r. (1) should not be granted. The petition therefore fails to provide the name of even one respondent. Such petition in my view is wholly bad and ought to be dismissed. Counsel finally argues that the petitioner ought to be allowed to amend and to be given further time under S. 5, Lim. Act. I do not think this is a case where any indulgence ought to be shown to the petitioner. The petition itself was filed at the very last minute to bring it within time. If there had been any real desire to file an appeal to the Privy Council and time was of importance the appeal could have been filed very much earlier than it was. I note further that the only persons who appear to object to the orders of the High Court are Lala Harkishan Lal himself who is of course a debtor of the company to a

very large amount, and the Bharat Insurance Company, Limited, which is controlled by Lala Harkishan Lal. Neither the company itself nor the general body of creditors have thought proper to ask for leave to appeal. In my opinion, this petition ought to be dismissed.

Addison, J.—I agree.

Tek Chand, J.—This is an application under Ss. 109 (b) and 110, Civil P. C., presented by the Bharat Insurance Company, Limited for leave to appeal to His Majesty in Council from the order of a Special Bench of this Court, dated 22nd May 1935, ordering the winding up of the Peoples' Bank of Northern India Limited.

The Bank is a joint stock company incorporated under the Companies Act 7 of 1913, having several thousands shareholders who had subscribed over 95 lakhs of rupees of its share-capital, out of which nearly 40 lakhs had been paid up. The number of depositors and other creditors is much larger and to them one and a half crore of rupees in round figures was due at the close of the year 1934. On 22nd January 1935, Lala Madan Gopal, who is a share-holder and also claims to be a creditor, presented in this Court, a petition under Ss. 162/166 of the Act for the compulsory winding up of the company. By order of the Hon'ble the Chief Justice, a Special Bench of three Judges was constituted to hear the petition. The usual advertisements issued in the Punjab Government Gazette and several newspapers, and at the date of hearing the Directors of the Company, several contributories, and over 700 creditors holding deposits of thirty-three lakhs of rupees approximately, opposed the petition, while seven creditors of the value of Rs. 50,000 supported it. One of the opposing contributories was the Bharat Insurance Company, Limited, which holds 3,000 shares in the Company. After lengthy proceedings the Special Bench, on 22nd May 1935, granted the petition and ordered that the Company be wound up by the Court. An Official liquidator was then appointed under S. 175 of the Act for the purpose of conducting the proceedings in the winding up. In accordance with R. 1 of the "winding up Rules" framed by this Court under S. 246, Companies Act, (printed at p. 1 at seq of Ch. 1, Vol. 2, of the Rules and Orders), Lala Madan

1. Ripon Press and Sugar Mills Co. Ltd. v. Gopal Chetty, 1932 P C 1=136 I C 114=58 I A 416=55 Mad 180 (P C).

Gopal had intituled his petition for the compulsory winding-up of the Company as:

In the matter of the Indian Companies Act 7 of 1913, and of the Peoples Bank of Northern India, Limited.

The present application by the Bharat Insurance Company Limited for leave to appeal to His Majesty in Council against the winding-up order was also headed:

In the matter of the Indian Companies Act 7 of 1913, and of the Peoples Bank of Northern India, Limited (in liquidation), Lahore.

In this application no person was specifically named as a respondent. The office, however, issued notices to (1) Lala Madan Gopal, the original petitioner, and (2) the Official Liquidator, to show cause why a certificate under O. 45, Civil P.C., for leave to appeal to His Majesty-in-Council be not granted. The applicant (Bharat Insurance Company Limited) was required to deposit process-fees for service of notices on Lala Madan Gopal and the Liquidator; this was duly done and notices served on them. At the hearing of the application before us, Lala Madan Gopal appeared and raised a preliminary objection that the application was not properly framed inasmuch as neither he, nor the Company, nor any other person had been impleaded by name as respondents in the appeal to His Majesty-in-Council. The objector contends that it was not sufficient for the applicant merely to give at the heading of the application the title of the original petition on which the winding up order was passed. He points out that in every 'cause' there must be a right litigated, a person asserting that right, and an 'opposite party' against whom that right is sought to be enforced and as in this application no 'opposite party' is named, the application is bad and should be dismissed in limine.

The objection appears to me to be based on a misapprehension of the true import and effect of a winding up order as well as of the nature of proceedings on applications made under Ss. 109 and 110, Civil P. C. It is no doubt true that, as laid down in S. 166, Companies Act, a petition for the compulsory winding up of a company may be made either by the company itself or by any creditor or creditors, or contributory or contributories. But after proceedings have been taken on such a petition and a winding-up order passed, the person at whose in-

stance the proceedings were initiated has no special locus in the matter. As enacted in S. 167, Companies Act, an order for winding up a company operates in favour of all the creditors and of all the contributories of the company as if made on a joint petition of a creditor and a contributory. The order is, as observed by Buckley, L. J., a judgment for "the benefit of all concerned." The real parties to the proceedings, therefore, are not merely the petitioning creditor and the company but the entire body of creditors and contributories, and as a winding up order is made appealable by statute, it follows that any creditor or contributory, who feels dissatisfied with it, may take the matter in appeal. But to such an appeal all the creditors and contributories, as persons affected by the order, sought to be appealed from, are necessary parties, and it is not open to the appellant to pick and choose, and implead a few of them as respondents in the appeal, to the exclusion of the others. It is thus clear that the creditors and contributories, other than the person or persons appealing, constitute the 'opposite party' to the appeal, and every one of them is entitled to receive proper notice of the admission of the appeal and to enter appearance and be heard before the appellate Court.

But while this is so, it is not necessary that the names and addresses of all these numerous persons should appear at the heading of the memorandum of appeal, which attacks the winding up order. I am not aware of any provision of the law and indeed none was cited before us by the objector which lays down that a memorandum of appeal in such a case will not be considered valid, unless it contains, or is accompanied by, a list of all the creditors and contributories. The appeal is sufficiently described if it bears the same title as the original petition, i. e. "In the matter of the Indian Companies Act and of the (name of the Co.) Limited" and also gives the name or names of the person appealing. Notice to the 'opposite party' consisting, as it does, of all the creditors and contributories other than the appellants is served by advertisement in the Government Gazette and one or more public newspapers, and by leaving a copy at the head office of the company, if there is one in existence. It is not necessary, even if it were possible, to effect personal

service on all the creditors and contributories. The only person who is given personal notice is the liquidator so that he may, as observed by their Lordships of the Privy Council in 55 Mad 180 (1), at p. 194,

be ready to inform (the appellate Court) of any facts and circumstances in relation to the affairs of the company;

but he is not a respondent to the appeal, in the real sense of the term. In the matter of intituling the memorandum of appeal and effecting service on the "opposite party," the procedure followed in the appellate Court is, so far as may be, the same as that observed in the Court of first instance for the presentation and trial of the original petition for winding up. It is considered that the "opposite party" to that petition is not only the directors of the company, but the entire body of creditors and contributories; and that it is not necessary for the petitioner to give their names and addresses on the title page of the petition, or to file a list thereof with it, and service on them is effected not individually but by public advertisement. It may be stated that this procedure was duly followed in the objector's petition for the winding-up of this company and when a number of share-holders and creditors appeared at the hearing to support or oppose the petition, the title of the case was not amended so as to add the "supporters" as co-petitioners and to enter the names of the "opponents" as respondents to the petition. The case continued to be intituled as before, namely "In the matter of the Indian Companies Act and of the Peoples Bank of Northern India, Ltd." and this is the only heading given in the certified copy of the judgment of the Special Bench supplied to the Bharat Insurance Company, Ltd., which Mr. Achhru Ram produced before us. Indeed, it appears that no consolidated list of the opposing or supporting creditors and contributories was ever prepared or is available even now; their names will be found scattered all over the record and it will require considerable effort to collect them at one place. In these circumstances, it could not be expected that in the application for leave to appeal to His Majesty in Council the applicant should have mentioned all the creditors conomine on the title page.

Another fallacy underlying the objec-

tion is the assumption that the application before us is a "substantive" cause. It is hardly necessary to say that this is not so. By presenting in this Court the application under Ss. 109 and 110, Civil P. C., accompanied by the "grounds of appeal," the applicant does not lodge the appeal to His Majesty in Council. That will be done in England after leave has been given, the record printed, and transmitted to that country. It is laid down in R. 29 of the "Judicial Committee Rules, 1925" that the "Petition of Appeal" may be lodged within four months of the arrival of the record in England, if it is printed in India, or within one month of the date of the completion of the printing thereof in England: see Bentwich's Privy Council Practice, pp. 210 and 351. The present application before us is not by any means a new and substantive "cause." It is merely a "miscellaneous application" in the case decided by the Special Bench and is truly described and numbered as such (Civil Misc. No. 767 of 1935). Such an application is, as observed by Bentwich (p. 141) the "assertion" within the period prescribed by law of the applicant's "intention to exercise the right to appeal," which, he claims, is given to him by statute, and all that he asks for is that this Court should certify that the case fulfils the requirements of S. 110, Civil P. C., as regards 'value and nature' and is appealable as of right. In such an application it is not necessary to repeat in detail the names and addresses of all the parties to the 'cause' decided by the Court, against whose order the applicant intends to appeal. All that need be done is to give sufficient indication of the particulars of the case so as to fix its identity, and this may be done by giving either its number or its short title. On the presentation of the application, the relevant record is put up and it is obligatory on the Court to direct that notices be served on the other parties to the cause (as disclosed on the record) to show cause why the certificate should not be granted as laid down in O. 45, R. 3 (2).

An application for grant of leave to appeal to His Majesty-in-Council is as much an application in the original 'cause' as applications for having *ex parte* decrees set aside, or those for review of judgment, or for grant of certificates under S. 41 (3), Punjab Courts Act, for preferring second

appeals to the High Court on questions of custom, or for certificates to appeal under Cl. 10 of the Letters Patent. It is conceded that in none of these, is it necessary for the the applicant to set out at length in the heading of the application the names and addresses of all the parties to the original suit or appeal (as the case may be). It is sufficient if the number of the cause or its short title is given correctly. If this is so, I fail to see why the omission to give in detail the names of all the parties in applications under S. 109 should be considered a fatal defect. The objector relies strongly on R. 1 of the Rules and Orders, Vol. 5, Ch. 8-A, which states that an application for leave to appeal to His Majesty-in-Council shall contain, inter alia, the name and address of each person whom it is proposed to make a respondent to the appeal. The rules in this Chapter, however, have no statutory force. They are by no means mandatory but are merely directory and may be modified according to the exigencies of each case. In any case, non-compliance with them is not such defect as would be fatal to the maintainability of the petition. In the majority of cases where the number of parties to a cause is small, and the decision binds some or all of them, it is generally convenient to set out in the petition the names of all the parties, but this is not possible in all cases, especially where the judgment sought to be appealed against is one in rem and the number of persons affected is too numerous to be easily known or conveniently entered in the petition.

The objector, realizing that the rule in Ch. 8-A, referred to by him, has not the force of law, urged that it was, at any rate, a 'rule of practice' and should have been followed strictly, but if I may be allowed to refer to my own experience (extending over a period of 28 years in this branch of the law) I can say that it has not been the invariable practice of the Punjab Chief Court or this Court to insist upon its observance in all cases. In this connection reference may be made to the following two cases as illustrative of what I have said above: In C. M. No. 42 of 1919 (2), there were 23 plaintiffs and one defendant. The judgment of this Court was in favour of

the plaintiffs. The defendant applied for leave to appeal to the Privy Council and in the petition under S. 109, Civil P. C., instead of naming all the 23 plaintiffs as the "opposite party" he merely styled the case C. M. No. 42 of 1919 (2). This was considered sufficient as the names and addresses of the "others" could be ascertained by reference to the original record. C. M. No. 295 of 1920 (3). In this case there were 10 plaintiffs and several defendants. The names of all of them were not given in the petition under S. 109, but it was merely headed "*Ahmad Khan etc. v. Mt. Chhanon Bibi etc.*" Many more cases of this type will be found, if a search were made in the record room.

It will thus be seen that R. 1, Chap. VIII-A has not been strictly followed in all cases, and it cannot be described as a "rule of practice," non-compliance with which is a fatal defect. The objector also referred us to R. 95 of the winding up rules printed in Chap. I, Vol. 2 of the Rules and Orders of this Court. This rule however merely states that:

In matters arising in the winding up of a Company, for which no specific provision has been made in the rules, the practice of the Court will be followed.

The application before us is not a "matter in the winding up" but is a miscellaneous application for leave to appeal to His Majesty-in-Council against the winding up order itself. To such an application the rules in this Chapter are obviously inapplicable, and in any case as stated already, there is no such uniform and invariable practice as alleged by the objector. In my opinion the preliminary objection is without force and must be overruled. It may be mentioned in conclusion that the objector Lala Madan Gopal can have no legitimate grievance on this score, as the office actually served him with notice of this application, and he has not been prejudiced in any way.

On the merits it was admitted by the objector that he had no valid objection to raise. The order of the Special Bench of this Court which the petitioner proposes to appeal from, was passed on the Original Side by a Bench of three Judges, who "finally" decided that the Company be wound up. The amount involved is far

2. *Chhaju Ram v. Neki*, C. M. No. 42 of 1919.

3. *Ahmad Khan v. Nabi Baksh*, C. M. No. 295 of 1920.

above Rs. 10,000 and the case fulfils the requirements of S. 110.

I would accordingly allow the application (C. M. 767 of 1935) and grant the applicant (Bharat Insurance Co., Ltd.) the certificate applied for, but having regard to all the circumstances would leave the parties to bear their own costs of these proceedings. The other application (C. M. 796 of 1935) which purports to be presented on behalf of Lala Harkishen Lal, another shareholder of the Company, for grant of a certificate for leave to appeal to His Majesty-in-Council against the winding up order, is clearly unauthorised and must be dismissed. It was presented by Messrs. Dev Raj Sawhney and Basant Krishna, Advocates, who purported to 'act' under a vakalatnama signed by 'Jiwan Lal Gauba, attorney for and on behalf of Lala Harkishen Lal.' No power-of-attorney on behalf of Lala Harkishen Lal in favour of Lala Jiwan Lal was filed with the petition or was placed on the record. When the case came up for hearing before us on 13th November, Lala Madan Gopal brought this defect to the notice of the Court and an adjournment was granted to enable the Advocates to produce the power-of-attorney or a certified copy thereof. But this was not done even at the adjourned hearing on 22nd November 1935. Under Act 22 of 1926, no Advocate can 'act' without a proper vakalatnama by the person, on whose behalf the application purports to be made, or by his recognised agent as defined in O. 3, R. 2, Civil P. C.

As a last resort, Mr. Dev Raj Sawhney urged that he had been orally authorised by Lala Harkishen Lal to 'plead' for him in the application but counsel can only 'plead,' if there is a proper application before the Court, and as this is not the case, he has no right to be heard. There is little doubt that there has been gross carelessness in this case. The winding-up order was passed on 22nd May 1935; the application under S. 109, Civil P. C., was not made till 8th October, which was the very last day of limitation, having been extended on account of vacation; the application was not accompanied by a power-of-attorney from Lala Harkishen Lal and the power-of-attorney or its copy has not been produced even though an adjournment was granted for this purpose. I would accordingly dismiss this application as unauthorised. There will be no

order as to costs, as the objector is not represented by counsel and has not incurred any other expense.

Order.—The order of the Court is that both petitions Civil Miscellaneous 767 and 796 of 1935 are dismissed. Parties to bear their own costs.

B.D./R.K. *Petition dismissed.*

A. I. R. 1936 Lahore 328

TEK CHAND AND DALIP SINGH, JJ.

Northern Forest Co.—Plaintiffs—Appellants.

v.

Ram Singh Kabuli & Co. — Defendants—Respondents.

First Appeal No. 1982 of 1933, Decided on 25th October 1935, from decree of Sub-Judge, 1st Class, Delhi, D/- 28th August 1933.

Limitation—For application of Art. 54, Limitation Act, allegation of non-execution of hundis is necessary—Defence should make clear allegation of limitation in written statement.

For Art. 54, Lim. Act to apply, it must be alleged that the hundis were not executed as promised. If the defendants wish to make this allegation, it is for them to make it in their written statement or their pleadings clearly and without any attempt to mislead the plaintiffs. [P 329 C 2]

Badri Das and Daulat Ram—for Appellants.

Achhru Ram and Inder Dev—for Respondents.

Dalip Singh, J.—The plaintiffs in this case sued the defendants for the price of timber supplied on an agreement dated 1st December 1919, printed at p. 111, Vol. 2 of the printed paper book. The plaintiffs alleged that the terms, according to the agreement, were that cash to the amount of one-third was to be paid immediately on delivery of timber and hundis on a five months' period were also to be drawn at the time for the remaining two-thirds of the price. There was a term in the contract as to the cutting short of the period of the hundis in case delay took place in the payment owing to the default of the defendants in carrying out measurements. There was no allegation in the plaint that the hundis were not duly drawn but it was alleged that from time to time the defendants executed hundis some of which, however, were not honoured, and hence a balance was left amounting to the item in suit which was due from the defendants to the plaintiffs.

In the first written statement to the plaintiff the defendants took various objections, but the main plea was that certain payments made by them had not been duly admitted and that if accounts were taken the result would show that the plaintiffs had been overpaid, and not that any sum was due from the defendants. There was no plea whatsoever that the suit was barred by limitation. Subsequently to this the plaintiffs alleged that they had made a mistake as regards certain payments made by the defendants which were admitted by them in the original plaintiff and asked for leave to amend the plaintiff. The plaintiff was, after some dispute, allowed to be amended but the onus of the issue in which these payments, which were once admitted and now denied, were to be proved, was cast on the plaintiffs and this order was upheld up to this Court. In reply to this amended plaintiff, for the first time, the defendants took the plea that this suit was barred by limitation. Nowhere was it alleged, however that the hundis which had been agreed to be drawn, had not been drawn, nor was any reason given as to how the suit was barred by limitation. Some time after this, on an application made by the plaintiffs' counsel, the defendants were called upon to furnish the reasons as to why the suit was barred by limitation. The only thing that their counsel then stated was that most of the items were barred by limitation because limitation ran from the date when the payment fell due.

This appears to have satisfied the Court and everybody else; at any rate nothing further was done in the matter and the issue remained with the onus on the plaintiffs that the suit was within time. During the course of the evidence one Jagat Singh, a partner of the plaintiff firm, appeared as a witness and in cross-examination he stated that he did not remember that any hundi had been drawn by the defendants after 15th February 1920. When the case finally came for argument it appears to have been argued by the learned counsel for the defendants that the suit was barred by limitation, because Art. 54, Lim. Act, applied. Owing to the Punjab Loans Limitation Act the period for the suit, if it fell within Art. 52 or Art. 53 or Art. 80, would have been six years. The plaintiffs, evidently thinking that their suit came within one of these

articles and was well within time, as admittedly it would be if any of these articles applied, never thought that the defendants' plea of limitation was based on the allegation that no hundis had been drawn. The plaintiffs therefore appear to have been taken by surprise and all sorts of contentions were urged in the Court below which did not find favour with the Court, which finally held that, as the plaintiff did not contain any allegation that the hundis had been drawn as agreed upon and as the defendants had pleaded that the hundis were not so drawn, (which does not appear to be correct on the record) and as Jagat Singh admitted that he had seen no hundis after 15th February 1920, (a fact which also is not quite correct, because what Jagat Singh stated was that he did not remember whether any hundi had been drawn after 15th February 1920) the suit was barred by limitation, applying Art. 54 and three years period or in the alternative under Art. 115. The suit was therefore dismissed. The plaintiffs have come in appeal.

The findings on other issues which have been agitated before us will be dealt with later, but the first point to decide is obviously the question of limitation. It appears to me that there is no force in the contention that the suit is barred by limitation. The plaintiffs had never alleged, as already stated, that the hundis were not executed. For Art. 54, Lim. Act to apply, it must be alleged that the hundis were not executed as promised. If the defendants wished to make this allegation it was for them to make it in their written statement or their pleadings clearly and without any attempt to mislead the plaintiffs. The whole trend of the litigation however shows that no such idea really entered the defendants' mind. There was some suggestion that some of the items were barred by limitation, though it is not clear why this was so.

There was no hint even that the whole suit was barred by limitation because of the non-execution of certain hundis. In the absence therefore of any allegation in the plaintiff that these hundis were not drawn, as agreed upon, and in the absence of any such pleading on the part of the defendants, it was not possible to hold that the hundis had not been drawn up, a point which had never been put in issue and that therefore the suit was barred

by limitation. I would therefore overrule the decision of the Court below on this point and hold that the suit is within limitation. The learned counsel for the respondents agrees that if Art. 54 does not apply, the suit is not barred by limitation. (Their Lordships after discussing question of various payments concluded thereby their findings and then proceeded.) Upon these findings, the learned counsel on both sides agree that the total amount due to the plaintiffs is Rs. 6,6,311 in round figures, omitting annas and pies. The interest on this amount up to date reckoned at 4 per cent comes to Rs. 39,780. Hence the total amount due to the plaintiffs comes to Rs. 1,06,091. I would therefore accept the appeal and decree the plaintiffs' suit for this amount. As the plaintiffs claimed Rs. 1,30,000, and have succeeded only to the extent of about Rs. 66,000, I consider it fair to allow them two-third costs only in both Courts.

Tek Chand, J.—I agree.

B.D./R.K.

Appeal allowed.

*** A. I. R. 1936 Lahore 330**

YOUNG, C. J. AND MONROE, J.

Ashiq Mahomed and others—Convicts—Appellants.

v.

Emperor—Opposite Party.

Cr. A. No. 805 of 1935, D/-28-11-1935.

*** Criminal Trial—Evidence—Court determines guilt or innocence of accused—Prosecution should not deceive Court by "padding" cases—Person procuring false evidence runs risk of punishing innocent persons.**

The duty of every one, police officers or constables, Government officials and plain citizens is to allow a case to come before the Court as it is without fabrication or "padding." It is for the Courts to decide whether an accused person is innocent or guilty, and not for the prosecution to determine his guilt in advance and attempt to deceive the Court into giving a verdict based on false evidence. Any one procuring false evidence or fabricating false evidence runs the risk of imprisonment and degradation from office, and what is still more serious, may have the burden on his shoulder of sending an innocent man to the gallows. [P 333 C 2]

Abdul Haye and Bashir Ahmad—for Appellants.

D. R. Sawhney—for the Crown.

Young, C. J.—Ashiq Mohammad and Sadiq Mahammad have been convicted of the murder of Mt. Ram Ditta, child of seven or eight years, and have been sentenced to death. The main evidence for the prosecution is that of Hasan Bakhsh, P. W. 2, an approver. The accused are sons of Nawab Khan, a petition writer of

Lodhran, and Hassan Bakhsh is a relation. Hassan Bakhsh has given a long statement, which includes a description of the murder, an account of disposal of the body, and of his own activities immediately afterwards. The following account is taken from his statement. On 13th February 1935 Hassan Bakhsh went to Lodhran to the house of Nawab Khan where he sat in a baithak with the two accused; they told him that there was a girl of five or six who was wearing ornaments worth Rs. 80 or Rs. 90 and suggested that her ornaments should be stolen. Hassan Bakhsh was reluctant but was eventually overborne and agreed to join in the theft: he and Sadiq Mohammad remained in the baithak, while Ashiq Mohammad went for the girl with whom he returned in a few minutes: the three then took the girl into an adjoining kothri and through it to an inner kotha, where they started to remove her ear-rings, sixteen in number: she started to cry and the assailants became alarmed and decided to kill her: the approver caught her legs, Sadiq Mohammad her hands and Ashiq Mohammad choked her: they came out of the inner kotha and divided the ear-rings: they then returned to the house: Hassan Bakhsh said that he was going and the accused asked him to return the next day so that they might throw away the dead body somewhere. During his absence from Lodhran he deposited his share of the ornaments with Mehrab Khan, his friend and resident of a neighbouring village.

On 18th February he returned to Lodhran and went straight to the house of Nawab Khan, where he saw Ashiq Mohammad and Sadiq Mohammad. They told him that the house was being watched by khattris, (the murdered girl was a Hindu), that they had not been able to remove the dead body and that the body was beginning to smell: it was suggested that Hassan Bakhsh, who pretended to possess powers of divination, should create a diversion by going to the bazar and talk of his powers, so that the khattris might hear of him and seek his aid in discovering the whereabouts of the corpse: this ruse succeeded and the attention of the khattris was distracted: Hassan Bakhsh arranged with them that he would set out that day to divine the whereabouts of the body. The attention of the khattris being distracted, the ac-

cused and Hassan Bakhsh took the opportunity of getting rid of the body: it was removed from the kotha by Ashiq Mohammad and thrown over a wall into the bhana of Khilanda, P. W. 11, at a short distance from the kotha: Hassan Bakhsh then set out with the persons interested in the girl and after leading them a wildgoose chase, he divined that the body was lying in the city in a house near the house of Nawab Khan on the other side of the wall. When the party returned the Assistant Sub-Inspector of police was present and told them that the body had been found. Suspicion arose that Hassan Bakhsh had been deceiving the party and he was called by the police, but it was not till 27th February that, after a conversation with the lambardar and others, he made a statement to the police and he and the accused were arrested. What his statement was is not and could not have been shown on the record, but one result of it was that on 28th February the ear-rings which Hassan Bakhsh said that he had taken as his share were produced at Hassan Bakhsh's instance by Mehrab Khan from a hiding place in the roof of the latter's house. On the same day Sadiq Mohammad and Ashiq Mohammad made statements before Mr. Lekh Raj, a Magistrate, admitting only that they had taken part in secretly removing the body from the kotha and throwing it over the neighbouring wall, and explaining that the presence of the body had been discovered accidentally by their grandfather Namdar. Their action was prompted by a fear that if the presence of the body in their house had been known, suspicion would have attached to them. When it is remembered that relations between Mohammadans and Hindus in the Multan District were at this time very strained and that the accused are Mohammadans, and the girl was a Hindu this fear ought not to be considered as unnatural and might well have been entertained by an ignorant, though innocent, person. It is also alleged for the prosecution that two further discoveries were made on 28th February, the first by Ashiq Mohammad and the other by Sadiq Mohammad, in this order, according to the evidence of the witnesses at these discoveries. The fard of the first of these discoveries (Ex. P. E.) relates that Ashiq Mohammad produced

five gold ear-rings "buried in the ground to the north of the door towards the eastern wall along with a card-board box containing those ear-rings."

The fard of the second discovery relates that Sadiq Mohammad produced six ear-rings "tied in a white khadar piece of cloth from his house where chaff was stored, buried in the ground near the eastern wall."

Both fards are signed by the same six persons namely, Imam Shah, Zaildar, Jiwan Das, Kabir Mohammad, Sufaid Posh, Datu Mal, goldsmith, Behari Lal, father of the deceased and Mt. Mehngi, wife of Behari Lal. Hassan Bakhsh after a promise of pardon made a statement on 3rd March to Mr. Moon, District Magistrate, which contained the story in a brief form, which he related afterwards in greater detail in Court. The evidence against the accused is in the first place the statement of the approver. We think that there is no doubt that, apart from the question of the participation of the accused in the crime, this statement is generally true. It has been corroborated in several important particulars and so far as it can be tested by independent evidence, it has been found to be correct. The evidence to connect the accused with the crime (apart from the approver's statement) consists in the case of each of his own statement before the Magistrate describing the finding and disposal of the body, and the discovery of ornaments made by him.

The statements alone are not in themselves sufficient to connect the accused with the crime: they do not contain an admission of any connexion with the crime, nor an admission of any fact from which a connexion with the crime can reasonably be inferred: nor can we find that any of the facts alleged in the statements are necessarily false. There is a further reason which will appear later in our judgment, why we think that these statements ought not to be considered of value as evidence against the accused. The result is that, if a discovery took place by either of the accused as alleged there is evidence against him corroborating the approver's statement and connecting that accused with the crime. If we are not satisfied with the evidence relating to either of the discoveries, the accused, who is alleged to have made it, must be acquitted, and, if the evidence

relating to one discovery is disbelieved, it will become necessary to consider whether the evidence of the same persons can be trusted in respect of the other. The contention of the learned counsel for the accused is that the evidence of the discovery by Ashiq Mohammad is false. To determine whether this charge is well founded requires an examination of the history of the case, so far as the evidence is concerned. It is unnecessary to discuss the evidence showing that the ear-rings discovered were those of the murdered girls, we consider that this has been established. Of the witnesses who signed the fards Mt. Mehngi Bai, Behari Lal and Datu signed them only as identifying the ornaments: and their evidence at the trial did not relate to the actual discoveries. At the trial the remaining 3 witnesses who signed the fards and Ghulam Nabi, Assistant Sub-Inspector of Police, who was in charge of investigation from 21st February onwards and was present and in control at the discoveries, were cross-examined about their statements in the Committing Magistrate's Court. The question in issue both before the committing Magistrate and the Sessions Judge was the nature of the floor in the room where the articles were hidden. The witnesses stated on both occasions that the small box containing the ear-rings was buried in the ground near the wall of the baithak. The contention for the defence was that this was impossible, because the floor was a brick floor and there was no space between the bricks or between the bricks and the wall. It appears from the record that on 13th March Jiwan Das stated before the committing Magistrate that the card board box in which the ear-rings were lying was not covered with a brick or anything else excepting earth: when first asked whether the floor was pucca he said that it had not a pucca floor, but when the question was put a second time he replied that he was unable to say. Kabir Mohammad, who was examined on the same day, said:

It is a pucca floor with bricks of the baithak, but pointing has not been done. The bricks of the floor are of 'kishtiwala' type. No brick was taken out. There was a little space vacant between the wall and the bricks of the floor and it was from that vacant place in the baithak that the card board box was brought out.

This witness also said that he, Jiwan Das, and Imam Shah were standing at

the doorsill and did not actually enter the baithak. Imam Shah said that as far as he knew the baithak had not a pucca floor. From the above it is easily deduced that these witnesses had probably not been inside the baithak. On 14th March, an application was put before the Magistrate on behalf of the accused, in which it was alleged that the evidence of Kabir Mohammad that there was unfloored ground between the walls and the floor was false, and praying for an inspection. No order was made except that the application should be put up on 25th March. Having allowed eleven days to elapse without taking any steps the Magistrate then decided that, as a month had passed since the occurrence, it would not serve any purpose if the inspection was then made. The application before the Magistrate taken in conjunction with the cross-examination of the witnesses on the previous day was sufficient to make it clear not only what the controversy was, but how vital to a decision on the value of the discovery it was to ascertain what was the nature of the floor. And immediate inspection would have determined the matter in dispute beyond doubt as indeed we decided when the case first came before us. Ghulam Nabi, the Assistant Sub-Inspector, was examined on 23rd March. He said:

Ashiq Mohammad did not take out any brick from the floor when he dug the earth to recover Ex. P. 21. Room No. 6 has a pucca floor: so far as I know pointing was not done there.

The defence did not allow the question to rest here. On 14th March photographs of the floor had been taken and on 3rd April 5 witnesses were called: two of these proved the photographs, and three, a draftsman, an overseer, and a mason testified to the character and age of the floor: the effect of their evidence was that the floor was an old floor of flat bricks closely set which ran up to the wall and had not been repaired. Even with this evidence before him, the Magistrate did not think an inspection worth while. The evidence of these witnesses of the discovery before the Sessions Judge is equally unsatisfactory, especially when considered with reference to their evidence before the Magistrate. There are a few important additions. Jiwan Das said that five or six inches of earth was removed in the digging up and the other witnesses repeated

this; all stated that the floor was of bricks. The Assistant Sub-Inspector said: It has a pacca floor, but the pointing has not been done. The space between the bricks has not been filled in. The packet Ex. P. 21 was lying between the wall and a brick of the floor.

When the case came before us, the evidence which we have set out was before us and several photographs taken on 14th March. The photographs gave a good idea of the nature of the floor and it became clear to us that the evidence for the prosecution was in conflict with that afforded by the photographs. The explanation suggested by the learned counsel for the Crown was that between the date of the murder (the 13th of February) and the date of the taking of the photographs (14th of March) there was sufficient time to set a different floor: and we had to consider that possibility, we felt that, considering the nature of the issue, we should not much improve the position by having further oral evidence but that the only way of reaching a satisfactory conclusion would be to inspect the floor ourselves. We visited Lodhran on the 9th of November: inspected the scene of the murder, and examined the floor of the baithak. The evidence of the witnesses for the defence gives a proper description of the floor as it was when we first saw it before we had some of the bricks removed as a test. The card board box could not have been buried as stated by the witnesses for the prosecution: nor could it have been buried in the floor at all without the removal of a brick.

We had several of the bricks dug up in our presence in different places, (they were not easy to remove) including those at the place, where the box was stated to have been buried. We have no doubt that the floor is an old floor and that it has not been dug up since the date of the murder. We are driven to conclude that no discovery took place in the baithak: It follows that the evidence for the prosecution is false and that this discovery is a fabrication from start to finish. We have no reason for supposing that any of the witnesses who gave evidence about this recovery have knowingly supported a false charge: they may have been over zealous to establish a charge which they believed to be true; but making every allowance possible, we cannot condemn too strongly their grave offence. Had it not been that they were

careless in not acquainting themselves with the nature of the floor, their evidence might have been the basis for the conviction of the accused persons innocent in the eye of the law because their offence would not have been established by true evidence. That such conduct on the part of responsible officials could take place, reveals a state of affairs which is intolerable. The matter would not be so grave, if this were an isolated case: but we know that this is not so. The records of this Bench for the last year alone show the contrary.

It may be well that we should give a warning to any one who may hereafter be tempted to interfere with the course of justice by the procuring of false evidence or the fabrication of evidence of recoveries that the duty of every one, police officers or constables, Government officials and plain citizens is to allow a case to come before the Court as it is without fabrication, or "padding." It is for the Courts to decide whether an accused person is innocent or guilty, and not for the prosecution to determine his guilt in advance and attempt to deceive the Court into giving a verdict based on false evidence. Anyone procuring false evidence runs the risk of imprisonment and degradation from office, and what is still more serious, may have the burden on his shoulder of sending an innocent man to the gallows.

In this case, we are now concerned only with the question whether there is evidence to show a connexion of the accused with the crime and so to corroborate the approver's evidence. The only evidence of the kind against Ashiq Mohammad is, we have found, a fabricated discovery supported by false evidence. As the evidence of a discovery by Sadiq Mohammad is that of the same witnesses, whose evidence upon the other discovery is false and was given for the purpose of procuring a conviction in the absence of what the police thought to be sufficient evidence, we consider that it would be dangerous to act on it. If the confessions of the accused afforded evidence of their connexion with the crime, we should be reluctant to act on them also: a person, who procures false evidence, cannot be trusted in anything connected with the investigation; and when the accused made their confessions, Ghulam Nabi was in charge of the investigations.

We cannot but be suspicious that these confessions, which only followed an earlier statement of the approver, may have been procured by improper means and are valueless. There being no evidence to corroborate the approver's evidence, both the accused must be acquitted. We allow the appeal and set aside the convictions and sentences.

B.D./R.K.

Appeal allowed.

* * A. I. R. 1936 Lahore 334

YOUNG, C. J. AND MONROE, J.

Moti Ram—Decree-holder—Appellant.

v.

Hans Raj and others—Judgment-debtor—Respondents.

Letters Patent Appeal No. 109 of 1935, Decided on 11th December 1935, from order of Abdul Rashid, J., High Court, Lahore, D/- 17th June 1935, reported in 1935 Lah 702.

*** * Limitation — Right to light and air—Obstruction to light and air is continuing wrong — No period of limitation as fresh period starts running every day.**

A obtained an injunction against *B* restraining him from building his house in such a way as not to obstruct *A*'s right to light and air in *A*'s house. Contending that *B* in contravention of the injunction has built his house obstructing *A*'s right, *A* made an application against *B* for execution of injunction decree against him. This application was made three years after the completion of the house. So it was contended that this application was barred by Art. 181, Lim. Act, the argument being that when the house was built for all time and that an application complaining of this particular interference with the plaintiff's right must be brought within three years of the breach:

Held: that the breach is a continuing breach coming within the meaning of S. 23, Lim. Act and therefore limitation period under Limitation Act applies; a fresh time starts running every day the wrong continues: 6 Cal 394 (P C); 1916 Cal 733 and 1 C W N 96, *Foll.*; 1935 Lah 702, *Reversed.* [P 334 C 2; P 335 C 1]

J. G. Sethi—for Appellant.*Nawal Kishore and Bhaqwat Dayal*—for Respondents.

Young, C. J.—This is a Letters Patent appeal against the decision of a learned Single Judge of this Court. It may be convenient in the first place to set out the facts out of which this appeal arises. In 1914 one *Moti Ram* obtained an injunction forbidding the defendants from building their house in such a way as to interfere with the passage of light and air through certain ventilators marked *A*, *B*, *C* and *D* constructed in the

plaintiff's house. In 1933 the decree-holder filed an application in execution complaining that the defendants had disobeyed the injunction in that they had built their house in such a way that the ventilator *A* had been closed, as regards the passage of light and air, that the ventilator *B* had been interfered with by the passage of smoke from the kitchen; and also that the injunction with regard to the other ventilators had been disobeyed. A preliminary objection was taken in all the lower Courts that this application was barred by Art. 181, Lim. Act, the argument being that when the house was built it was built for all time and that an application complaining of this particular interference with the plaintiff's right must be brought within three years of the breach. This view found acceptance in all the three lower Courts. The appellant here that is to say the plaintiff in the original application, has argued that the breach is a continuing breach coming within the meaning of S. 23, Lim. Act, and therefore no limitation period under Limitation Act would apply; a fresh time starts running according to his argument every day the wrong continues.

For the purposes of the decision of this case we must take it that the house has been built in defiance of the injunction and that it does interfere with the plaintiff's right of light and air. This question of course will have to be decided as a matter of fact by the lower Court when we remand the case to that Court for decision according to law. Assuming that the house does definitely obstruct the right of the plaintiff-appellant to light and air we are of opinion that this is a continuing wrong; every day this building obstructs the flow of light and air. This view of the case is supported by consideration of many authorities in other Courts. For example their Lordships of the Privy Council in 6 Cal 394 (1), a case which was concerned with an obstruction which interfered with the flow of water to which the plaintiff was entitled—at p. 404 held that an obstruction of this nature was a continuing nuisance and the cause of action arising with regard to it was renewed *de die in diem* so long as the obstruction causing such interference was allow-

1. *Raj Rup Koer v. Abdul Hossain*, (1881) 6 Cal 394=7 C L R 529=7 1 A 240=4 Sar 199 (P C).

ed to continue. The same view was expressed in 1 C W N 96 (2); that was an obstruction of a right of way. Their Lordships there held that that was a continuing wrong within the meaning of S. 23, Lim. Act.

In 29 I C 385 (3), where both flow of water and obstruction of right of way were concerned, their Lordships came to the same conclusion. It is clear that an obstruction of light and air is analogous to the obstruction of a right of way or flow of water. Counsel for the respondents submits that if this were a case of a suit or application, the building in this case would constitute a continuing wrong but it does not constitute a continuing wrong where the matter is an execution for enforcement of an injunction of this kind. This is a subtle proposition which we fail to appreciate. The question is a question of fact whether the building in this case is a continuing wrong or not. The question of fact cannot be affected by the nature of the suit or application. As this, according to our own view and the authorities, is clearly a case of continuing wrong we hold that no limitation period applies. We therefore set aside the judgments of the lower Courts and order that the case be returned to the trial Court for decision on merits. The appeal is allowed. The appellant will get his costs occasioned by the proceedings before the learned Single Judge and in this Court.

B.D./R.K.

Appeal allowed.

2. Soojan Bibi v. Shamad Ali, (1897) 1 C W N 96.
3. Nazimulla v. Wazidulla, 1916 Cal 733=29 I C 385=21 C L J 640.

A. I. R. 1936 Lahore 335

YOUNG, C. J. AND ABDUL RASHID, J.
Dhunda—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1508 of 1934, Decided on 17th January 1935, from order of Sess. Judge, Sialkot, D. 31st October 1934.

Criminal Trial—Evidence—Blood stain — Discovery of bloodstained article is not by itself enough for conviction.

The discovery of a bloodstained article is not enough by itself to justify a conviction for murder. This is circumstantial evidence the value of which is very great when used to corroborate other evidence. It cannot by itself prove the case for the Crown.

[P 335 C 2 ; P 336 C 1]

Kanwar Sain—for Appellant.

Nazir Hussain—for the Crown.

Young, C. J.—Three persons, Dhunda, Shafi and Allah Rakha, were charged with murder in the Court of the learned Sessions Judge of Sialkot. The learned Sessions Judge acquitted Shafi and Allah Rakha but convicted Dhunda. Dhunda appeals. Dhunda had cause to dislike Maqaddam Din, the murdered man. On the night of the 15th/16th May, the prosecution alleges that while the deceased was sleeping with his wife and daughter and his son, these three accused came to the house, two of them seized the murdered man, and Dhunda, with a chopper, cut his throat. The eye-witnesses are the wife, daughter and the son. The learned Sessions Judge came to the conclusion that the eye-witnesses could not be trusted. He says:

The statements of Mt. Daulat Bibi and her son and daughter are, in my opinion, far from reliable. They are full of discrepancies and contradictions.

Later on he says:

It seems to me that the account of the assault given by these three witnesses is very untrustworthy. It is true that they cannot be expected to have noticed minor details but some of these discrepancies are by no means trivial.

The learned Judge, because he could not rely on the eye-witnesses, has acquitted Shafi and Allah Rakha. Against Dhunda, however, there was evidence of the recovery from his house of a bloodstained chopper and a bloodstained sheet. The learned Judge has urged this evidence to corroborate the evidence which he has not relied on as against the two accused. We have examined the evidence and we come to the same conclusion as the learned Judge as regards the eye-witnesses. The contradictions and discrepancies are so many and so material that it is almost impossible to believe that these witnesses saw anything of importance. Their evidence is so unreliable as to be worth precisely nothing. It appears to us therefore to be impossible in law to corroborate this evidence. Nothing cannot be multiplied or corroborated. The only point remains as to whether the evidence of the recovery from Dhunda's house of a bloodstained chopper and a bloodstained chadar is enough by itself to justify the conviction of Dhunda. We do not think it is. This is circumstantial evidence the value of which is very great when used

to corroborate other evidence. It cannot by itself prove the case for the Crown. It is possible to imagine many an occasion where the mere discovery of a blood-stained weapon or bloodstained clothes was due to something other than murder, for instance, concealing a dead body or receiving from the real murderer a blood-stained weapon in order to hide it and so assist the murderer. It is impossible to say that the discovery of a bloodstained article is enough by itself to justify a conviction for murder. This being our view we have to accept the appeal and set aside the conviction and sentence of death.

K.S./R.K.

*Appeal accepted.***A. I. R. 1936 Lahore 336**

COLDSTREAM, J.

Was Deo—Debtor—Appellant.

v.

Haidar Hassan—Receiver and another, Creditor—Respondents.

Misc. First Appeal No. 1345 of 1934, Decided on 12th February 1935, from order of Dist. Judge, Ludhiana, D/- 12th May 1934.

Insolvency—Partition effected by debtor with his undivided brother without making provision for debts held to be act of insolvency.

Where a debtor effected a partition with his brother whereby he gave his brother all the property and himself taking only a small amount in cash and no provision was made for the settlement of his debts:

Held: that the partition may be taken to be effected with intent to delay or defeat creditors and so constituted an act of insolvency: 1930 Nag 215, *Appl.* [P 337 C 1]

Indar Dev for Fakir Chand—for Appellant.

Qabul Chand for Shamair Chand and Shamair Chand—for Respondents (Creditor).

Judgment.—Ganga Bishan, respondent, petitioned the District Judge, Ludhiana, under S. 9 (1), Provincial Insolvency Act, to have the present appellant Was Deo declared insolvent alleging that Was Deo owed him Rs. 1,900 which he was unable to pay and had committed an act of insolvency by partitioning his joint family property with his brother with the intention of defeating Ganga Bishan, his creditor. Was Deo resisted the petition denying that he owed the debt alleged and contending that the partition did not amount to an act of insolvency.

The District Judge found the debt proved and held that Was Deo had committed an act of insolvency. He made an order of adjudication accordingly. Was Deo has appealed and it is argued on his behalf that the District Judge's decisions on the points in issue were both erroneous.

The evidence regarding the debt is fully discussed by the District Judge and for the reasons he has given, I agree with his decision on this point. Ganga Bishan's case was that in dealings between Was Deo and the partnership Ganga Bishan Des Raj (Des Raj being Ganga Bishan's brother) Was Deo was found to owe the partnership Rs. 1,922-2-6 on 29th March 1932. This debt was discharged by Was Deo who borrowed Rs. 1,900 from Ganga Bishan and paid Rs. 1,922-2-6 to the partnership the same day executing in favour of Ganga Bishan a promissory note for Rs. 1,900 and also giving him a receipt for this sum. Was Deo at the same time was given a receipt by Ganga Bishan (Ex. D-A), as evidence of the discharge of the business debt due on accounts. Was Deo's story is that the payment of Rs. 1,922 for which the receipt Ex. D-A was given, discharged the debt on the promissory note.

The fact that the promissory note remained with Ganga Bishan goes strongly against Was Deo and the latter's counsel is unable to explain why it was not taken back by his client. The receipt Ex. D-A purports to be an acknowledgment of the payment of the business debt of Rs. 1,922-2-6. Ganga Bishan could give a discharge and the fact that the shop is not described as the creditor is of no consequence. It is not explained why although the promissory note was for Rs. 1,900, Rs. 1,922-2-6 were required to meet this debt. Was Deo's story is moreover clearly falsified by the fact that he repaid Rs. 150 to Ganga Bishan on 27th May 1933, a record of which payment was made on the back of the receipt for Rs. 1,900 (P-B).

The circumstances of the partition which was effected in June 1933 between Was Deo and his brother justified the District Judge's conclusion that it was a transaction with intent to defraud Was Deo's creditor. Direct evidence of intention is not ordinarily to be found in such cases. The fact that the partition was effected by an arbitrator does not

justify any conclusion on this point one way or another. It has been held in 1930 Nag 215 (1) that a partition of joint family estate by a father without making adequate provision for the settlement of his debts may amount to a transfer of property with intent to delay and defeat creditors and so constitute an act of insolvency and I think that this principle is applicable in the present case. The property was a haveli and two shops and the whole of it was given to the brother Was Deo taking Rs 1,250 in cash to compensate him. The debt was not discharged. It is true that this is a statement by Was Deo (recorded in the vernacular record) that the property was mortgaged for Rs. 10,000. But there is no documentary proof in support of this nor is it shown that the compensation given to Was Deo represented his proper share in the equity of redemption. I find no sufficient reason for interfering with the lower Court's decision on this part of the case. I accordingly dismiss the appeal with costs.

K S./R.K.

Appeal dismissed.

1. Bajirao v. Daulatrao, 1930 Nag 215 = 128 I O 404.

* A. I. R. 1936 Lahore 337

YOUNG, C. J. AND RANGI LAL, J.

Dial Singh—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 631 of 1934, Decided on 26th November 1934, from order of Sess. Judge, Jhelum, D/- 7th April 1934.

(a) Interpretation of Statutes — Principles of English law are to be referred to only in case of ambiguity in language in statute.

It may be permissible to refer to the principles of English law only if there is any ambiguity in the language used by the statute and adopt the interpretation which is in conformity with those principles. Courts are not at liberty to read into the section words which do not exist there; they cannot stretch the language of the statute in order to give effect to the principles of English law. [P 338 C 1, 2; P 339 C 1]

* (b) Evidence Act (1872), S. 30—Confession by accused implicating co-accused made at close of prosecution can be considered as against co-accused—Value of such confession depends on facts and circumstances of case.

A confession made at the close of prosecution by one of several accused persons who are being jointly tried implicating himself, and such other persons can be taken into consideration against such other persons, but this evidence

would be of weakest kind and the value to be attached to such evidence would be a matter for determination in each particular case. If such a confession is made before a Magistrate at the close of the case for the prosecution, the accused whom it affects has an opportunity of nullifying its effects by his defence evidence and also by cross-examining the prosecution witnesses after the charge: *Case law reviewed.*

[P 337 C 2; P 338 C 2]

Muhammad Alam—for Petitioner.

Des Raj Sawhney and *Ram Lal*—for the Crown.

Rangi Lal, J. — Dial Singh, Allah Bakhsh and Harbans Singh were tried together and convicted under S. 379. I. P. C., and sentenced to undergo 1 1/2 years' rigorous imprisonment each. On appeal the learned Sessions Judge maintained the convictions but reduced the sentence passed on Harbans Singh to one year's rigorous imprisonment. Dial Singh and Allah Bakhsh, whose sentences were maintained, have come up to this Court in revision. The petitions were admitted by Din Mohammad, J., because he was of opinion that a confession made by Harbans Singh at the close of the prosecution case implicating himself and the other accused was wrongly admitted in evidence under S. 30, Evidence Act. The petitions came up for hearing before Coldstream, J., and he has referred them to a Division Bench because he was not inclined to agree with Din Mohammad, J., on the law point mentioned above.

We have merely to decide whether a confession made at the close of the prosecution by one of several accused persons who are being jointly tried implicating himself and such other persons can be taken into consideration against such other persons or not. The practice of this Court has been to take such a confession into consideration, but we do not find any discussion on the point in any of the published rulings cited before us. The Allahabad High Court has however held in 45 All 323 (1) that S. 30, Evidence Act, does not cover such a confession and that it applies only to a confession made previously and proved at the trial as a part of the case for the prosecution. This view has been approved by the Madras High Court in 54 Mad 788

1. *Emperor v. Mahadeo Parshad*, 1923 All 322 = 76 I O 1025 = 25 Or L J 305 = 45 All 323 = 21 A L J 179.

(2) and 1929 Mad 285 (3), though the opposite view was taken in an earlier decision of that Court, namely 38 Mad 302 (4). The Bombay High Court has fully considered the matter in 1930 Bom 354 (5) and has not agreed with the view of the Allahabad Court. The Judicial Commissioner of Nagpur has also taken the same view as the Bombay High Court in 134 I C 686 (6). In 4 Cal 483 (7) the point did not arise but, in the course of arguments, Garth, C. J., made a casual remark to the effect that the word "proved" in S. 30, Evidence Act, must refer to a confession made beforehand. This ruling is therefore of no help in deciding the case before us. In the Allahabad case referred to above the question was discussed at length by Walsh, J. The decision however mainly proceeds on the ground that S. 30, Evidence Act, creates an exception to the fundamental principles upon which criminal law is administered in England and must be construed with reference to those principles.

Those principles are, firstly, that an accused is entitled to know what the evidence against him is before he is called upon for his defence at all; secondly, that the prosecutor cannot re-open his case and make additions to it, except such voluntary additions as the accused may make himself; thirdly, that evidence cannot be received against an accused person which he has no power to submit to cross-examination; and, fourthly, that an accused person cannot himself give evidence. It is clear that the Indian legislature desired to depart from these principles in enacting S. 30, Evidence Act. Still the section has to be interpreted according to the ordinary canons of interpretation of statute law. It may be permissible to refer to the principles mentioned above, if there is any ambiguity in the language used by the statute, and adopt the interpretation which is in con-

formity with those principles. Walsh, J., realized that the interpretation he was placing on the section involved the addition of the words "as part of the case for the prosecution" which did not exist therein. He went on to say that that addition would have been superfluous in view of the principle that the only thing that an accused person has to meet in a criminal trial is the case for the prosecution, his own statement and the defence evidence. Finally, the learned Judge remarked that a confession could be "proved" only by tendering evidence to show that it was made on a previous occasion. We have to point out with great respect that, in arriving at this conclusion, the learned Judge and the learned Judges of the Madras High Court overlooked the definition of "proved" in S. 3, Evidence Act. That definition is:

A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

If a confession is made before the Court itself it "is a matter before it" and the Court must believe it to exist. It must, therefore, be said to be "proved." A fact can be proved not only by "evidence" as defined in S. 3, Evidence Act, but also by other matters before the Court. A confession recorded by the Court itself would not be "evidence," but would be a "matter before the Court." We are, therefore, of opinion that the language of S. 30, Evidence Act, does not justify a distinction between a confession made by an accused person before the trial and in the course of the trial. A confession made before the Court even at the close of the case for the prosecution can, therefore be said to be a confession "proved" within the meaning of S. 30, Evidence Act. This being so, it could legally be taken into consideration, that is to say, used as evidence. It is, however, clear that this evidence would be of the weakest kind, but we are not concerned here with the value to be attached to such evidence. This would be a matter for determination in each particular case.

In view of the interpretation which we place on S. 30, Evidence Act, it is unnecessary to consider the reasoning of Walsh, J. It is certainly very cogent, but we are not at liberty to read into

2. In re Marudamuthu Padayachi, 1931 Mad 820=134 I C 63=54 Mad 788=61 M L J 358.

3. In re Govinda Naidu, 1929 Mad 285=118 I C 512=30 Cr L J 932.

4. In re Bali Reddi, 1914 Mad 45=22 I C 157=15 Cr L J 13=38 Mad 302.

5. William Cooper v. Emperor, 1930 Bom 354=127 I C 105=31 Cr L J 1137=54 Bom 531=32 Bom L R 747.

6. Ganpat v. Emperor, 1931 Nag 169=1931 Cr C 830=134 I C 686=32 Cr L J 1222=27 N L R 163.

7. Empress v. Ashootosh Chukraburty, (1879) 4 Cal 483=3 C L R 270.

the section words which do not exist there. The legislature has made a departure from certain fundamental principles and the Courts cannot stretch the language of the statute in order to give effect to those principles. In practice the section need not create any difficulty. It is always for the Court to consider what value to attach to such evidence. It has to be borne in mind that, if such a confession is made before a Magistrate at the close of the case for the prosecution, the accused whom it affects has an opportunity of nullifying its effect by his defence evidence and also by cross-examining the prosecution witnesses after the charge. For these reasons we hold that the confession of Harbans Singh was admissible in evidence against Dial Singh and Allah Bakhsh. Even apart from this confession there is sufficient evidence to justify their conviction.

We dismiss the petitions.

K.S./R.K. *Petitions dismissed.*

A. I. R. 1936 Lahore 339

TEK CHAND AND SKEMP, JJ.

Mahi and another—Plaintiffs—Appellants.

v.

Mt. Barkate—Defendant—Respondent.

First Appeal No. 1308 of 1932, Decided on 16th January 1935, from order of Sub-Judge, 1st Class, Lyallpur, D/- 19th May 1932.

Custom (Punjab)—Succession—Self-acquired property—Kalon Jats of Sialkot District—Daughter excludes collaterals.

Amongst Kalon Jats of Sialkot District daughters of last male holder exclude collaterals from succession to self-acquired property of the last male holder: 1930 Lah 724; 1929 Lah 58; 1929 Lah 465 and 1923 Lah 401, *Rel. on.*

[P 340 C 2]

Ghulam Mohy-ud-Din and Shaukat Rai—for Appellants.

Ch. Zafrullah Khan and Asadullah Khan—for Respondent.

Tek Chand, J.—One Faujdar, a Kalon Jat of Sialkot District was the grantee of two squares of land in Chak No. 146, R. B. Tahsil and District Lyallpur. He fulfilled the conditions of the grant and in due course "occupancy rights" in the land were conferred on him. On Faujdar's death in 1899, the tenancy was mutated in the name of his

widow, Mt. Begam. Mt. Begam died on 25th December 1930, and on her death the plaintiffs, who are Faujdar's brother's son's sons, took possession of the land. On 28th January 1931 the Naib Tahsildar sanctioned the mutation of $\frac{3}{4}$ ths of the land in favour of the plaintiffs and $\frac{1}{4}$ th in favour of his daughter Mt. Barkate in accordance with an alleged settlement between the parties. On appeal the Collector ordered mutation of the entire land in the name of Mt. Barkate. Thereupon the plaintiffs brought a suit in the civil Court for a declaration that they were in lawful possession as occupancy tenants of $\frac{3}{4}$ ths of the land under the aforesaid family settlement. In the alternative, they prayed that in case the alleged family arrangement be not proved, they be declared to be occupancy tenants of the entire land. In the plaint it was alleged that Mt. Barkate was not the daughter of Faujdar, but that she was, Mt. Begam's daughter from a former husband. They further averred that in the course of mutation proceedings the parties had settled their dispute amicably through the intervention of the bradari, whereby $\frac{3}{4}$ ths of the land had been given to the plaintiffs and $\frac{1}{4}$ th to Mt. Barkate. They also pleaded that according to the custom prevailing in the tribe of the parties, collaterals succeeded to the self-acquired property of a sonless male proprietor to the exclusion of his daughter.

Mt. Barkate traversed these allegations and stated that she was the legitimate daughter of Faujdar and that according to custom she had a prior right to succeed to Faujdar's self-acquired property. She denied that any settlement, as alleged by the plaintiffs, had been arrived at in the course of the mutation proceedings. The learned Subordinate Judge found against the plaintiffs, on all these points and dismissed their suit. Before us the first contention raised by counsel is that Faujdar was not the last male-holder of the property, but that he left him surviving a four year old son Allah Ditta who died eighteen months later. It was urged, therefore that even if the plaintiffs, fail on all other points, Mt. Barkate had no right to succeed, as she was the sister, and not the daughter of the last male holder. This however is an entirely new case set up for the first time in the course of the arguments before us.

It was not mentioned in the plaint or in the memorandum of appeal, and is not supported by any tangible evidence on the record. As stated already, on Faujdar's death in 1899, mutation of the land was effected in favour of his widow Mt. Begam, which could not have been the case if he had left a son. The mutation proceedings in 1899 had continued for six months and though the lambardar and several members of the brotherhood are stated to have been present, the record does not contain any mention of the existence of a son of Faujdar. The suggestion is clearly a baseless after-thought and I have no hesitation in rejecting it.

Counsel attacked in a half-hearted manner the lower Court's finding as to Mt. Barkate being the legitimate daughter of Faujdar. We have read the evidence bearing on the point and find that it fully supports the conclusion of the learned Sub-Judge. Mt. Barkate was married to one Jalal on 26th August 1911 and in the marriage register she was described as the daughter of Faujdar. There is no reason to suppose that a false statement was made about 20 years before the present dispute arose. It is significant that in the mutation proceedings, which followed on the death of Mt. Begam, the defendant's status as the daughter of Faujdar was not challenged by the plaintiffs or anyone else. Similarly in the document Ex. D. W. 3/1, which according to the plaintiffs was executed on 6th January 1931, and in which the alleged family settlement is stated to have been recorded, the plaintiffs themselves described her as the daughter of Faujdar. It is further important to note that the plaintiffs have not been able to give the name of Mt. Begam's alleged first husband of whom Mt. Barkate is alleged to have been born. In the lower Court the plaintiffs in support of their claim to succeed to the self-acquired property of Faujdar in preference to the defendant relied on the answer to Question No. 47 of the *Riwaj-i-Am* of Sialkot District compiled by Mr. Byod in 1916. It is well settled that the initial presumption must be made in favour of the correctness of this entry, but the lower Court after a careful examination of the evidence on the record and the previous judicial decisions held that the defendant had succeeded in displacing the presumption. Before us, Mr. Ghulam Mohy-ud-Din frankly admitted

that he was unable to assail this finding. He conceded that there were several instances of daughters excluding collaterals in succession to non-ancestral property of their sonless fathers, while there was not even one instance in support of the answer as recorded. This entry in the *riwaj-i-am* has been examined in several cases by this Court and in every one of them it has been found that it was not in accord with the actually prevailing custom. See 4 Lah 99 (1), 10 Lah 485 (2); 10 Lah 489 (3); 1930 Lah 724 (4); 11 Lah 415 (5) and C. A. No 381 of 1930 (6). The finding on this point in favour of the defendant therefore must be maintained.

The last point urged was that after the death of Mt. Begam, when mutation proceedings were going on before the Naib Tahsildar, the parties came to a settlement whereby the land in dispute was divided between the parties, Mt. Barkate being given $1\frac{1}{2}$ square and the plaintiffs, $1\frac{1}{2}$ squares. In support of this contention reliance was placed mainly on an unregistered document (Ex. D. W. 3/1) which purports to have been executed by Mahi and Ilahi, plaintiffs, on 6th January 1931. This document however is not signed by Mt. Barkate. The oral evidence produced by the plaintiffs is vague and discrepant and was rightly rejected by the lower Court. Some of the witnesses, who claimed to have brought about the settlement, have stated that two agreements were executed, one of which was given by the plaintiffs to Mt. Barkate, and the other was given by Mt. Barkate to the plaintiffs. This later document, if it was executed at all, must have been in possession of the plaintiffs, but it was not produced at the trial. Indeed, Mahi, plaintiff, when examined as his own witness, denied that Mt. Barkate had executed any agreement in favour of himself or his brother. I agree with the lower Court that the plaintiffs have failed

1. Balha v. Fatima Bibi, 1923 Lah 401=76 I O 921=4 Lah 99.
2. Shahamed v. Mahomed Bibi, 1929 Lah 58=113 I O 189=10 Lah 435=30 P L R 678.
3. Said v. Said Bibi, 1929 Lah 465=118 I O 393=10 Lah 489=30 P L R 618.
4. Khudalad v. Rabi Bibi, 1930 Lah 724=125 I O 609.
5. Fateh Din v. Mahomed Bibi, 1930 Lah 971=122 I O 727=11 Lah 415=31 P L R 760.
6. Mangal Singh v. Mt. Indar Kuar, 1935 Lah 106=158 I O 194=16 Lah 616=37 P L R 732.

to prove the alleged settlement. The appeal is without force and I would dismiss it with costs.

Skemp, J.—I agree.

B.D./R.K.

Appeal dismissed.

A. I R. 1936 Lahore 341

YOUNG, C. J. AND SALE, J.

Hans Raj—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 606 of 1934, Decided on 6th June 1934, from order of Sess. Judge, Sialkot, D/- 7th February 1934.

(a) Criminal Trial—Evidence—Charge only of murder and attempt to murder—Evidence as to accused being members of terrorist association is irrelevant and unnecessary.

Where the only offences with which accused were charged were murder and attempt to murder:

Held: that evidence to prove that the accused were members of a terrorist association was wholly irrelevant and quite unnecessary.

[P 341 C 2]

(b) Criminal P. C. (1898), S. 164—After recording confession, Magistrate should avoid handing over document to police in charge of prisoner—No prejudice caused to accused by sending it through police—S. 164 (2) held complied with substantially.

A Magistrate who records a confession under S. 164, Criminal P. C., should avoid handing over the document after completion to the police in charge of the prisoner, but should forward it as required by sub-s. (2) of S. 164, Criminal P. C. direct to the Magistrate by whom the case is to be enquired into or tried. But where by sending such document the accused is not prejudiced there is substantial compliance of S. 164 (2).

[P 345 C 1]

(c) Criminal Trial—Concerted attack by two accused armed with deadly weapon—Weapon used with fatal result—Both are guilty of murder.

Where the two accused were engaged in a concerted attack upon the police and either of them was armed with a deadly weapon and used it to kill a police officer:

Held: they were both equally guilty of murder and it did not matter which of them attacked with the weapon.

[P 344 C 1]

(d) Criminal Trial—Prosecution should confine to simple and true evidence—It should not hide facts and embroider case.

The conviction of a guilty person would be more certainly obtained if the prosecution is confined to simple and true evidence and no attempt is made either to hide essential facts or to embroider the case.

[P 344 C 2]

(e) Penal Code (1860), S. 302—Sentence—Two accused equally guilty—One sentenced to death and another to lesser penalty—Appeal by both—That one is given only lesser penalty is no consideration for commuting extreme penalty of other.

Where two accused who were equally guilty of a brutal and premeditated murder should have received the same sentence, but one was sentenced to death and the other to transportation and both appealed and there was no appeal by the Crown for enhancement:

Held: that the fact that one of them was given only the lesser penalty was no consideration, which would entitle the High Court to commute the sentence of death passed on the other.

[P 344 C 2; P 345 C 1]

B. R. Puri—for Appellant.

Des Raj Sawhney for the Crown.

Young, C. J.—*Hans Raj* and *Pritam Khan* (alias *Prabhe Khan*) were charged under S. 302 read with S. 34, I. P. C., and S. 307 read with S. 34, I. P. C., in the Court of the learned Sessions Judge, Sialkot. The learned Judge found *Hans Raj* guilty under both sections and sentenced him to transportation for life. *Prabhe Khan* was found guilty under both sections and sentenced to death. Both appeal and we have to consider the question of the confirmation of the death sentence on *Prabhe Khan*. At the outset it is to be noted that murder and attempt to murder were the only offences charged. On 7th May these two together with *Jagdish Chandar*, absconder, and *Kasturi Lal*, who was acquitted at a previous Sessions trial on a similar charge, were travelling in a third class compartment in a train from Jammu to Sialkot. There were with them in the carriage three police officers and a bank peon. The train had not proceeded far before the accused and the others with them are alleged to have produced revolvers and a knife and attacked the police party. One police constable named *Karam Dad* was shot dead, the two other police officials were wounded by bullets.

It is to be seen from the above that this is a simple case the facts of which lie within a small compass. It is almost unbelievable that in the Court below it took over two months to try and that the judgment extends to 42 printed pages. The reason is that the prosecution produced a mass of evidence in order to prove that the two accused were members of a terrorist association. It appears to us that this procedure was wholly unjustified. The sole point for decision was were these two accused parties to a murderous attack upon the police. For this it was quite unnecessary and indeed wholly irrelevant to consider whether they were terrorists or members of any other body. There was

no charge of conspiracy. This mass of evidence should have been excluded by the learned Sessions Judge. The judgment of the learned Sessions Judge is divided into chapters. Ch. 6 is headed "Material evidence." It is unnecessary to consider most of the previous chapters. The procedure in this case in the trial Court has resulted in a great waste of public time and money. Fortunately for the purpose of this appeal counsel both for the Crown and the defence agreed that it was unnecessary to consider the irrelevant evidence. We are confining our attention to the question which ought to have been the sole question in the trial Court, namely, were these two accused parties to this murderous attack upon the police which resulted in the death of one policeman and the wounding of two others?

The material facts of this case are that during April 1931 a cheque for Rs. 497-4-0 was drawn on the Sialkot branch of the Imperial Bank which on 2nd May 1931 was discovered to be a forgery. Private investigation by the Bank followed but was unsuccessful and on 6th May a report was made to the police. In the course of the investigation a police party headed by Assistant Sub-Inspector, Ata Ullah, Khan Bahadur, Head Constable, and Karam Dad, foot constable, proceeded to Jammu to make enquiries taking with them a Bank peon, Haveli Ram, for the purpose of identification. Arriving at Jammu on 7th May 1931 Haveli Ram identified Kasturi Lal and Hans Raj as being concerned in this forgery. When these two men were found they were in the company of Jagdish Chandar and Prabhe Khan. The police took all four to Jammu police station. Here it is alleged by the police that Kasturi Lal being mainly concerned in the forgery was directed to attend at the police station, Sialkot; the other three were discharged. In his confession Hans Raj alleges that he also was kept under police detention. Whatever the truth may be it is common ground that the police party travelled by train to Sialkot that evening accompanied by Kasturi Lal, Hans Raj, Prabhe Khan and Jagdish Chandar. The case for the prosecution is that Jagdish Chandar, Prabhe Khan, Kasturi Lal and Hans Raj organised a concerted murderous attack on the police. The case for the defence is

that during the journey the police maltreated Kasturi Lal and thereby drew upon themselves an attack by Jagdish Chandar and his friends to avenge the treatment of Kasturi Lal, but the defence version does not explain how the party of the accused came to be in possession of revolvers or why the revolvers were used on the police.

It has been argued in this connexion by Mr. Puri that the story of a concerted attack by the accused's party on the police must be rejected. It is contended that at least two of the accused's party being under detention by the police, they must have been searched in which case it would be inconceivable that they could have been left in possession of lethal weapons. The Assistant Sub-Inspector Ata Ullah and the police however deny that the accused were under arrest. In this matter we are of opinion that the police have not told the whole truth. It seems to us unlikely that the four accused should by chance, or of their own free will, be travelling with the police party from Jammu to Sialkot in the particular circumstances of this case. We are of opinion that although none of the accused's party may have been under formal arrest, at least two of them, viz., Kasturi Lal and Hans Raj, must have been travelling under some form of compulsion, whether by the British police or of the Kashmir State police. It is unnecessary to speculate. We are of opinion, in disagreement with the view taken by the learned Sessions Judge, that none of the accused's party were in fact subjected to any search (Hans Raj in his confession does not say they were), a fact which explains how they came to be in possession of lethal weapons. It will be convenient at this stage to consider the confession proved against Hans Raj which was retracted during the Sessions trial. This confession is Exhibit P. W. 53-B and was recorded by Mr. C. H. Disney, First Class Magistrate, who gave evidence for the prosecution as P. W. 19.

The learned Sessions Judge has rejected this confession for reasons which we are unable to appreciate. Mr. Puri has attempted to support the decision of the learned Sessions Judge in this respect by drawing attention to certain discrepancies noted in Mr. Disney's evidence at p. 20 of the paper book. These discrepancies consist of certain minor differ-

ences between the vernacular and the English record of Hans Raj's statement. We are of opinion that these discrepancies, such as they are, are wholly immaterial and they do not in any way affect the admissibility of the confession. Another point taken by Mr. Puri is that although the necessary certificate and memorandum regarding the voluntary nature of the confession appears on the English record, it has been omitted from the vernacular record. Whatever may have been the effect of this omission, it has been cured by Mr. Disney's evidence in Court. Further it has been urged that Mr. Disney failed to comply with the provisions of sub-s. (2), S. 164, Criminal P. C., which require that the statement after being recorded shall be forwarded to the Magistrate by whom the case is to be enquired into or tried. Mr. Disney states in his cross-examination that after completing the statement he made it over to the same Police Officer who had brought Hans Raj before him. But the statement admittedly reached the Magistrate by whom the case was enquired into in due course.

There is no suggestion that it was tampered with in transit and Mr. Puri concedes that his client has not been prejudiced by the method of forwarding the statement actually adopted by Mr. Disney. We are, in these circumstances, of opinion that there has been substantial compliance with the provisions of the section. At the same time we take this opportunity of pointing out that a Magistrate who records a confession under S. 164, Criminal P. C., should avoid handing over the document after completion to the police in charge of the prisoner, but should forward it as required by sub-s. (2), S. 164, Criminal P. C., direct to the Magistrate by whom the case is to be enquired into or tried.

The learned Sessions Judge has also assigned as a reason for rejecting the confession that it is a mixture of truth and palpable falsehood and contains matter which in the opinion of the learned Sessions Judge is "not only totally ridiculous and incredible but even grossly repugnant to common sense." The learned Sessions Judge has referred to what he calls the constant shuffling and passing of the revolver, cartridges and knife from one hand to another

in the railway compartment under the very eyes of the police.

It appears to us that the learned Sessions Judge has exaggerated the effect of Hans Raj's statement. It is here necessary to refer to the confession itself. The material part reads as follows :

Jagdish Chandar and Prabhe Khan were released at the thana while I and Kasturi Lal were taken by the police. Prabhe Khan accompanied us at his own request. We were taken to the railway station. Shortly after Jagdish Chandar also arrived at the station in a tonga. He and Prabhe Khan spoke together and then Jagdish Chandar informed me that they had decided to release Kasturi Lal, and that I should take Kasturi Lal's revolver from him in case he was searched. Kasturi Lal made an excuse of asking me where the balance of the money was and on this pretext he was allowed to speak to me alone in the railway compartment. There at my request he quietly gave me his revolver. . . . When Kasturi Lal was taken out by the police I quietly gave Jagdish the knife I was carrying and he made it over to Prabhe Khan. I kept the revolver. . . . On the pretence of speaking to Kasturi Lal about a lawyer, Jagdish Chandar secretly obtained a box of revolver bullets from him. Kasturi Lal then went back to his own seat. Jagdish Chandar gave me the bullets. I went to the lavatory and loaded my revolver with five bullets ; one chamber remained empty. I then came back to my seat.

It will be seen from this that Jagdish Chandra and Prabhe Khan came to the station of their own free will. It is to be noted that Kasturi Lal and Hans Raj were suspected of forgery. The police had apparently no indication that they were dangerous criminals inclined to violence or likely to be armed with lethal weapons. There is nothing unbelievable therefore in the statement that Hans Raj should be allowed to speak either to Jagdish Chandar or to Kasturi Lal or that Kasturi Lal should be allowed to speak to Jagdish Chandar. Under these circumstances it would be perfectly simple for the accused's party to pass from one to the other small weapons like the pistols exhibited in this case or a small box of cartridges. These articles have been produced before us in Court. It would have been otherwise if the police had cause to suspect the accused of being violent criminals. There is nothing in our opinion in the confession of Hans Raj which is not in accord with what might easily have happened under the circumstances of this case. The fact undoubtedly remains that there were revolvers or pistols in that compartment and that they were used. The

police were negligent in the matter of searching the accused and unfortunately have paid for their neglect.

The confession is clearly admissible in evidence and may be taken into consideration against both appellants who were jointly tried. Hans Raj implicates himself to an equal extent with the other accused. The confession of Hans Raj is corroborated by the evidence of the eye-witnesses, and in our opinion gives in all essential points a substantially true account of this occurrence (His Lordship then examined the evidence of the eye-witnesses and proceeded.) It is clear to us that the evidence of the eye-witnesses, the confession of Hans Raj, and the circumstances under which this sudden attack was made upon the police, show premeditation and common intention on the part of the two appellants. It is wholly unnecessary to establish which of the appellants attacked which of the policeman or indeed to show what particular weapons were used by either appellant. If the two appellants were, as we have found, engaged in a concerted attack upon the police and either of them was armed with a deadly weapon and used it to kill a police officer, they are both equally guilty of murder.

It was urged before us that the learned Sessions Judge had wrongly refused to permit the defence to make use of certain alleged statements of witnesses embodied in the inquest report. At the time that this inquest report was made it was obvious that the death of Karam Dad was homicidal and the case was therefore under police investigation so that the statements of any witnesses thus recorded by the police are governed by the provisions of S. 162, Criminal P. C., and could only have been made accessible to the defence under the limitations provided by that section for the purpose of contradicting the statements made by these witnesses in evidence. In point of fact there are no contradictions. It is true that there is no specific mention of the use of a knife in the inquest report, nor is there any mention of the signal word "ready." But these are omissions which do not amount to contradiction. Moreover it is obvious from the medical evidence that a knife must have been used so that the omission of this weapon in the inquest report is in any case of no significance. It follows that no inference

prejudicial to the prosecution can be drawn from the inquest report. In Ch. 7 of the judgment dealing with "expert evidence" the learned Sessions Judge has attempted to fix the number of shots fired. This under the circumstances of this case is wholly impossible. Several shots may undoubtedly have gone out of the windows and the bullets for this reason would not be recovered. Accordingly the finding of the learned Sessions Judge that only two revolvers were used and not three, cannot be accepted. The evidence in this case leaves us in no doubt that both the appellants actively participated in this murderous assault upon the police.

We would in conclusion observe that the lack of candour on the part of the police with regard to the detention of Kasturi Lal and Hans Raj has added greatly to the difficulty of this trial and has given an argument to the defence that the rest of the police evidence is unreliable. We think it is possible that the police adopted this attitude because the arrest in Kashmir may have been illegal. It cannot too often be pointed out that the conviction of guilty persons would be more certainly obtained if the prosecution was confined to simple and true evidence and no attempt was made either to hide essential facts or to embroider the case. It would further add to the facility of trials if irrelevant evidence was excluded. Further where there is no distinct charge of conspiracy, or where it is unnecessary and the evidence is sufficient, if believed to prove the particular offences with which the accused are charged, it is a waste of time and money to try and establish a conspiracy. We invite the attention of the proper authorities to this criticism of the evidence and the procedure adopted in this case.

The result is that we confirm the convictions of both the appellants. With regard to Prabhe Khan, we confirm the sentence of death passed upon him. In our opinion Hans Raj is fortunate to escape the extreme penalty, but since the Crown has not petitioned for enhancement, we have not thought it necessary to take any action on our own motion. Both the appellants are equally guilty of a brutal and premeditated murder and should have received the same sentence. This consideration however does not

entitle us to commute the sentence passed on Prabhe Khan. The appeal is dismissed.

K.S./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 345

ABDUL RASHID, J.

Lakhi Ram—Plaintiff—Appellant.

v.

Parlhal Singh and another—Defendants—Respondents

Misc. First Appeal No. 102 of 1934, Decided on 10th July 1934, from order of Senior Sub-Judge, Karnal, D/- 9th December 1933.

Arbitration—Agreement to refer—Arbitrator looking into account books of one party before agreement to refer was written—Parties heard and award delivered—Award not vitiated.

After the arbitrator began looking into the 'bahis' of one of the parties, the agreement of reference was written. After an examination of the 'bahis' the arbitrator heard the parties and delivered his award which was at once reduced to writing. The award was then signed by the parties:

Held: that looking into the 'bahis' by the arbitrator before the agreement to refer was drawn up does not vitiate the case of award.

[P 346 C 1]

Shamair Chand—for Appellant.

Krishan Swarup—for Respondents.

Judgment.—On 14th November 1933, Lakhi Ram presented an application in the Court of the Senior Subordinate Judge, Karnal, alleging that a dispute between him and the defendants, Parbhal Singh and Rajbir Singh, had been referred to the arbitration of one Ram Chand, that Ram Chand had delivered the award, that this award may be ordered to be filed in Court under para. 20, Sch. 2, Civil P. C., and that a decree may be passed in accordance therewith. This application was registered as a plaint and notice was issued to the defendants requiring them to show cause why the award should not be filed. On 9th December 1933, the defendant Parbhal Singh made the following statement:

I admit the agreement and the award, Exs. A and B. As the plaintiff was about to bring a suit against us, we told Ram Chand to arbitrate. Lakhi Ram came to Karnal to institute the suit. We followed him. Ram Chand was already in the Court compound. Ram Chand and Lakhi Ram were sitting with the petition writer when we came. All of us told him to decide our dispute. Ram Chand then saw plaintiff's bahis. He then fixed Rs. 15,000 and made it payable by instalments. Then the agreement Ex. A was written and after that

the award Ex. B was written. The same petition writer wrote all this at the same time.

Rajbir, defendant 2, supported the statement of his father Parbhal Singh. The trial Court refused to file the award on the ground that the statements of the defendants showed that the arbitrator had already given his award, before the agreement of reference and the award, Exs. A and B, were written. The plaintiff has preferred an appeal to this Court. It appears to me that the inferences drawn by the trial Court from the statements of the defendants are not justified. As all the proceedings took place the same day it is impossible for the defendants to remember the exact sequence of events. The statements of the defendants must be read subject to the allegations contained in the agreement and the award. The agreement Ex. A runs as follows:

Joki ham friqain ka tanaza babat gaymi raqm len den barue bahi wa tariqa adaygi raqm wajib hai is liye ham friqain ne bar razamandi khud Lala Ram Chand... ko wahid salis khangi bina bar tasiya tanaza khud muqarar kya hai.

The award Ex. B mentions the fact that the arbitrator had heard the statements of the parties and that Lakhi Ram had produced a transliteration of his bahis. After an examination of the bahis and a consideration of the statements of the parties the arbitrator found that Rs. 15,000 were due by the defendants to the plaintiff. The award made this amount payable by means of instalments, and also laid down elaborate stipulations as to what was to happen if any instalment was not paid in time. An examination of the statements of the defendant and the two documents mentioned above shows that as soon as the defendants arrived at the stall of the petition writer they orally agreed to refer the matter to the arbitration of Ram Chand, that thereafter Ram Chand began looking into the bahis of the plaintiff and the agreement of reference Ex. A was written by the petition writer. After an examination of the bahis the arbitrator heard the parties and delivered his award which was at once reduced to writing by the same petition writer. The award was then signed by the parties. It is clear, therefore, that at the time when the parties appointed Ram Chand as the sole arbitrator there was a real dispute between them, particularly with respect to the payment of

interest, and the period and nature of instalments. The defendants did not plead in the trial Court that there was no valid reference to arbitration or that no valid award was made by Ram Chand. On the other hand it was stated in the written statement of the defendants that Ram Chand had been duly appointed as the sole arbitrator, and that the award given by him was correct. It was prayed that a decree for Rs. 15,000 may be passed against the defendants, but that they may be relieved from the payment of costs. The learned counsel for the appellant relied on 137 I C 807 (1) and 1930 Lah 860 (2); while the learned counsel for the respondents quoted 54 I C 285 (3) and 1931 Bom 164 (4). It is, however, unnecessary to deal with these rulings as it appears to me that the parties had not arrived at any final settlement before they appointed Ram Chand as the sole arbitrator. Even if the agreement Ex. A was written after the arbitrator had looked into the basis of the plaintiff it does not affect the case in any manner. For the reasons given above, I accept this appeal and order the award to be filed and pass a decree in favour of the plaintiff against the defendants in accordance with the terms of the award. Parties will bear their own costs throughout.

B.D./R.K.

Appeal allowed.

1. Ganga Ram v. Ram Kishan, 1932 Lah 459 = 137 I C 807 = 33 P L R 934.
2. Nihal Singh v. Ashtakar, 1930 Lah 860 = 127 I C 705 = 31 P L R 225.
3. Uttamchand Saligram v. Jawa Mamooji, 1920 Cal 143 = 54 I C 285 = 46 Cal 534 = 23 C W N 704.
4. Dawoodbhai Abdulkader v. Abdulkader Ismailji, 1931 Bom 164 = 130 I C 588 = 33 Bom L R 51.

A. I. R. 1936 Lahore 346

TEK CHAND AND SKEMP, JJ.

Inayat Ali and others—Defendants—Appellants.

v.

Mohammad Hussain and another—Plaintiffs and others, Defendants—Respondents.

First Appeal No. 1335 of 1932, Decided on 16th January 1935, from order of Senior Sub-Judge, Sialkot, D/- 1st August 1932.

(a) Custom (Punjab)—Ancestral property—Nature of—Fact that common ancestor founded village is not sufficient.

It is necessary for persons relying on the ancestral character of property to prove that the common ancestor of themselves and the last male owner actually held the property in dispute and that it had devolved from him to the last male holder by inheritance, and not merely that their common ancestor had founded the village. [P 347 C 2]

(b) Custom (Punjab)—Succession—Self-acquired property—Sayyads of Sialkot District—Daughters succeed in preference to collaterals.

Amongst Sayyads of Sialkot District daughters of a sonless male proprietor succeed to his self-acquired property in preference to the collaterals: 1923 Lah 401; 1929 Lah 465; 1929 Lah 58; 1930 Lah 724; 1930 Lah 971; 1935 Lah 106 and 1936 Lah 339, Ref. [P 347 C 2]

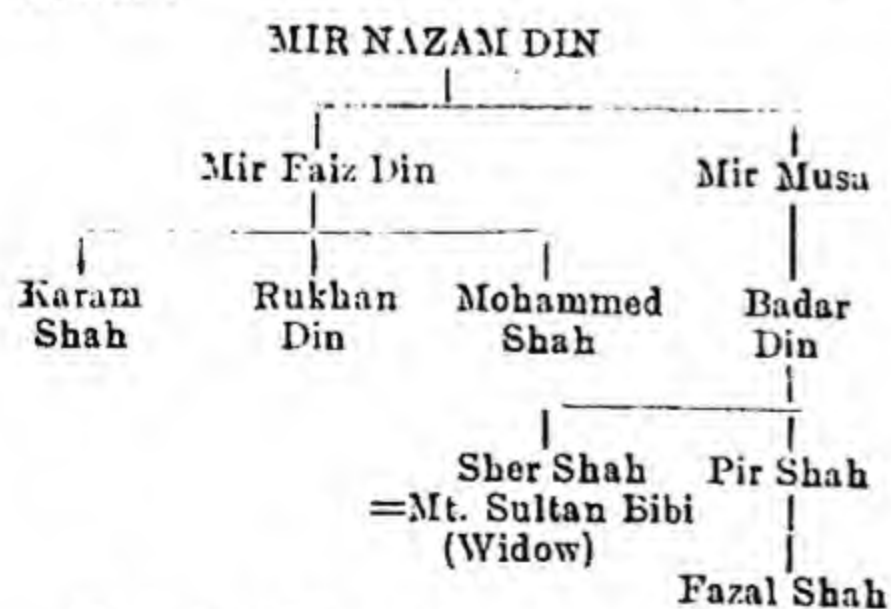
Shuja-ud-Din and Akbar Ali—for Appellants.

Nawal Kishore and Bashir Ahmad—for (Plaintiffs) Respondents.

Skemp, J.—This suit and the appeal concern the land left by one Fazal Shah, a Bukhari Sayyad of Kotli Amir Ali, Tehsil and District, Sialkot. The Collector sanctioned mutation in favour of his collaterals in the fifth degree. The present plaintiffs Muhammad Hussain and Mt. Ghulam Fatima are respectively the daughter's son and the daughter's daughter of Fazal Shah. They state in their plaint that Fazal Shah died about 40 years ago, being succeeded by his two widows. On the death of one of them the other succeeded to the entire estate and died shortly before suit. The plaintiffs alleged that the land in dispute was non-ancestral. The defendants pleaded that it was ancestral and that in accordance with the Customary law of the Sialkot District, by which the parties were bound, their claims as heirs were preferential to those of the plaintiffs. The parties went to trial on these two main issues and the learned Senior Subordinate Judge found, first, that the land was non-ancestral and secondly, that in respect of non-ancestral land among Sayyads of Sialkot District daughters and their issue were not excluded by collaterals of the fifth degree. The defendants have appealed through Dr. Shuja-ud-Din, who has agitated the same two points. Dr. Shuja-ud-Din relies on the statement of the history of the village prepared at the settlement of 1865 (Ex. D-1). This sets forth that 250 years previously, in the reign of the Emperor Aurangzeb, the common ancestor Mir Mohammed Mohsin founded the village in the jungle.

This village, then called Sayyedawali, was deserted after about 40 years, but re-founded by Amir Ali, son of Mir Mohammed Mohsin. Since the second foundation the village, which was then called Kotli Amir Ali, has never been deserted. The statement continues that Amir Ali took possession of a larger area (apparently of a larger area than his father) "according to his means." Afterwards his brother's son, Faqir Ullah, also came to the village and took possession of a small area. Two tarafs, called after Amir Ali and Faqir Ullah, were formed comprising the area held by each of them and the descendants of one Mir Hadi also came to taraf Faqir Ullah.

The learned counsel also relies upon the pedigree table of the owners of the village prepared at the same settlement, and according to remarks in that pedigree table the measure of ownership was "possession according to means." "According to means" is a translation of *hasab-i-stata'at* the words meaning "strength or pecuniary means" and from this fact and the fact that in the pedigree table, prepared at the last settlement of 1913-14, certain acquisitions by purchases were specifically recorded, he seeks to derive the principle that in this village there was a special custom whereby the owners held as much land as they could and yet the whole of the property was ancestral. But in my opinion this alleged principle is no principle, and this case must be decided in accordance with the usual rules. The learned Senior Subordinate Judge gave an abbreviated pedigree table of the parties which will be useful :



He pointed out that according to the settlement records of 1865 the areas owned by different members of the family were very unequal, for instance, Fazal Shah and Mt. Sultan Bibi, widow

of Sher Shah, owned 82 ghumaons odd out of which Mt. Sultan Bibi held 129 kanals and Fazal Shah 527 kanals odd. Thus Fazal Shah and Sher Shah did not own land in equal shares. Similarly the areas held by the descendants of Mir Faiz Din were unequal. The descendants of Karam Shah held 64 ghumaons odd, Rukhan Din's 31 ghumaons odd and Mohammad Shabs 31 ghumaons odd. These facts are *prima facie* inconsistent with the ancestral nature of the property. It is necessary for persons relying on the ancestral character of property to prove that the common ancestor of themselves and the last male owner actually held the property in dispute and that it had devolved from him to the last male holder by inheritance, and not merely that their common ancestor had founded the village. For these reasons, I am in agreement with the learned Subordinate Judge in holding that appellants have not shown that the property in dispute is ancestral.

The next point is whether fifth degree collaterals exclude daughters and their issue. The Collector in ordering mutation in favour of the collaterals relied on Question and Answer 47 to Boyd's Customary Law of the Sialkot District, which states that in the absence of male lineal descendants unmarried daughters take possession of their father's property till marriage but not subsequently. This statement is made with regard to all property. The answer then says :

that married daughters do not inherit in the presence of collaterals, but adds that this is the general rule, but under the influence of judicial decisions some people assert that daughters succeed in preference to collaterals of the fifth or more remote degrees.

This Question and Answer were the subject of consideration very recently before a Division Bench of this Court in Civil Appeal No. 381 of 1930 (1). It was there pointed out that the answer is ambiguous and that it cannot be said with any degree of certainty that the distinction between ancestral and self-acquired property was understood by the persons answering the questions. It was also pointed out that in a number of rulings there quoted, a daughter had succeeded to the self-acquired property of her father in preference to near collaterals. With this ruling I am in respect-

1. Mangal Singh v. Indar Kaur, 1935 Lah 106=158 I O 194=16 Lah 616=97 P L R 732.

ful agreement. Dr. Shuja-ud-Din took us through the instances and the evidence brought on the record in the present case. There are five alleged instances in his favour, but three of them concern alienations effected by widows in favour of strangers and are therefore irrelevant. A fourth Ex.-D 9 was a suit brought to set aside an adoption of a daughter's son amongst Sayyads of Sialkot District. The suit was successful but the property was ancestral. This also is no guide here. Ex.-D 10 is a mutation in which a gift made by the mother of the last male-holder to her daughter, i. e. to the sister of the last male-holder was set aside at the instance of the collaterals and is also not relevant. On the other hand, the learned Subordinate Judge at pp. 45-46 of the printed paper book has surveyed a number of instances which support his conclusion and which are in accord with the rulings cited in Civil Appeal No. 381 of 1930. For the above reasons I am of opinion that this appeal ought to be dismissed with costs and would order accordingly.

Tek Chand, J.—I agree with the conclusions reached by my learned brother on both the points which have been argued before us. It is true that the "history of the foundation" of the village as given in the Settlement record of 1865 shows that more than two hundred years ago Amir Ali, the common ancestor of the parties, and his nephew Faqir Ullah, had refounded the village, but this fact is insufficient to justify the assumption that all the land now held by the various descendants of Amir Ali had devolved on them by inheritance from generation to generation. As pointed out in detail in the judgment of the learned Senior Subordinate Judge, there is very great disparity in the areas owned by the various members of the family, including Mir Musa's descendants, and the plaintiffs have failed to furnish any satisfactory explanation as to why this is so. Clearly it was for the plaintiffs to exclude the possibility of acquisition, otherwise than by inheritance from the common ancestor but admittedly this they have not done. It is quite possible that during the long time that has elapsed since the death of the common ancestor, one branch of the family might have acquired from another portions of the land now held by it, by sale, gift, pre-emption, prescription or

otherwise, and it has not been shown that this could not have been the case. The finding of the lower Court that the land has not been proved to be ancestral is therefore correct.

On the question of custom, I have no doubt that the plaintiffs have succeeded in discharging the onus which lay on them, that in the tribe to which the parties belong daughters of a sonless male proprietor succeed to his self-acquired property in preference to the collaterals. In the judgment of the lower Court, the evidence produced by the parties has been carefully analysed and it has been shown that, in numerous cases in this and the neighbouring districts daughters were successful, and that there is not a single proved instance of collaterals excluding daughters in succession to such property. Before us the appellants' counsel relied solely on the presumption arising from the answer to Question 47 of Boyd's *Riwaj-i-Am*. This answer has been considered in several rulings of this Court and in each of them it was found that not a single instance was forthcoming in support of the custom as recorded, whereas there were several instances to the contrary. See 4 Lah 99 (2), 10 Lah 489 (3), 10 Lah 485 (4), 1930 Lah 724 (5), 11 Lah 415 (6), 1935 Lah 106 (1) and Civil Appeal No. 1308 of 1932 (7). The finding of the lower Court on this point is also correct. I agree that the appeal fails and must be dismissed with costs.

B.D./R.K. *Appeal dismissed.*

2. Budha v. Fatima Bibi, 1923 Lah 401=76 I C 921=4 Lah 99
3. Said v. Said Bibi, 1929 Lah 465=118 I C 398=10 Lah 489=30 P L R 618.
4. Shahamad Bibi v. Muhammad Bibi, 1929 Lah 58=116 I C 189=10 Lah 485=30 P L R 678.
5. Khuda Dad v. Rabia Bibi, 1930 Lah 724=125 I C 609.
6. Fateh Din v. Mohammad Bibi, 1930 Lah 971=122 I C 727=11 Lah 415=31 P L R 760.
7. Mahi v. Mt. Barkate, 1936 Lah 339=16 Lah 985.

A. I. R. 1936 Lahore 348

DALIP SINGH, J.

Teja Singh—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. No. 235 of 1934, Decided on 4th December 1934.

Criminal Trial—Sentence—Fine—Imprisonment and fine—Full term undergone—Release on undertaking to pay fine by instal-

ments and offering security for same—Imprisonment in default of fine cannot be subsequently inflicted.

Where an accused who has been sentenced to imprisonment and fine undergoes imprisonment for the full term and is released on his offering security to pay the fine by instalments, he cannot be sent back to jail by subsequently inflicting an imprisonment in default of fine.

[P 349 C 1]

Shamair Chand—for Petitioner.

Des Raj Sawhney—for the Crown.

Order.—The learned Public Prosecutor has not been able to show me any section at law by which the present petitioner can be sent back to jail. The sentence of the High Court was passed in October 1926. Thereafter the petitioner was released after undergoing his full term of imprisonment on offering security for fine payable by instalments. The last instalment was paid in October 1931 and then nothing happened until the present order was passed recommitting the petitioner to jail. The fine admittedly is no longer leviable under S. 70 and I do not see how imprisonment in default of fine can be inflicted now. It is true the original order releasing the prisoner was illegal, but no law has been shown me by which the present order is legal, and I therefore set aside the order of the Additional District Magistrate and direct the petitioner to be released. The learned Public Prosecutor wishes me to add that his contention is that the fine not having been paid in full, the proportionate sentence still stands and must be served. He cites no law in support of this contention.

K.S./R.K.

Petition allowed.

A. I. R. 1936 Lahore 349

ADDISON AND ABDUL RASHID, JJ.

Ghulam Rasul and others—Plaintiffs—Appellants.

v.

Mt. Mohammad Bibi and others—Defendants—Respondents.

Second Appeal No. 1561 of 1929, Decided on 29th May 1934.

Punjab Colonization of Government Land Act (5 of 1912), Ss. 19, 21 (a)—Widow of occupancy tenant allowed to succeed by Government—Gift by her to her daughter—Sanction of Commissioner obtained—Reversioner cannot contest gift.

Where after the death of an occupancy tenant his widow succeeds to him and the Government by allowing her to succeed allots her fresh occupancy rights the succession to such occupancy rights in the widow is governed

by S. 21 (a), Act 5 of 1912. The right of alienation is governed by S. 19, which requires sanction by the Commissioner. When therefore the widow gifts her rights to her daughter, and the Commissioner has sanctioned such gift, the gift is good and the reversioners have no locus standi to contest the gift. [P 349 C 2]

Khurshaid Zaman for Zafrullah Khan—for Appellants.

Mohammad Amin—for Respondents.

Addison, J.—The plaintiffs are nephews of one Nikka who was granted occupancy rights in a square of land by Government. Nikka died in 1897 and was succeeded by his son, Ghulam Nabi, who died in 1898. Government allowed his mother, Mt. Mahtab Bibi, widow of Nikka, to succeed to the occupancy rights. Later she made a gift of those rights in favour of Mt. Mohammad Bibi, one of her daughters. This gift was sanctioned by the Commissioner under S. 19, Act 5 of 1912. The plaintiffs then sued for a declaration that the widow had no power to make this gift or the Commissioner to sanction it, and that it should be held inoperative after the death of Mt. Mahtab Bibi. The Courts below have dismissed the suit and the plaintiffs have preferred this second appeal. Prior to the enactment of Act 5 of 1912 it was held, in 14 P R 1908 (1), that succession to these special occupancy rights was regulated by S. 59, Punjab Tenancy Act. Mt. Mahtab Bibi was not an heir to her son under this section when she was allowed to become the occupancy tenant in 1898. This act of Government, therefore, amounted to allotting to her the occupancy tenancy. In these circumstances she must be treated as a person to whom the tenancy was first allotted by Government, succession to whom would now be governed by S. 21 (a), Act 5 of 1912, and her right of alienation is thus restricted only by the provisions of S. 19 of the Act, that is the sanction of the Commissioner is necessary to validate the gift. This has been given and therefore the reversioners of the husband have no locus standi to contest it. The suit was rightly decided and we dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

1. *Sahibzada v. Jawaya* (1908) 14 P R 1908=107 P L R 1908=24 P W R 1908.

* A. I. R. 1936 Lahore 350

ADDISON AND SALE, JJ.

In the matter of assessment of Kangra Valley Slate Co. Ltd., Lahore.

Civil Reference No. 25 of 1932, Decided on 28th June 1934.

* Income-tax — Capital expenditure—Criterion of—Money spent in defending suits is capital expenditure.

The Income-tax Act does not contain any definition of the term 'capital expenditure'. The nearest approach to a definition of 'capital expenditure' is that 'capital expenditure is a thing that is going to be spent once for all and income expenditure is a thing that is going to recur every year.' [P 351 C 1, 2]

A company had a monopoly of quarrying slate from quarries in a village. The proprietary body of the village assailed that right and the company had to incur expenses in defending that suit:

Held: that the expense incurred was in the nature of capital expenditure and could not be deducted under S. 10 (2) (ix), Income-tax Act: *Usher's William Brewery v. Bruce*, 6 Tax Cas 399, *Disting*; *Vallambrosa Rubber Co. Ltd. v. Farmer*, 5 Tax Cas 529 and *Small v. Eason*, 12 Tax Cas 351, *Applied*. [P 351 C 2]

Badri Das—for Assessee.

Jagan Nath Aggarwal—for Commissioner of Income-tax.

Judgment.—The Commissioner of Income-tax has referred to us for our opinion the question whether the expenditure incurred by the Kangra Valley Slate Co. Ltd., in defending as lessee of certain land in Mouza Kanhayara, District Kangra a suit for possession and injunction instituted by the lessors who are the proprietary body of that village, is deductible under Cl. (9), sub-s. (2), S. 10 Income-tax Act. The material facts of this case are that the Kangra Valley Slate Co. Ltd., by lease dated 22nd February 1867 secured in perpetuity the exclusive right of quarrying slate in Kanhyara village of the Kangra District. The company is also a share-holder in the village shamilat and as such enjoyed quarrying rights in common with the proprietary body, but the essence of the company's business is that by reason of the lease it enjoys a monopoly of slate quarrying in this village. This monopoly has been recently assailed by the village proprietary body who, on 10th July 1928, instituted a suit to reject the company from the quarries covered by the lease and also for an injunction to prevent the company from quarrying. On 11th July 1930 a decree was passed against the company by the trial Court and an appeal against that decree is pending in this Court. The company have obtained stay of execution

so far as the injunction is concerned, so that the business of the company continues during the pendency of the appeal.

In submitting a return of its income for the year ending 30th June 1930, which is the 'previous year' for the purpose of assessment under consideration (1931-32), the company showed a net income of Rs. 23,350 which was arrived at after deducting Rs. 13,397 on account of the legal expenses of the suit to date. The Income-tax Officer, supported by the Commissioner, Income tax, has held that no deduction is permissible because the legal expenses were expenditure in the nature of capital; and since it was not incurred solely for the purpose of earning the profits and gains of a business it did not fall within the purview of S. 10 (2) (ix), Income-tax Act. Para. (ix), sub-s. (2), S. 10, Income-tax Act, provides that allowances may be made on

any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains.

Mr. Badri Das on behalf of the company urges that the cost of the litigation was incurred to defend the monopoly of quarrying which is the very life-blood of the company. For this reason he contends that the expenditure should be held to have been incurred solely for the purpose of earning profits or gains; since if the monopoly were lost, the business of the company would come to a standstill and there would be no profits or gains. Further he contends that the expenditure is debitable to revenue and is not capital expenditure and that for these reasons the deduction is permissible under the clause. The opinion of the Commissioner is that since the subject matter of the suit represents the capital of the company, the expenditure on litigation was incurred to defend the capital of the business and must therefore be deemed to be in the nature of capital expenditure. Accordingly he holds that no deductions can be permitted. No authority applicable to the facts of this case has been cited before us at the Bar. Counsel for the assessee has invited our attention to a British case reported as 6 Tax Cas 399 (1), in which a Brewery Company as lessees of a number of houses which they had acquired in the course of their busi-

1. *Usher's William Brewery v. Bruce*, (1915) A C 433=6 Tax Cas 399=59 S J 144=31 T L R 104=112 L T 651.

ness claimed deductions on account of certain expenditure as being money wholly and exclusively laid out for the purpose of the Brewery; and this claim was upheld on appeal to the House of Lords. The only point of relevance in this case is that a sum of £66-2-8 was included in the expenses thus claimed and allowed as legal and other costs.

This authority however has no bearing upon the present case, partly because this item for legal expenses, being trifling in comparison with the other expenses claimed, passed practically unnoticed in the course of the legal discussion and also because (as would appear from p. 410 of the ruling) it was agreed between counsel at the commencement that these legal expenses were not incurred for any extension of the business so as to make them 'capital business.' In our opinion the answer to the reference made by the Income-tax Commissioner in the present case depends on the question whether the legal expenditure incurred by the Kangra Valley Slate Company was or was not in the nature of capital expenditure; and since it was agreed that the legal expenses permitted in 6 Tax Cas 399 (1) were not to be considered capital expenditure, the authority has no bearing on the present dispute. As observed by Wright, J., in 3 Tax Cas 298 (2) the question whether certain expenditure in respect of which a deduction is sought is capital or not is in its essence one of fact; and as such it is open to question whether this is a permissible reference to us under S. 66, Income-tax Act. But we have no doubt that this reference should be treated as involving a question of law. It should however be understood that in answering this reference we are not deciding any question of principle, but are giving an opinion which is relevant solely to the facts of the case before us. The Income-tax Act does not contain any definition of the term 'capital expenditure' nor has any definition been attempted in the various authorities cited at the Bar. The nearest approach to a definition of 'capital expenditure' occurs in certain observations by Lord Dunedin in the case reported as 5 Tax Cas 529 (3). Lord Dunedin observed (on p. 536) as follows:

2. *Marant Surveyor of Taxes v. Wheal Grenville Mining Co.*, (1894) 3 Tax Cas 298.

3. *Vallambrosa Rubber Co. Ltd., v. Farmer*, (1910) 5 Tax Cas 529.

I think it is not a bad criterion of what is capital expenditure as against what is income expenditure, to say that capital expenditure is a thing that is going to be spent once for all and income expenditure is a thing that is going to recur every year.

This test laid down by Lord Dunedin was approved in the case reported as 12 Tax Cas 351 (4) in which Clerk, L. J., at p. 355 observed that this criterion has been accepted in several subsequent cases. The expenditure incurred by the Kangra Valley Slate Co. Ltd., in the present case was clearly a non-recurring outlay required to retain a capital asset. Following the criterion laid down by Lord Dunedin in the *Vallambrosa* case (3) we hold that the expenditure incurred by the Kangra Valley Slate Co. Ltd., in this particular case is in the nature of capital expenditure and we agree therefore with the Commissioner of Income-tax in answering the question referred to us in the negative.

B.D./R.K.

Reference answered.

4. *Small v. Eason*, (1920) 12 Tax Cas 351.

A. I. R. 1936 Lahore 351

AGHA HAIDAR, J.

Lalu—Defendant—Appellant.

v.

Baldev Singh and others—Plaintiffs—Respondents.

Appeal No. 772 of 1934, Decided on 7th November 1934, from decree of Dist. Judge, Hoshiarpur, D/- 17th February 1934.

Custom (Punjab)—Gift—Delivery of possession necessary—Gift by simpleton with no one to advise is not valid.

A gift to be valid must ordinarily be followed by possession. Where therefore a deed of gift has been obtained from a man who is a simpleton and who has no friends and relations to advise him, it cannot be allowed to stand in the absence of proof of delivery of possession; merely mutation of names is not sufficient.

[P 352 C 2; P 353 C 1]

Shamair Chand and Qabul Chand—for Appellant.

Achhru Ram and R. P. Khosla—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for possession. The trial Court dismissed the suit, but on appeal by the plaintiffs the lower appellate Court has decreed the claim. The defendant has come up to this Court in second appeal. *Lalu*, defendant, has been described as a simpleton. He had neither wife nor children and was living all alone in his native village. On 20th June 1931

one Tek Singh, a caste fellow of Lalu obtained a deed of gift in his favour from Lalu. Tek Singh was a native of a neighbouring village. Mutation proceedings were started and Tek Singh himself did not appear before the Revenue Officer, but Lalu was present with his mother. The Revenue Officer recorded that Lalu was a simpleton and was unable to say anything, but his mother denied the execution of the deed of gift and further stated that possession had not been given to the donee and the whole thing was a deception. Under these circumstances, and in view of the fact that delivery of possession had not been made, the mutation was rejected. In 1925 the patwari made a report that possession had now passed and that mutation might be sanctioned. On 5th June 1925 Lalu is said to have appeared before the Revenue Officer accompanied by the village lambar-dar and is said to have attested something, we don't know what. It was ordered that the case should be put up in the presence of the donee.

The donee however did not appear, but his brother Sunder appeared on 20th December 1925 and mutation was sanctioned on the basis of the gift. In the meantime Tek Singh died and on 21st January 1928 mutation was sanctioned in favour of the sons of Tek Singh. In 1931 Lalu brought a suit for a declaration that the gift in favour of Tek Singh was invalid but subsequently he withdrew the suit saying that he himself was in possession, and therefore, it was not necessary for him to sue for a declaration.

On 13th June 1933, the sons of Tek Singh instituted the present suit for possession against Lalu. The plea which prevailed in the trial Court on behalf of Lalu was that no delivery of possession had taken place and therefore the gift was incomplete and invalid. The suit of the plaintiffs was accordingly dismissed. The plaintiffs went up in appeal before the District Judge. The judgment of the learned District Judge is not by any means clear. He seems to be of opinion that no possession was actually delivered under the deed of gift. But, since mutation had been effected in favour of the plaintiffs, therefore the gift must be taken to have been given effect to. He refers to para. 60 of Rattigan's Digest which lays down that a gift to be valid must ordinarily be followed by possession

and must be free from undue influence. He however says that the word 'ordinarily' makes all the difference and the present is one of the cases in which it would not be necessary for the validity of the gift that it should be followed by actual delivery of possession, and that in any case it is more than amply proved that everything has been done to make the gift complete and irrevocable. Apart from para. 60, I may observe that in primitive or semi-primitive societies a transfer could only take place by actual delivery of possession. Under the old English law it used to be "feoffment" and delivery of seisin. Under the Mohammadan law a gift was incomplete without delivery of possession. This idea seems to have been at the foundation of the rule of Customary Law as enunciated by the compilers of Rattigan's Digest. We have to see whether there is clear and cogent evidence that possession had been given. That evidence is lacking in this case and the learned Judge therefore considered himself justified in falling back upon the evidence of mutation entries, in order to hold that the gift was valid. In my opinion the mutation and the circumstances attending the same in the present case are wholly insufficient to be a legal substitute for delivery of possession without which the gift cannot be valid and legally binding on the parties. The word "ordinarily" in para. 60 of Rattigan's Digest probably refers to those cases when the property from its nature is incapable of delivery of possession. The learned Judge has clearly misread the opening portion of the mutation proceedings dated 20th December 1925 which makes all the difference. He understood the sentence to mean that Lalu, the donor, identified by the lambar-dar, attested possession. This was not so. The word used is *deh* and not *qabza* and *deh* goes with the lambar-dar.

I was asked by Mr. Achhru Ram, the learned counsel, for the respondents, to remit an issue on the question of delivery of possession. The trial Court had given a finding on the evidence that there was no delivery of possession. The learned Judge disposed of the case on the ground that in the absence of possession other circumstances go to show that the gift was a valid one. If the case were to be remanded at this stage the result would be that a good deal of perjured evidence

would be led on both sides. I therefore, do not consider it proper in the interests of justice to prolong these proceedings by ordering a remand. The deed of gift, which as already stated, had been obtained from a man who is described as a simpleton and who had no friends and relations to advise him, cannot under the circumstances be allowed to stand in the absence of proof of delivery of possession. I therefore, allow the appeal and setting aside the judgment and decree of the lower Court, restore the decree of the trial Court. The defendant-appellant shall get his costs throughout.

K.S./R.K.

Appeal allowed.

* * A. I. R. 1936 Lahore 353

COLDSTREAM AND BHIDE, JJ.

Faqir Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 65 of 1934,
Decided on 29th October 1934.

* * Criminal Trial—Pardon—Case against co-accused withdrawn by Government—Magistrate not tendering pardon suo motu—Government withdrawing case through Magistrate—Provisions of S. 337, Criminal P. C., not applicable.

In a criminal case the Public Prosecutor withdrew the case against some accused under S. 494, Criminal P. C. The Local Government had promised pardon or 'non-prosecution' to these accused on condition that accused would make a true statement of facts in the case. Afterwards these accused were produced as witnesses against the remaining accused. At the time of framing charge the accused under trial raised an objection that the case must be "committed to the Sessions" as some of the accused were tendered pardon:

Held: that this was a case of promise of pardon by the local Government through the Magistrate and as the Magistrate had not tendered pardon suo motu, provisions of S. 337, Criminal P. C., were not applicable. Moreover, if the case could by any means come under S. 337 then there was no necessity of withdrawing the prosecution as in this case, because under S. 337 the moment pardon was tendered, the accused no longer remained an accused: 1931 *Lah* 476, *Rel. on.* [P 853 C 2; P 354 C 1,2]

Held also: when the Government intended to withdraw a prosecution and not to have recourse to S. 337, Criminal P. C., care should be taken to make the fact clear to all concerned.

[P 355 C 1]

Petitioner in person.

*Ram Lal—*for the Crown.

Bhide, J.—The material facts giving rise to this petition for revision are as follows: On the termination of a suit

1936 L/45 & 46

based on a promissory note, the Senior Subordinate Judge, Lahore, took action under S. 476, Criminal P. C., and filed a complaint under Ss. 467/471, read with S. 120-B, I. P. C., against three persons, named Sain Das, Vishwa Mitter and G. S. Kochhar. The Public Prosecutor filed a complaint in connection with the same transaction against the petitioner Bawa Faqir Singh and two other persons named Shamsher Singh and Ram Lal. Both these complaints were being inquired into by Mr. R. N. Luthra, Special Magistrate. Before any evidence was recorded the case against Sain Das was withdrawn with the permission of the Magistrate under S. 494, Criminal P. C., and he was then produced as a witness against the other accused, including the petitioner. After a certain number of witnesses were examined the case against Vishwa Mitter was similarly withdrawn and he, too, then appeared as a witness. When charges were framed by the Magistrate the petitioner raised an objection that both Sain Das and Vishwa Mitter had been tendered pardon by the District Magistrate and the provisions of S. 337, Criminal P. C., being applicable, the case ought to be committed to the Court of Session. The objection was overruled by the learned Magistrate and a petition to the Sessions Judge for revision of that order having proved unsuccessful, the petitioner Bawa Faqir Singh has moved the Court on the revision side praying that the case against him be ordered to be committed to the Court of Session.

It is not disputed that Sain Das and Vishwa Mitter were produced before the District Magistrate and the Additional District Magistrate (who had all the powers of a District Magistrate), and that they were told that no proceedings would be taken against them provided they made a true statement of facts relating to the case within their knowledge, and that after they had accepted the terms, the cases against them were withdrawn under S. 494, Criminal P. C. The petitioner's contention is that, in the circumstances, the case fell within the purview of S. 337, Criminal P. C., and he is entitled to have it tried by the Court of Session in accordance with the provisions of sub-s. 2-A of that section. The learned Government Advocate, on the other hand, contended that the promise of pardon or

"non-prosecution" was made in this instance by the Local Government and it was merely conveyed to Sain Das and Vishwa Mitter through the District Magistrate and the Additional District Magistrate, respectively, and as the Magistrates concerned did not act *suo motu* in the matter, the provisions of S. 337, Criminal P. C., are not applicable. The order of the local Government, which authorized the promise in question to be made to Sain Das, has been produced and placed on the record: vide Exhibit P. W. 4/G. The order communicated to Vishwa Mitter has not been produced, but it is not disputed that it was of a similar character.

It appears from Exhibit P. W. 4/H that the terms of Exhibit P. W. 4/G were explained to Sain Das and were accepted by him and then the Public Prosecutor was directed to withdraw the prosecution against him. After fully considering these documents, I am of opinion, that there is force in the contention of the learned Government Advocate. The order Exhibit P. W. 4/G merely authorises the "Deputy Commissioner" of Lahore to inform Sain Das that His Excellency the Governor had directed that no proceedings would be taken against him, provided he made a full and true disclosure of the facts within his knowledge and repeated the same when called upon to do so in a Court of justice. If the intention was to take action under S. 337, Criminal P. C., it would have been sufficient to say so, and it would not have been necessary to specify the terms upon which the Local Government had agreed not to prosecute Sain Das. It may also be noted that S. 337, Criminal P. C., requires the person to whom pardon is tendered to make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and "to every other person concerned, whether as principal or abettor in the commission thereof." The latter portion, which I have put within inverted commas is not to be found in the order of the Local Government. Lastly, S. 337, Criminal P. C., does not say anything about "repeating the facts disclosed in a Court of justice." It would thus appear, that the terms were not identical with the terms prescribed by S. 337, Criminal P. C. If action was to be taken under S. 337, Criminal P. C., I think care

would have been taken to mention that section and to adhere strictly to its provisions.

The above facts indicate that the Local Government did not contemplate action being taken under S. 337, Criminal P. C. This view is further confirmed by the fact that the Deputy Commissioner, after acceptance of the terms by Sain Das, directed the Public Prosecutor to withdraw the case against him. If action was being taken under S. 337, Criminal P. C., there would have been no necessity to withdraw the case. For an accused person to whom a pardon is tendered under S. 337, Criminal P. C., ceases to be an accused person from the moment the pardon is accepted and is to be treated as a witness thereafter: cf. 1931 Lah 476 (478) (1). The petitioner has laid stress on the fact that Mr. F. H. Puckle, the Deputy Commissioner, while explaining the terms to Sain Das and directing the withdrawal of the case against him has signed his order as D. M. (District Magistrate), instead of D. C. (Deputy Commissioner). This was probably due to inadvertence. For the order of the Local Government was certainly conveyed to him as Deputy Commissioner and not as District Magistrate, and as pointed out above there are indications in the order of the Local Government as well as in Mr. Puckle's order, which go to show that action under S. 337, Criminal P. C., was not contemplated. The only persons who might have reasonably complained in the matter were Sain Das and Vishwa Mitter, if they had been misled by the procedure adopted and had been led to think that the pardon was being tendered to them by Mr. Puckle in his capacity as District Magistrate under S. 337, Criminal P. C., and that they were, therefore, entitled to all the privileges conferred by that and the following sections. But they made no such complaint in Court. Notices were issued to these persons in these proceedings as the decision of this petition would have affected them; but they have not cared to appear. In the circumstances, it may be presumed that they understood and accepted the position taken up by the Government, viz., that

1. *Khairati Ram v. Emperor*, 1931 Lah 476 = 1931 Cr C 700 = 32 Cr L J 913 = 132 I C 519 = 12 Lah 635.

no pardon was tendered to them under S. 337, Criminal P. C.

Section 133, Evidence Act, lays down clearly that an accomplice is a competent witness. It was conceded by the petitioner that the Local Government has the option of not taking proceedings against an offender, and that it can, if it so chooses, produce him as a witness, without having recourse to the procedure laid down in S. 337, Criminal P. C. In the present instance, the circumstances mentioned above show that there was no intention to proceed under that section, and the mere fact that Mr. Puckle signed his order as District Magistrate instead of Deputy Commissioner (apparently through inadvertence) cannot, in my opinion, be held to be sufficient to bring the case within the purview of S. 337, Criminal P. C. It has been urged that the Local Government has merely tried to circumvent the provisions of S. 337, Criminal P. C., in order to avoid the necessity of commitment of the case to the Court of Session. That may be the case. But when it is conceded that the alternative procedure was open to the Local Government, that fact cannot render the procedure "illegal." The procedure adopted possibly places the prosecution in a much weaker position; for it may be that the Court will not be inclined to attach the same importance to the testimony of an ordinary accomplice as it will to the testimony of an approver to whom pardon has been formally tendered by a Magistrate under S. 337, Criminal P. C., and who enjoys certain privileges as a consequence of that procedure.

But this was a matter for the Local Government to decide, and if it has chosen to adopt the above procedure, it must, of course, accept it with the consequent risks, such as there may be. There is, however, one point to which I would like to refer and that is, that if it is intended not to adopt the procedure under S. 337, Criminal P. C., care should be taken to make the fact clear to all concerned. In the present instance the promise of pardon or "non-prosecution" was made through the District Magistrate. This fact was likely to mislead and create an impression that proceedings were being taken under S. 337, Criminal P. C. If Sain Das and Vishwa Mitter had raised any such objection, we

might have found it necessary to consider the matter further; but no such objection has been raised. If proceedings are not being taken under S. 337, Criminal P. C., the best course would be to produce the persons concerned before some Police or other Executive Officer, and not before a Magistrate empowered to act under S. 337, Criminal P. C., and make it clear in the proceedings that action is being taken independently of S. 337, Criminal P. C. The advisability or propriety of adopting such a procedure is, of course, a matter for the Local Government to decide, and I am not concerned here with that aspect of the question. But if that procedure is to be adopted, there should be no room left for any doubt as to the nature of the proceedings.

I have already stated above that it was admitted before us that the order of the Local Government in respect of Vishwa Mitter was to the same effect as that in the case of Sain Das though the order has not been placed on the record. But there are two points of difference. The order of the Local Government was communicated to Vishwa Mitter, not by the District Magistrate but by the Additional District Magistrate and, secondly, this was done while he was under trial. It would appear from the proviso to S. 337, Criminal P. C., that when pardon is to be tendered during the course of an enquiry or trial, it must be tendered by "the District Magistrate." There is only one District Magistrate for a district (vide S. 10, Criminal P. C.) and although the Additional District Magistrate may have the powers of a District Magistrate he cannot be called "the District Magistrate." I do not therefore, think the Additional District Magistrate was empowered to take action under S. 337, Criminal P. C., in the circumstances of the case. It was next argued by the petitioner that S. 343, Criminal P. C., is a bar to pardon being tendered to an "accused" person during the course of a trial, unless the pardon is tendered under Ss. 337 or 338, Criminal P. C. In support of this contention reliance was placed on 10 C W N 847 (2) and 33 Cal 1353 (3). The wording of S. 343, Criminal P. C., lends some colour to this argument and the point is

2. Paban Singh v. Emperor, (1906) 10 C W N 847=4 Cr L J 44.

3. Banu Singh v. Emperor, (1906) 33 Cal 1353=10 C W N 962=4 Cr L J 145.

not free from difficulty. But it is unnecessary to discuss this question for the purposes of this petition. For assuming that the contention of the petitioner in this respect is correct, that would at the most render the evidence of Vishwa Mitter inadmissible. That would certainly not be a ground for commitment of the case to the Court of Session. It is open to the petitioner to raise the question of the admissibility of the evidence of Vishwa Mitter in the Court below and it would be for the learned Magistrate to decide the point. In my opinion the petition fails and must be dismissed. I note however, that the trial of the case has already taken an inordinate amount of time and it is desirable that the learned Magistrate should proceed to dispose of the case with the least possible delay.

Coldstream, J.—I agree.

B.D. R.K. *Petition dismissed.*

A. I. R. 1936 Lahore 356

CURRIE, J.

Ujagar Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 276 of 1934,
Decided on 2nd January 1935, from Addl.
Dist. Magistrate, Jullundur.

(a) Criminal Trial—Transfer—Application
for—No affidavit—Application cannot be
entertained.

S. 526 (4), Criminal P. C., provides that an application for transfer must be supported by an affidavit, the mode of swearing the affidavit being provided for in S. 539, Criminal P. C. Such application cannot therefore, be entertained in the absence of an affidavit. [P 356 C 2]

(b) Criminal Trial—Case by police against
accused—Accused filing cross-complaint—
Arguments heard in challan case—Orders in
challan case should be postponed till hearing
of evidence in complaint case.

A case was filed by the police against an accused. When the evidence in the case commenced, accused filed a cross complaint. This complaint case was adjourned from time to time along with the challan case. After the arguments in the challan case were heard the accused in the case asked for transfer of the challan case:

Held: that it was desirable that both cases should be heard by one and the same Magistrate and thus the danger of conflicting decisions being given on the same facts would be avoided; and that the Magistrate should not pronounce orders in the challan case until he would have completed the hearing of the evidence in the complaint case. [P 356 C 2]

Ghulam Mohy-ud-Din—for Petitioner.

D. R. Sawhney and *Mohammad Amin*
—for the Crown.

Order.—A case was instituted by the police under S. 307, I. P. C., against the applicant Ujagar Singh. Record of evidence commenced on the 3rd October 1934. On the 5th of October, Ujagar Singh filed a cross-complaint under Ss. 326, 324 and 452, I. P. C. This case was adjourned from time to time along with the challan. After arguments had been heard in the challan, the applicant applied for a transfer of the case, which was refused by the District Magistrate. He has now come to this Court with a request that either the case should be transferred or the Magistrate ordered not to announce judgment till he has recorded the evidence in the complaint case. The learned Public Prosecutor raises an objection to the effect that the application for transfer cannot be entertained as it is not accompanied by an affidavit. S. 526 (4), Criminal P. C., provides that such applications must be supported by an affidavit, the mode of swearing the affidavit being provided for in S. 539, Criminal P. C. This objection has not been seriously contested by Mr. Ghulam Mohy-ud-Din and must be accepted.

Mr. Ghulam Mohy-ud-Din, however, presses his alternative prayer. It certainly appears reasonable that the pronouncement of orders in the challan case should be deferred until the Magistrate has heard the evidence in the case brought by the applicant. It is obviously desirable that both cases should be heard by one and the same Magistrate and thus the danger of conflicting decisions being given on the same facts would be avoided. Reference has been made by counsel to 112 I C 563 (1), and 1930 Mad 190 (2). The matter is clearly one to be decided on the basis of convenience, and it is clearly convenient that both cases should be disposed of by the same Court after hearing the whole of the evidence. I, therefore, reject the application for transfer, but direct that the learned Magistrate should not pronounce orders in the challan case until he has completed the hearing of the complaint brought by the applicant.

B.D./R.K.

Order accordingly.

1. *Emperor v. Krishan Murari Lal*, (1928) 112 I C 563=29 Cr L J 1059.
2. *Krishan Pannadi v. Emperor*, 1930 Mad 190=1930 Cr C 190=31 Cr L J 461=123 I C 10.

A. I. R. 1936 Lahore 357

YOUNG, C. J. AND MONROE, J.

Narinjan Singh—Convict—Appellant.
v.*Emperor*—Opposite Party.

Criminal Appeal No. 768 of 1935, Decided on 15th October 1935, from order of Sessions Judge, Lahore, D/- 21st June 1935.

(a) Criminal Trial — Confession — Person making confessions should not be sent back to police custody.

If confessing persons know that there is a likelihood of their being returned to police custody after making confession, they would be more inclined to make false confessions at the instance of the police than they otherwise would do. This practice ought to be abolished. [P 357 C 2]

(b) Criminal Trial — Evidence — Evidence recorded under Chap. 18, Criminal P. C.—Taking on record of such evidence by Sessions Court—There need not be any corroboration—It is like all other evidence, to be believed or not and to be valued.

There is nothing in S. 283, Criminal P. C. itself to show that there need be corroboration of evidence so recorded. Evidence recorded in this manner in the Sessions Court is precisely the same as any other evidence. It has, like other evidence, to be examined with care. It is to be considered together with all the other surrounding circumstances. The Judge or Jury, as the case may be, must make up their minds whether the evidence is to be believed or not, and if it is believed, what value has to be placed upon it. No general law can, therefore, be laid down as to this. Evidence must be judged—as all evidence must be—according to the facts of each particular case. It is clear that there is no difference in law between evidence of this sort and any other evidence: 51 P. R. 1887, *Foll.* [P 358 C 1]

Mohammad Din Jan—for Appellant.*D. R. Sawhney*—for the Crown.

Judgment.—Narinjan Singh, the appellant in this case, has been condemned to death by the learned Sessions Judge of Lahore for the murder of one Mt. Tej Kaur, his aunt. The deceased woman was of loose character. She was at the time of the murder living with the uncle of the accused. Shortly before the murder Gurdit Singh, the father of Narinjan Singh, and another man named Kammum had jointly pawned some ornaments. Narinjan Singh redeemed them. Kammum wished to have in his possession on payment his half of the ornaments. Narinjan refused. Mt. Tej Kaur provided hundred rupees in order to enable Kammum to pay Narinjan Singh and recover the jewellery. Narinjan Singh however, refused after having taken the money,

either to return the money or to return the ornaments. Mt. Tej Kaur had summoned a panchayat to decide this matter and a day had been fixed for the return of the ornaments or the money. On the day before the day fixed Mt. Tej Kaur was killed.

In the committing Magistrate's Court no less than five eyewitnesses gave evidence that they had seen the accused slaughtering Mt. Tej Kaur with a chhavi. These witnesses were witnesses who ordinarily would be in the vicinity. They lived in adjacent houses or were staying in those houses with friends. One of them Mt. Mamo ran at once to inform the father of the deceased woman of the murder and thereafter the father proceeded to the police station and made a first information report in which he stated that his daughter had been killed by Narinjan Singh. The accused further was arrested the same day with the blood-stained chhavi still in his possession. At this time the accused must have been without hope. There were all the eyewitnesses and he himself had been arrested with the actual weapon with which he committed the murder. It was not unlikely, therefore, that he should make a confession. He expressed his willingness to make a confession and on 5th March he did make a confession before a Magistrate under S. 164. The Magistrate very improperly returned the accused after the confession to the custody of the police.

In this Court we have frequently observed that this practice is very improper. It is equally not in the interest of the prosecution that this should be done. It gives a very strong argument both in the trial and appellate Courts that the confession should not be relied on. It is perfectly clear that if confessing persons know that there is a likelihood of their being returned to police custody after making confessions they would be more inclined to make false confessions at the instance of the police than they otherwise would do. This practice ought to be abolished. In the committing Magistrate's Court the eyewitnesses all gave evidence to the effect that on hearing the cry of Mt. Mamo they had come up and actually seen Narinjan Singh attacking the deceased with a chhavi. In the Sessions Court, however, every one of them went back on their statements in

the committing Magistrate's Court most of whom said that they did not know who the murderer was at all. Mehtab, however, said that there were two murderers and Narinjan Singh was one of them. Wassan, although he did not say who the murderer was, admitted that Narinjan Singh was standing there by the deceased woman. The learned Sessions Judge in accordance with the provisions of S. 288, Criminal P. C., placed the evidence given in the committing Magistrate's Court upon the record of the Sessions Court. In his judgment he records the facts of the case very clearly. He, however, is in our opinion, misled as to the law as regards these statements. The learned Judge says that he can only act upon the evidence given in the committing Magistrate's Court if there is "corroboration of those statements otherwise." This point also has been argued by the counsel for the appellant in this Court. We have examined the actual section of the Code which is clear and is as follows :

The evidence of a witness duly recorded in the presence of the accused under Chap. 18, may in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provision of the Evidence Act, 1872.

The words "the evidence.....be treated as evidence in the case for all purposes subject to the provision of the Evidence Act of 1872," could not be stronger. There is nothing in the section of the Act itself to show that there need be corroboration of evidence so recorded. In our opinion evidence recorded in this manner in the Sessions Court is precisely the same as any other evidence. It has like other evidence to be examined with care. It is to be considered together with all the other surrounding circumstances. The learned Judge or Jury, as the case may be, must make up their minds whether the evidence is to be believed or not, and if it is believed, what value has to be placed upon it. No general law can therefore be laid down as to this. Evidence must be judged—as all evidence must be—according to the facts of each particular case. It is clear however in our opinion that there is no difference in law between evidence of this sort and any other evidence. Our attention has been drawn to several authorities and we may say that we are in entire agreement with the statement of the

law on this point laid down by Plowden, J. of the Punjab Chief Court in 51 P R 1887 (Cr.) (1). It might be advantageous to repeat what the learned Judge has said on this point :

Once admitted it is on the same footing with all other evidence in the case, that is to say, it is to be considered by the jury or by the assessors and the Judge, according to the nature of the trial, as part of the materials upon which the verdict or a finding is to be given. . . . Its value is a question in the particular case for the jury or for the assessors, subject to the directions of the Judge in summing up, or for the Judge in cases where he is a judge of fact. . . Whether any portion or the whole of the evidence thus admitted is entitled to credit, and if so, to such a degree that a conviction may be based upon it wholly or in part, are very important questions for the jury or assessors, or for the Judge, as the case may be.

We have dealt with this point as it has been raised, but, in any event, there is ample evidence to corroborate the evidence of these witnesses. There is the fact that long before the police came on the scene the first information report on the information of Mt. Mamo was recorded and in that first information report Narinjan Singh is named as the murderer. Kishen Singh, a lambardar, also gave evidence. He was early on the scene and he says—as a result of a question put to him by defence counsel in cross-examination—that all these eyewitnesses were present at the time he arrived and that they all said that Narinjan Singh was the murderer. This piece of evidence was given not in examination-in-chief but in cross-examination. Therefore any suggestion that this statement was made in order to assist the police or the prosecution falls to the ground. There is also the fact, which was unchallenged in the lower Court, that the accused was in possession of his bloodstained chhavi when arrested. The Chemical Examiner and the Imperial Serologist establish that the blood on the chhavi was human blood. There is also the fact of the confession by the accused himself. This confession, it is true, was retracted in the Sessions Court, but was not retracted in the committing Magistrate's Court. The learned committing Magistrate put to the accused several questions, but the only answer that he made to any of them was "I will make my statement in the Court of Session." If, as the accused now contends, the confession was the result of

1. Umar v. Empress, (1887) 51 P R 1887 (Cr.).

improper treatment by the police he undoubtedly would not answer in the way he did before the committing Magistrate.

It was contended here that the accused had been in custody of the police right up to the time of his committal proceedings. But on looking at the record we find that he was only in the police custody after the confession until 8th March; the date of his statement in the committing Magistrate's Court is 29th March, i. e. the accused had three weeks after leaving the custody of the police before he made his statement in the committing Magistrate's Court. We are, therefore, clearly of opinion that if there had been any improper treatment of the accused he should have made a complaint about it at that time.

We are satisfied therefore on the evidence of the eyewitnesses given in the committing Magistrate's Court after considering it carefully and of the surrounding circumstances and the other evidence in this case that the learned Judge in the lower Court came to the only possible conclusion, namely that Narinjan Singh was guilty of the crime with which he was charged. On the question of sentence we see no reason to interfere. The accused in his confession tried to raise a defence that he had seen a man leaving the room of his aunt. No attempt has been made to prove this. Indeed the confession has been denied now by the accused. In any event, even if this suggestion is true, there would not be enough provocation in our opinion to justify us in reducing the sentence from that of death to transportation. Every one apparently knew that this woman was of loose character and the woman's own husband had not taken action in the matter. The real motive was more probably the one suggested, namely that Mt. Tej Kaur was making herself objectionable to Narinjan Singh in the matter of the jewellery and the money. The learned Judge in the earlier part of his judgment makes it clear that the reason for the retraction by the eyewitnesses of their original statements is probably the fact that Deva Singh and Narinjan Singh are influential persons in the village and that the witnesses were all tenants or neighbours of Narinjan Singh or his father. We therefore see no reason to interfere either in the conviction or sentence and we confirm the sentence of death and

dismiss the appeal. In view of the fact that it appears that the eye-witnesses in this case, namely Mt. Mamo, wife of Gama, Wassan, Mehtab, Mt. Daro, Mt. Barkat and Mt. Madho, have committed perjury, we direct that necessary proceedings be taken against them.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 359

COLDSTREAM, J.

Baij Nath Bhatnagar — Accused —
Petitioner.

v.

Muhammad Din — Complainant —
Opposite Party.

Criminal Revn. No. 525 of 1935, Decided on 2nd November 1935, from order of Sess. Judge, Gujranwala, D/- 1st April 1935.

(a) Criminal Trial — Statement made to police officer during investigation not reduced to writing relevant and not privileged under S. 123 or S. 124, Evidence Act, can be used.

Statements not reduced to writing made to a police officer during investigation, if relevant, and not privileged under S. 123 or 124, Evidence Act, can be used at a trial for an offence not under investigation when they were made.

[P 360 C 2]

(b) Criminal Trial — Recorded statement can be used for offence of trial not under investigation when it was made — Record of statement heard by police officer and recorded in diary forms unpublished official record—Evidence derived from which when can be produced—Court not bound to give copies of such statements.

Section 172 of the Code does not forbid a recorded statement to be used at a trial for an offence not under investigation when it was made. There is, however, no doubt that the record of a statement heard by a police officer in exercise of the power conferred by S. 161 of the Code and recorded either in the diary or separately in the course of investigation proceedings is an unpublished official record relating to an affair of state evidence derived from which cannot be produced in a case to which the first proviso to S. 162 is not applicable except with the permission of the officer at the head of the police department. It cannot in any sense be termed a deposition and it is not evidence. It is not a document, a copy of which must be given on demand under the provision of S. 76, Evidence Act. [P 360 C 2; P 361 C 1]

Jhanda Singh for the Government
Advocate—for the Crown.

Order.—The petitioner in this case was being tried by the District Magistrate of Gujrat for offences under Ss. 211, 344 and 504, I. P. C. In order to contradict some of the prosecution witnesses by confronting them with statements

made by them previously, he applied to the Magistrate (who being District Magistrate was also head of the District Police) to be furnished with copies of the records of statements made by them to the police in the course of an investigation into an offence other than that for which he was being tried. The District Magistrate declined to give the copies. The learned Sessions Judge has recommended that this Court should, in the exercise of its revisional jurisdiction, order that the copies asked for be furnished. He has based his recommendation on the remark made by Madras High Court in 56 Mad 154 (1) that a statement made to the police is as good evidence as a statement made to any other person save for certain exceptions to be found in the Indian Evidence Act and in the Code of Criminal Procedure. That judgment, as noticed by the District Magistrate in his order now under question, did not deal with the point whether a person is entitled to be given copies of statements recorded by the police.

It is true that the prohibition in S. 162, Criminal P. C., against the use of statements made to the police, relates only to the use of them at an enquiry or trial in respect of any offence under investigation at the time when such statement was used. (Before it was amended in 1923, the section forbade the use of any such statements 'as evidence'). It seems clear that S. 162 does not forbid an accused person to contradict a witness by a previous statement made to the police in an investigation not made in respect of the offence for which the accused is being tried.

For the Crown it is contended before me that statements recorded by the police are nothing more than entries recording the investigation proceedings in the diary prescribed in S. 172, that the whole of this diary is privileged and that the Magistrate was right to refuse to order the copies asked for to be given. In reply the petitioner's counsel argues that the record of statements of witnesses examined under S. 161 are not part of the diary but separate records to which no protection is given by S. 172, and that records of statements written by a police officer can be used in the

same way as memoranda of statements made by any other person so long as they do not come within the scope of S. 162.

So far as statements not reduced to writing are concerned, I see no reason why statements made to a police officer in the course of an investigation should not, if relevant under the Evidence Act, be used at a trial for an offence not under investigation when they were made, provided that they are not held privileged by the provisions of Ss. 123 and 124, Evidence Act.

The question whether a recorded statement written by a police officer in the course of an investigation can be used to confront the maker of the statement when he is giving evidence in a case which was not under investigation when he made the statement does not appear to have been raised before in this Court. The judgment in 1933 Lah 498 (2) cited by Counsel for the Crown does not express distinctly any decision on this point, although it makes it clear that S. 172 precludes a Court from giving an accused access to police diaries of the investigation into the particular offence for which he is being tried or into a connected offence. In 17 P R 1894 (3) it was held by Plowden and Roe, JJ., that the diary was the proper place for putting on departmental record memoranda of such statements made by person examined by a police officer as he considers of sufficient importance to be reduced to writing, and that when such statements are included in the diary, they form an integral part of it. In the same judgment, however, Plowden J., remarked that it does not necessarily follow from the qualified protection of the diaries and memoranda against inspection by an accused in a judicial proceeding which is the result and continuation of the police investigation that the diaries or memoranda are privileged against production in any subsequent or collateral proceedings in which they are capable of being used as relevant evidence or to refresh the memory. I understand the law on the matter to be this: S. 172 of the Code does not forbid a recorded statement to be used at a trial for an offence not under investigation when it was made.

1. Kovuro Subayya v. Pata Verraya, 1933 Mad 65=1933 Cr C 81=141 I C 276 = 34 Cr L J 137=56 Mad 154=63 M L J 794.

2. Emperor v. Dharam Vir, 1933 Lah 498 = 1933 Cr C 758=142 I C 854=34 Cr L J 464 = 34 P L R 541.

3. Kallu v. Empress, (1894) 17 P R 1894.

There is, however, no doubt in my mind that the record of a statement heard by a police officer in exercise of the power conferred by S. 161 of the Procedure Code and recorded either in the diary or separately in the course of investigation proceedings is an unpublished official record relating to an affair of State evidence derived from which cannot be produced in a case to which the first proviso to S. 162 is not applicable except with the permission of the officer at the head of the Police Department (S. 123, Evidence Act). By itself the record of the statement will prove nothing. As pointed out by Knox, J., in 16 All 207 (4) it cannot in any sense be termed a deposition and it is not evidence. It is not a public document a copy of which must be given on demand under the provision of S. 76, Evidence Act. But the fact or allegation that the statement has been reduced to writing will not preclude evidence of its having been made (subject, of course, to the provisions of the Evidence Act), for S. 91, Evidence Act, does not apply. To prove that the statement was made, it would be necessary to call the police officer who heard it. If the accused has succeeded in having the original record of the statement produced, notwithstanding objections raised under S. 123, 124 or 125, Evidence Act, and the police officer has referred to it to refresh his memory under S. 159, the provision of S. 145 of that Act will apply. The District Magistrate was not bound to give copies of the statements. There is, therefore, no reason for this Court to interfere.

B.D./R.K.

Order accordingly.

4. Queen-Empress v. Nazir-ud-Din, (1894) 16 All 207=1894 A W N 57.

A. I. R. 1936 Lahore 361

ADDISON AND DIN MOHAMMAD, JJ.

Nizam-ul-Haq—Defendant—Appellant.

v.

Mohammad Ishfaq and others—Plaintiffs—Respondents.

Second Appeal No. 531 of 1934, Decided on 3rd December 1934, from decree of Dist. Judge, Delhi, D/- 14th January 1931.

(a) Appeal—Representative suit—One of plaintiffs dying during pendency of appeal—Surviving plaintiffs can continue appeal.

Where an appeal is filed in a representative suit and one of the plaintiffs dies during the

pendency of the appeal, it was held that surviving plaintiffs are competent to prosecute the appeal. [P 361 C 2]

(b) Mahomedan Law—Religious endowment—Suit for removal of Mutawalli—District Judge in appeal can settle scheme under S. 92, Civil P. C., with sanction of Collector.

In a declaratory suit it was claimed that the Mutawalli of a mosque was not properly appointed, for his removal, etc. On appeal to the District Judge, he settled a scheme of trust for the mosque under S. 92, Civil P. C., without the sanction of the Collector:

Held: that the District Judge could settle a scheme without sanction. [P 362 C 1]

Amar Nath Chona—for Appellant.

Shamair Chand—for Respondents.

Judgment.—In this case a suit was instituted by the residents of Baradari Nawab Wazir, Delhi, for a declaration that the defendant was not the lawful Mutawalli of the mosque situated in their Mohalla, and for his removal and the appointment of a new Mutawalli and for rendition of accounts. The defendant resisted it on various grounds. The Subordinate Judge came to the conclusion that the defendant had not been proved to be guilty of the mismanagement alleged against him and that no case for his removal was therefore made out. He dismissed the suit in toto. On appeal the learned District Judge agreed with the conclusions arrived at by the Court below, but, in the interest of the trust itself, settled a scheme appointing a committee of five persons, including the Mutawalli himself as its president, to manage the trust in future. Of the remaining four, two were to be nominated by the Mutawalli, and two were to be elected by the residents of the Mohalla by majority of votes. This committee was charged with collecting subscriptions, keeping accounts, appointing the Imam, starting an elementary school, supervising the furniture of the mosque and regulating the hours when the mosque should remain open. The defendant appealed, but in the meantime he has died and is now represented by his son. The respondents, however, have no objection to his continuance as Mutawalli in place of his father. One of the original plaintiffs has also died, but as the suit had been brought in a representative capacity, we are of opinion that the three surviving plaintiffs are competent to prosecute the appeal.

The only point that has been urged before us is that as no sanction had been given by the Collector under S. 92, Civil P. C., for settling a scheme the learned District

Judge had no jurisdiction to grant a relief on that basis. We are not, however, inclined to agree that, in the circumstances of this case, in the absence of express sanction by the Collector, this relief could not be granted. Under R. 33, O. 41, Civil P. C., an appellate Court has no power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. We are satisfied therefore that in settling a scheme the learned District Judge did not exercise his jurisdiction in a manner which was not warranted by law or would justify our interference at this stage. It is amply proved that for want of funds the mosque is not being properly run. This may not amount to mismanagement of the Mutawalli, as he is not to blame if funds are not forthcoming, but it is obvious that, unless the Mutawalli secures the co-operation and goodwill of the residents of the Mohalla, he cannot be expected to be in possession of funds that will be required to look after the mosque in a proper manner. We think therefore that a committee consisting of the representatives of the Mohalladars as well as the nominees of the Mutawalli, would be in a better position to collect the necessary funds than the Mutawalli, himself who has lost favour with some of the worshippers who visit the mosque.

We however consider that the scheme, as propounded by the learned District Judge, is open to objection on one minor point. The system of election of the two representatives of the Mohalladars introduced in the scheme will not be so workable as at first sight it appears to be. All the three respondents are present before us and have agreed to the modification proposed by us of this part of the scheme which we consider will be more practicable. We, therefore, modify the scheme settled by the learned District Judge to this extent: that instead of the two representatives of the Mohalladars being elected in the manner suggested by him, they will, in future, be nominated by the Muslim Municipal Commissioner who at the time represents the Ward in which Baradari Nawab Wazir, Delhi, is situated. As we have not interfered with the scheme in any other manner, and this modification is acceptable to the defendants, we dismiss this appeal, but direct

that the modification be incorporated in the decree. Parties to bear their own costs throughout.

B.D./R.K.

Appeal dismissed.

* A. I. R. 1936 Lahore 362

TEK CHAND AND DALIP SINGH, JJ.

Mt. Koshalia and another—Plaintiffs—Appellants.

v.

Riaz-ud-Din and others—Defendants—Respondents.

First Appeal No. 1859 of 1933, Decided on 5th December 1935, from decree of Senior Sub-Judge, Kangra, D/- 11th August 1933.

* (a) Civil P. C. (1908), O. 41, R. 22—Time for filing cross-objection—Term "within" fixes two limits—Cross-objection filed before that limit is no cross-objection at all.

O. 41, R. 22, lays down that a respondent may cross-object provided he does so within one month from the date when he receives notice of the hearing of the appeal. The use of the word "within" would fix two limits; an anterior limit starting from the date of receipt of the notice and a posterior limit of one month after that date. The cross-objections filed before that date would not be cross-objections at all in the strict legal sense of the word.

[P 363 C 2]

* (b) Fatal Accidents Act (1885), S. 1—Expectation of life—Actuarial tables provide good basis of calculation.

In cases arising under Fatal Accidents Act, actuarial tables of Insurance Companies afford a good basis for calculation of "normal expectation of life" of the deceased. [P 364 C 2]

Mehr Chand Mahajan and Mehr Chand Sud—for Appellants.

Mohammad Sharif and Nasar Mohammad for Abdul Haye—for Respondents.

Dalip Singh, J.—This appeal arises out of a suit brought by Mt. Koshalia and Mt. Shakuntla, the mother and widow of Jagat Ram, deceased, who was killed in a motor accident by a car belonging to Mr. Muin-ud-Din, I.C.S., son of Mr. Riaz-ud-Din, Superintendent of Police, and driven by Muhammad Bashir, defendant 2, the chauffeur of Mr. Muin-ud-Din. The suit was under the Fatal Accidents Act and the amount of damages claimed was Rs. 10,000. The trial Court held that there had been negligence on the part of the chauffeur Muhammad Bashir, defendant 2, and that Mr. Riaz-ud-Din, who was his temporary master, was also liable for the tortious act of the chauffeur. Accordingly after considering the evidence the trial Court held that Jagat Ram, deceased, was earn-

ing about Rs. 20 a month at the time and out of this sum of Rs. 20 was likely to give or was actually giving about Rs. 10 per month to his mother and widow, the claimants. Allowing Rs. 4 as the maintenance amount for the mother and Rs. 6 as the maintenance for the widow and taking the "normal age" as 50 he held that the mother was entitled to Rs. 576 and the widow to Rs. 1,944. Looking to the fact that the sum was to be paid in one amount and not by monthly instalments he allowed Rs. 500 to Mt. Koshalia, the mother, and Rs. 1,500 to the widow, Mt. Shakuntla. The total amount came to Rs. 2,000 and a decree for this amount and proportionate costs exclusive of Court-fee, was passed in favour of the plaintiffs against the defendants. Out of this amount Mt. Koshalia was held entitled to recover Rs. 500 and one-fourth proportionate costs and Mt. Shakuntla to recover Rs. 1,500 and three-fourths proportionate costs. The suit was brought in forma pauperis, and the learned Judge directed that the amount of Court-fee, Rs. 712-8-0 would be paid by the parties as follows:

Mt. Koshalia	Rs.	142	0	0
Mt. Shakuntla	"	428	8	0
Defendants	"	142	0	0

The plaintiffs have come in appeal claiming that the sum allowed is too small and that a sum of Rs. 5,000 should have been allowed to them by way of damages. The defendants did not appeal but cross-objections were filed under O. 41, R. 22, Civil P. C., on behalf of Mr. Riaz-ud-Din. In the cross-objections it was objected that the finding of the learned Judge, that the accident was due to the negligence of the chauffeur, was not correct, that the death was due to the negligence of the deceased himself and that the amount of damages awarded by the lower Court was excessive and the prospects of Mt. Shakuntla's re-marriage had not been considered by the Court in assessing it. As the "cross-objections" went to the root of the case, whereas the appeal only affected the quantum of damages, we decided to hear the "cross-objections" first. A preliminary objection was raised by the learned counsel for the appellants that the "cross-objections" were not cross-objections in law, because they had been filed before notice of the date of hearing of the appeal was sent to the parties. The fact appears to be cor-

rect, and from the record it seems that notice of the hearing of the appeal was not sent to the respondents until some time in February 1935. The "cross-objections" were filed on 23rd February 1934. The appeal was filed on 13th November 1933 and was admitted to a Division Bench on 8th December 1933. It appears that the respondents took the notice for printing of the paper-book as notice of the hearing of the appeal. The result is somewhat curious, but there can be no doubt on the law. O. 41, R. 22 lays down that a respondent may cross-object provided he does so "within one month from the date when he receives notice of the hearing of the appeal." The use of the word "within" would fix two limits; an anterior limit starting from the date of receipt of the notice and a posterior limit of one month after that date. The "cross-objections" filed before that date would not be cross-objections at all in the strict legal sense of the word. If for instance the appeal had been withdrawn after being admitted to a Division Bench in December 1933, before February 1935, the mere fact that the cross-objections had been filed on 23rd February 1934 would not entitle the respondents to have the "cross-objections" heard.

This was conceded by the learned counsel for the respondents, and it appears to me to be incontestable. Mr. Riaz-ud-din died on or about 15th March 1934 and his legal representatives never applied that the "cross-objections" already filed should be treated as their cross-objections, nor did they file any fresh cross-objections. The difficulty, therefore, arises that the "cross-objections" actually filed, are cross-objections by Mr. Riaz-ud-din, which were filed before the date when the right to put in cross-objections had accrued. Mr. Riaz-ud-din has since died. It is impossible to attach these "cross-objections" to him as he died before the issue of the notice of the date of hearing of the appeal; nor is it possible on this record to attach these "cross-objections" to his legal representatives or to extend the time under O. 41, R. 22, because after looking at the record there is no power-of-attorney or vakalatnama in favour of the learned counsel appearing for the respondents, nor on behalf of the counsel who filed the cross-objections on behalf

of the legal representatives of the deceased. It is, therefore, impossible to attach these "cross-objections" to the legal representatives, for the counsel appearing has no power to act on their behalf; and to treat these cross-objections as being now filed on behalf of the respondents would be to allow the counsel to act on behalf of the legal representatives. The preliminary objection, therefore, must, in my opinion, prevail and the "cross-objections" must be dismissed with costs.

Turning now to the appeal of the plaintiffs-appellants the learned counsel has addressed us at length, pointing out that there is nothing to show that Jagat Ram was not earning Rs. 20 per mensem exclusive of his own board and lodging, that the accounts which have been put in in support of this statement by his employer Jagan Nath have wrongly been rejected by the trial Court and that Mt. Koshalia's evidence proves that Jagat Ram used to give her the whole of this Rs. 20 per mensem which he had been earning for some time previously after he gave up reading in school and became a full time worker in the shop of Jagan Nath. I must say I am unable to see why the trial Court seems to consider these accounts unreliable. It is true that the employer does not keep a roznamcha but he keeps a rokar or daily cashbook and it was not unusual to find a small shop-keeper keeping nothing more than a daily cashbook and a khata bahi. However the real point that arises in this case is a very short one, and it is unnecessary to go at length into the evidence on the record. Even on the learned Judge's own finding, Rs. 10 was a fair amount to take as the contribution of Jagat Ram towards the maintenance of the plaintiffs. It may also be taken that the trial Court was right in dividing this sum in the proportion of Rs. 4 to the mother Mt. Koshalia and Rs. 6 to the widow Mt. Shakuntla. There is no evidence on the record to show why the learned Judge fixed the normal age of the parties at 50 years. From the actuarial tables of the Oriental Life Assurance Co. Ltd. it would appear that the "expectation of life" at the age of 20 is 36.8 and the "expectation of life" at the age of 39, which is the age of Mt. Koshalia, is 23. The normal "expectation of

life" of Jagat Ram at the age of 23 would have been 34.6. It seems to me, therefore, that proceeding on the lines of the learned trial Judge, but taking the actuarial tables as furnishing a more correct basis for the normal "expectation of life" than the rough figure of 50 years taken by him, the amount due to Mt. Koshalia at the rate of Rs. 4 per mensem for 23 years would come to Rs. 1,104 and the amount due to Mt. Shakuntla at Rs. 6 per mensem for 35 years as being the "expectation of life" for Jagat Ram would come to Rs. 2,520; adding the two amounts the total would come to Rupees 3,624. Taking into consideration the somewhat slender chance of re-marriage possessed by Mt. Shakuntla, to my mind a remote contingency having regard to the fact that the Suds as a rule, as is wellknown, do not favour widow re-marriage, and also taking into account that the amount is being paid in a lump-sum and not by monthly instalments, I consider that a sum of Rs. 3,000 would be a fair amount to allow. This sum of Rs. 3,000 would be divided between the plaintiffs, Rs. 1,000 to the mother Mt. Koshalia and Rs. 2,000 to the widow Mt. Shakuntla. Both the plaintiffs would be entitled to proportionate costs on this amount in both Courts from the estate of Mr. Riaz-ud-din and from the person and estate of Mohammad Bashir, defendant 2. In the trial Court the Court-fee, which amounted to Rs. 712-8-0 would be paid as follows:

Rs. 262-8-0, the Court-fee on Rs. 3,000 decreed, payable by defendants.

Rs. 150 payable by Mt. Koshalia.

Rs. 300 payable by Mt. Shakuntla.

The appeal is not a pauper appeal and so no trouble arises about the distribution of Court-fee therein. The appellants will get proportionate costs on Rs. 1,000, by which sum the amount decreed by the trial Court has been enhanced in appeal. If any of the sums decreed by the trial Court have already been realized by the Crown, proportionate amounts by way of adjustment will of course be taken or returned according as may be necessary to arrive at the result given above. The full amount spent by the plaintiffs in having the paper-book printed shall be recovered from the defendants-respondents.

Tek Chand, J.—I agree.

B.D./R.K.

Order accordingly.

A. I. R. 1936 Lahore 365

JAI LAL, J.

Ahmad Din and others—Plaintiffs—Appellants.

v.

Mohammad Taqi and others—Defendants—Respondents.

Second Appeal No. 1214 of 1935, Decided on 13th December 1935, from decree of Dist. Judge, Delhi, D/- 22nd March 1935.

Administration Suit—Court can direct one of parties to hand over assets belonging to estate in possession of such party—**Disputed debt is not asset**—Meaning of word "asset."

No doubt a Court in pursuance of a decree in the administration suit is competent to direct one of the parties to the suit to restore or hand over to the administrator or the receiver assets belonging to the estate in possession of such party, but a debt, specially a debt which is disputed, is not governed by this rule, because the expression "asset" as used above means property which has come in the hands of the representatives of the deceased as such either actually or by implication and a disputed debt cannot be deemed to be an asset which has come in the hands of any person representing the estate: 1932 Lah 328, Ref.; 1921 Bom 187, Explained. [P 365 C 2]

Mehr Chand Mahajan and Nawal Kishore—for Appellants.

Shamair Chand—for Respondents.

Judgment.—Mt. Rahmat Sultan died on 6th April 1924 and an administration suit was instituted in respect of her estate on 3rd April 1930. Mohammad Din, her husband, was impleaded as a defendant in that suit. A preliminary decree was passed and a receiver was appointed to take charge of the estate. It appears that Mt. Rahmat Sultan was living separately from her husband Mohammad Din owing to strained relations. Mohammad Din has died and is now represented by the respondents. The appellants are four of the heirs of Mt. Rahmat Sultan. The dispute on this appeal is about two items. It has been found by the learned District Judge that deferred dower was due to Mt. Rahmat Sultan from Mohammad Din at the time of her death. He has not mentioned the amount but the trial Court held, and this is not contested before me, that it was Rs. 700. The learned District Judge has held that in an administration suit it is not open to the Court to direct a debtor to pay the debt due to the estate to the administrator or to the receiver. But the learned counsel for the appellants contends that this view of the learned

District Judge is erroneous and he cites 45 Bom 1053 (1) and 1932 Lah 328 (2). Both these cases however do not in my opinion support him in the proposition that he has propounded. It has been held in the Bombay case that a Court in pursuance of a decree in the administration suit is competent to direct one of the parties to the suit to restore or hand over to the administrator or the receiver assets belonging to the estate in possession of such party.

I do not think that a debt, specially a debt which is disputed is governed by this rule. The expression 'asset' as used in the Bombay case in my opinion means property which has come in the hands of the representatives of the deceased as such either actually or by implication and a disputed debt cannot be deemed to be an asset which has come in the hands of any person representing the estate. The second question relates to a house the title to which, it has been found, is in the name of Mohammad Din but it is claimed on behalf of the appellants, and this claim seems to be well founded, that the house was purchased by Mohammad Din with the money of Mt. Rahmat Sultan. This claim is based specially on the fact that when there was a dispute as to the partition of the joint property between Mohammad Din and his father and the matter was referred to arbitration Mohammad Din claimed that the house could not be partitioned as it belonged to his wife and it was on account of this claim that the house was excluded from partition. It is true that the learned District Judge has not given a definite finding that the house has been established to belong to Mt. Rahmat Sultan, but that seems to be his conclusion and in any case I am of opinion that it has been established that the house belonged to Mt. Rahmat Sultan.

The view of the learned District Judge that the house could not be restored to the estate under the circumstances except on a suit to be brought for that purpose does not appear to be correct. The authorities cited above support the contention of the appellants that in a case like the present the party in possession of the assets of the deceased can be directed

1. Motibhai v. Nathabhai, 1921 Bom 187=62 I O 24=45 Bom 1053=23 Bom L R 444.

2. Praphull Dev v. Sham Lal, 1932 Lah 328=138 I O 335.

to hand the same over to the administrator or the receiver. It is however, claimed by the respondents that Mohammad Din after the purchase of the house effected improvements to the same out of his own money and that before the house is handed over to the receiver they should be reimbursed in respect of the cost of such improvements. The appellants deny that there were any improvements effected, but there has been no enquiry on this question in the Courts below. The reason is that it was not claimed by Mohammad Din that he had effected any improvements and the claim for the first time has been put forward by his legal representatives who on his death were impleaded in this Court. Under these circumstances, I do not think it is open to them to claim any compensation for any alleged improvements to the house. Accordingly I accept this appeal to this extent, that I direct that the house in dispute be handed over by the legal representatives of Mohammad Din to the receiver to be administered as part of the estate of Mt. Rahmat Sultan. The appeal is otherwise dismissed. As both parties have succeeded partially in this Court I leave them to bear their own costs,

B.D./R.K. *Order accordingly.*

A. I. R. 1936 Lahore 366

BHIDE, J.

Allah Bakhsh—Defendant—Appellant.
v.

Mt. Jiwan and another—Plaintiffs and
others—Defendants—Respondents.

Second Appeal No. 1375 of 1935, Decided on 13th December 1935, from decree of Dist. Judge, Dera Ghazi Khan, D/- 25th April 1935.

Part Performance — Sale-deed of a house not registered—Purchaser put in possession—Document could be admitted in evidence for collateral purposes—T. P. Act not applicable to Punjab—Doctrine of part performance is applicable to Punjab.

Though the Transfer of Property Act is not in force in the Punjab, yet the doctrine of part performance has been held to be applicable in this province: 1934 Lah 751, *Foll.* [P 366 C 2]

Where a document purporting to be a sale-deed of a house which should have been registered but is not registered, such document, if the person is put in possession of the property, can be admitted into evidence for a collateral purpose under the provisions of S. 53-A, T. P. Act. [P 366 C 2]

Arjan Dev Bagai—for Appellant.

C. L. Gulati—for Respondents.

Judgment.—The plaintiff Mt. Jiwan sued in this case for possession of 27/36th share of a certain house by partition. Allah Bakhsh, defendant 1, pleaded that he was in possession of the eastern half of the house by virtue of a sale made by Ali, to whom the house originally belonged. He alleged further that the western half was not in his possession but had been sold to one Palia. The plaintiff, however, persisted in the allegation that Allah Bakhsh was in possession of the whole house and the suit was proceeded with on that basis. The learned Judge of the trial Court held that the sale deed on which Allah Bakhsh, relied was inadmissible in evidence for want of registration as the property was worth more than Rs. 100. The plaintiff was, therefore, granted a preliminary decree for possession by partition as prayed for. This decision was confirmed on appeal by the learned District Judge. From this decision a second appeal has been preferred by Allah Bakhsh.

It is urged on behalf of the appellant that the Courts below have erred in holding that the sale-deed, dated 15th January 1926, on which appellant relied, was inadmissible in evidence for want of registration. It was contended that the principle of part performance, laid down in S. 53-A, T. P. Act, was applicable inasmuch as the appellant had been put in possession of the house in pursuance of the contract. Reliance was placed in support of this argument also on the proviso to S. 49, Registration Act, which was added in the year 1929. The Transfer of Property Act is not in force in this province but the doctrine of part performance has been held to be applicable in this province: see 1934 Lah 751 (1), which follows the Privy Council ruling reported as 42 Cal 801 (2). The learned counsel for the respondents was unable to give any reason why the doctrine of part performance should not be held to be applicable to the circumstances of the case. He merely pointed out that before the learned District Judge the learned counsel for the appellant had only urged that the document was admissible for a collateral purpose. The judgment of the learned District Judge is,

1. Kaura Rama v. Chamanlal, 1934 Lah 751=154 I C 1088.

2. Mahomed Musa v. Aghore Kumar, 1914 P C 27=28 I C 930=42 I A 1=42 Cal 801 (P C).

however, very brief and I am not prepared to hold that the point now raised was not raised before the learned District Judge. In fact it appears from the judgment of the learned trial Judge that the point had been raised even in the trial Court. I accept the appeal and setting aside the decrees of the Courts below, remand the case to the trial Court for receiving the sale deed relied upon by the appellant in evidence and decision on merits. Costs will follow final decision.

B.D./R.K.

Case remanded.

A. I. R. 1936 Lahore 367

BHIDE, J.

(Firm) Hira Lal-Narain Das—Decree-holder—Defendant—Appellant.

v.

Dharam Chand—Plaintiff and others—Defendants—Respondents.

Second Appeal No. 1280 of 1935, Decided on 19th December 1935, from decree of Dist. Judge, Jullundur, D/- 1st April 1935.

Will—Attestation — Witnesses consenting to disposition by will can become attesting witnesses.

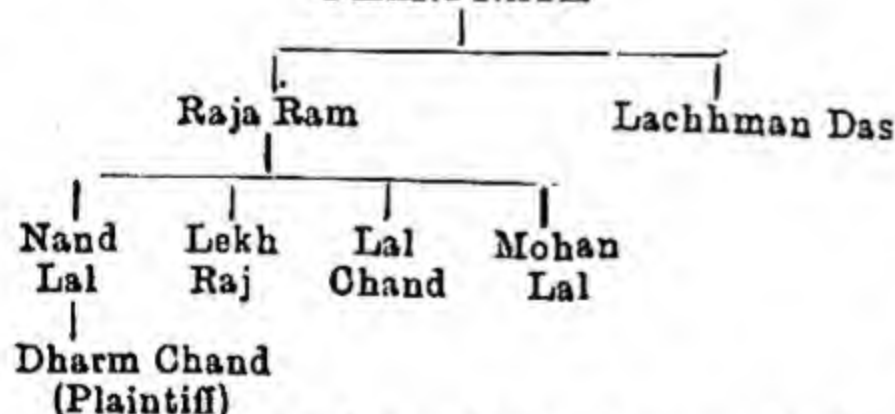
Persons who have signed a document in token of their consent to the disposition evidenced by a will can be held to be attesting witnesses if all the conditions laid down in S. 63, Succession Act, are otherwise fulfilled: 1921 Cal 208 and 1934 Cal 772, *Applied*; 1927 P C 248, *Expl.* [P 367 C 2]

N. L. Sadana and Nawal Kishore—for Appellant.

Indar Dev—for Respondents.

Judgment—The pedigree table of the parties may be briefly stated:

DHANI NATH



There was a firm styled Dhani Nath-Raja Ram against whom a decree was obtained by another firm styled Hira Lal-Narain Das. In execution of the decree a shop was attached but an objection was raised by Dharm Chand, plaintiff, that it was his sole property by virtue of a will made by his grandfather Raja Ram. The objection having been dismissed he

instituted the present suit to establish his title. One of the main issues in the case was whether the will on which the plaintiff based his title was genuine and duly proved. According to S. 63, Succession Act, 1925, this will was required to be attested by two witnesses. The contention on behalf of the defendants was that the necessary attestation was not proved. The learned District Judge has held that it was proved by the evidence of Nand Lal and Lekh Raj. The will was also held to be genuine in view of other facts and the plaintiff's suit was decreed by the learned District Judge. It is from this decision that the present appeal has been preferred.

The sole point argued before me was whether the attestation of the will had been proved in accordance with law. It was contended that the witnesses Nand Lal and Lekh Raj had signed the will only in token of their consent to the disposition of property made thereby and that in the circumstances they could not be considered to be attesting witnesses within the meaning of S. 63, Succession Act. In support of this contention reliance was placed on a ruling of their Lordships of the Privy Council reported as 1927 P C 248 (1). A somewhat similar question arose in that case and it was held that the signatures of the sons to a will made by the father were in token of their consent and that they were not attesting witnesses. There were, however, other attesting witnesses in the case and the contention of the sons that they were only attesting witnesses was not accepted in view of all the circumstances. I do not think this ruling lays down that persons who have signed a document in token of their consent cannot be held to be attesting witnesses even if all the conditions laid down in S. 63, Succession Act, are otherwise fulfilled. It is not disputed that these conditions were fulfilled in the present case and the mere fact that the witnesses signed the document in token of their consent cannot, in my opinion, prevent their being looked upon as attesting witnesses also. It has been held by the Calcutta High Court in 62 I C 97 (2), following two previous decisions of the same Court, that a scribe

1. Shiram Sunder Singh v. Jagannath Singh, 1927 P C 248=106 I C 534 (P C).
2. Jagannath Khan v. Bajrang Das, 1921 Cal 208. 62 I C 97=48 Cal 61.

may be held to be an attesting witness if the conditions as regards attestation are otherwise satisfied. In 1934 Cal 772 (3), it was held that if the conditions for a valid attestation under the Transfer of Property Act, are fulfilled, there is nothing in law to prevent a Sub-Registrar from being treated as an attesting witness even though the signature of the Sub-Registrar might have been made merely to satisfy the requirements of the Registration Act. The present case appears to me to stand on a similar footing. In my opinion the decision of the learned District Judge is correct. I dismiss the appeal with costs.

An oral request was made for a certificate to file an appeal under the Letters Patent. I grant the necessary certificate.

B.D./R.K.

Appeal dismissed.

3. Neelima Basu v. Jaharlal Sarkar, 1934 Cal 772=151 I C 1063=61 Cal 525=38 C W N 753.

A. I. R. 1936 Lahore 368

BHIDE, J.

Muni Lal and others—Judgment-debtors—Appellants.

v.

Bari Doab Bank, Ltd., Hoshiarpur and others—Decree-holders—Respondents.

Misc. First Appeal No. 1400 of 1935, Decided on 12th December 1935, from order of Sub-Judge, 1st Class, Hoshiarpur, D/- 20th May 1935.

Insolvency — Judgment-debtor declared insolvent during execution—Insolvent has no locus standi to appeal from order confirming sale.

A person who has been declared insolvent during execution proceedings has no locus standi to appeal under O. 21, R. 90, Civil P. C. from an order confirming a sale: 1921 Mad 402 and 1933 Mad 694, Dissent. [P 368 C 1, 2]

Shamair Chand and Shuja-ud-Din — for Appellants.

Achhru Ram and Inder Dev—for Respondents.

Judgment.—This is an appeal from an order confirming a sale in execution proceedings. A preliminary objection is raised that the appellants, who were declared insolvents during the sale proceedings, have no locus standi to appeal. In support of this contention reliance was placed on 1928 Lah 675 (1) and 35

I C 530 (2). The learned counsel for the appellants, on the other hand relied on 1921 Mad 402 (3) and 1933 Mad 694 (4) in which a contrary view was taken. These rulings apparently proceed on the ground that although the property of the insolvent is vested in the Official Receiver, he still has a contingent interest in the sale, e.g., in the event of a surplus being available out of his assets, after the debts are satisfied. This view seems to be opposed to the principle followed in a Full Bench decision of the Madras High Court, reported in 49 Mad 461 (5). That was a case under the Presidency Towns Insolvency Act and the question for consideration was whether an insolvent was an 'aggrieved' person within the meaning of S. 8 of the Act, so as to entitle him to appeal. Although the word 'aggrieved' is not used in O. 21, R. 90, Civil P. C., the words 'whose interests are affected by the sale,' are practically of the same import. In the Full Bench Madras case, certain English authorities were cited and it was observed:

The insolvent has no legal interest but has merely a hope or expectation, and as James, L.J. pointed out, the mischief of allowing a bankrupt, on the contingent chance of ultimately acquiring title to some surplus which might never be realized to interfere with and embarrass the administration of the estate, would be immeasurable.

With all respect to the learned Judges who have taken the contrary view, I must say that I see no good reason why this principle should not apply to a sale under O. 21, R. 90, Civil P. C. In the end it may be noted that during the sale proceedings the Official Receiver had apparently taken charge of the case and it was he who produced the evidence. He has, however, apparently not thought it fit to appeal. To allow the insolvent to appeal in such circumstances would be clearly anomalous. I uphold the preliminary objection and dismiss the appeal, but leave the parties to bear their costs in this appeal.

B.D./R.K.

Appeal dismissed.

2. Prayji Kali v. Assa Jalal, 1916 Sind 20=35 I C 530=10 Sind L R 53.

3. Tatireddi v. Ramchandra Rao, 1921 Mad 402=62 I C 854.

4. Swaminatha Odayar v. Kalyanarama Ayyangar, 1933 Mad 694=145 I C 855=65 M L J 359.

5. Hari Rao v. Official Assignee, Madras, 1926 Mad 556=94 I C 642=49 Mad 461=50 M L J 358 (F B).

1. Bhagavan Das v. Amritsar National Bank, 1928 Lah 675=111 I C 432.

A. I. R. 1936 Lahore 369

JAI LAL, J.

Shiv Dial Bakhtawar Lal—Judgment-debtors—Appellants.

v.

Kanga & Co. — Decree-holders — Respondents.

Misc. First Appeal No. 1207 of 1935, Decided on 6th December 1935, from order of Senior Sub-Judge, Gurgaon, D/- 31st May 1935.

(a) Execution—Transfer of decree—Certificate need not be signed by Judge who passed it.

A certificate of transfer of a decree need not be signed by the Judge who passed it.

[P 369 C 2]

(b) Execution—Order of payment made by Bombay High Court in favour of solicitor—Order made under R. 874 of rules made under S. 129, Civil P. C.—Such order can be executed as a decree.

Section 129, Civil P. C., expressly authorizes the Bombay High Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction. A payment order under R. 874 in favour of a solicitor when validly made can be executed as a decree.

[P 370 C 1]

N. C. Pandit, Shamair Chand and Prem Nath Bhardwaj—for Appellants.

D. C. Ralli—for Respondents.

Judgment.—The appellants *Shiv Dial Bakhtawar Mal Lal* were parties to a suit which was instituted in the Bombay High Court in exercise of its original jurisdiction. They engaged Messrs. Kanga and Co., Solicitors of Bombay, as their solicitors in that suit. After the termination of the original suit in the Bombay High Court the solicitors made an application for their costs against their clients *Shiv Dial Bakhtawar Mal* being taxed and for an order of payment thereof. A learned Judge of the Court, after hearing both the parties, passed an order determining the amount due by the appellants to the respondents and made an order against the appellants for payment of the sum allowed by him on taxation. The solicitors obtained a certificate of transfer under Ss. 39 and 40, Civil P. C., addressed to the District Judge of Hissar where apparently the appellants reside and have property. This certificate of non-satisfaction was sent by the District Judge to the Senior Subordinate Judge of Gurgaon. An objection was raised before the Senior Subordinate Judge that the order in question could not be executed as if it were a decree against the appellants. Two grounds for objection were stated in sup-

port of this contention: one was that the order of payment made by the Bombay High Court was ultra vires and that the order transmitting the decree for execution to the District Judge of Hissar had not been signed by a competent official. The Senior Subordinate Judge has decided both these objections against the appellants and has directed that the execution of the order should proceed as if it were a decree and consequently this appeal has been presented in this Court. The order transferring the decree to the District Judge of Hissar for execution was signed by the Registrar of the Bombay High Court. The contention of the appellants seems to be that it should have been signed by the learned Judge who passed it. As this objection has not been repeated before me, it is not necessary for me to decide it, but it is obvious that the objection has no force. The objection pressed before the Senior Subordinate Judge and repeated before me is that there is no jurisdiction in the Bombay High Court on a mere application by the solicitor to tax his costs against his client and to make an order for their payment by the latter to the former. But R. 874 of the rules framed by the Bombay High Court is quite clear on the subject. It provides that :

An attorney, when he has taxed his bill of costs against his client, may apply in Chambers on summons for an order against his client or the legal representatives of such client for payment of the sum allowed on taxation or such sum as may then remain due. The Judge on hearing the summons may make such order or refer the parties to a suit. Such order may be executed under O. 21, Civil P. C., as a decree for money.

If this rule has been validly framed by the Bombay High Court, then it is obvious that two results follow on an application being made by the attorney: the Judge either investigates the claim of the attorney and determines the amount that is payable by the client or, if the Judge is of opinion that for some reason he should not enter into an enquiry into the merits of the application, he may refer the attorney to a civil suit: that is a matter entirely in the discretion of the Judge. In the present case the learned Judge chose to follow the first alternative, that is to say to determine the amount due to the attorney and on such determination passed a payment order. The second result is that when a payment order is passed it has the force of a decree

and can be executed as a decree. The learned counsel for the appellants, however, contends that no decree can be passed except in consequence of a suit, but this is an order which has the force of a decree and no decree has been passed. Moreover there is no provision in the Civil Procedure Code that no order which is capable of being executed as a decree can be passed except in a suit or on a suit instituted praying for such an order. The order in question was passed by the Bombay High Court in exercise of its original jurisdiction and S. 129, Civil P. C., expressly authorises that Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction. It has not been shown by the appellants' counsel that there is anything in the Letters Patent of the Bombay High Court which is inconsistent with the rule in question. The rule, therefore, has not been shown to be ultra vires. The order could be executed as if it were a decree; it was, therefore, open to the Bombay High Court either to execute it itself or to send it to another Court for execution under Ss. 39 and 40, Civil P. C., and this is the procedure that has been followed in the present case. In my opinion there is no force in this appeal and I dismiss it with costs.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 370

ADDISON AND ABDUL RASHID, JJ.

Abdullah and another—Judgment-debtors—Appellants.

v.

Narain Das—Decree-holder and *others*—Judgment-debtors—Respondents.

Letters Patent Appeal No. 101 of 1935, Decided on 21st November 1935, from order of Backet, J., D/- 6th June 1935.

Punjab Tenancy Act (16 of 1887), S. 57—Occupancy rights under S. 6 or S. 8—Usufructuary mortgage of such rights—Mortgage rights cannot be attached and sold in execution.

Where occupancy rights falling under S. 6 or S. 8 are mortgaged usufructually, the rights of the mortgagee in the occupancy tenancy are not liable to attachment and sale in execution of the decree. [P 371 C 1]

Ghulam Mohy-ud-Din—for Appellants.

R. L. Anand I — for Respondent (Decree-holder).

Addison, J.—Narain Das in execution of his decree, attached certain mortgage rights in an occupancy tenancy. The

appellants in this Letters Patent appeal objected to this attachment on various grounds; one of these was embodied in issue 5, "can the occupancy rights in certain field numbers which were mortgaged with Ladha Khan be attached and sold in this decree? Under what section of the Tenancy Act do these rights fall?" The finding was that the occupancy rights fell within S. 6 or S. 8, Tenancy Act, and that the mortgage of them was therefore exempt from attachment and sale in execution of a decree. The decree-holder appealed and in para. 3 of the grounds of appeal urged that, although under S. 56, Tenancy Act occupancy rights under Ss. 6 and 8 were exempt, this exemption did not extend to the rights of the mortgagee in the occupancy rights. The position was thus accepted, that the occupancy rights themselves fell within S. 6 or S. 8, Punjab Tenancy Act. The lower appellate Court held that, although the occupancy rights themselves were exempt as they fell either within S. 6 or S. 8, this exemption did not extend to the mortgage rights in those occupancy rights. There was a second appeal by the judgment-debtors to this Court, which was heard by a Single Judge. It was pointed out that S. 57, Punjab Tenancy Act, had been overlooked by the lower appellate Court. It is to the effect that :

When a right of occupancy has been transferred by sale, gift or usufructuary mortgage to a person other than the landlord that person shall, in respect of the land in which the right subsists, have the same rights and be subject to the same liabilities, as the tenant to whom before the transfer the right belonged had and was subject to.

The appeal was therefore remanded for a finding as to whether Ladha or Abdula held a usufructuary mortgage of the occupancy tenancy, as if that was so. S. 57 provided the same exemption to such a mortgagee as S. 56 gave to the occupancy tenant. After the remand the appeal came before another Judge who held that the mortgages were usufructuary, but went on to observe that there was nothing, so far as he could see, to show that the occupancy rights had not been originally acquired under S. 5 of the Act. On this ground therefore he dismissed the appeal of the judgment-debtors, who have preferred this Letters Patent appeal. From what has already been said, it is clear that the executing Court held that

the occupancy rights fell within S. 6 or S. 8 and there was no ground of appeal taken to the lower appellate Court by the decree-holder against that finding. The lower appellate Court endorsed that finding, but held that, although the occupancy rights themselves would have been exempt from attachment, yet the rights of the mortgagees were not exempt. On the finding therefore that the mortgages are usufructuary the appeal should have been accepted by reason of the provisions of S. 57, Punjab Tenancy Act. We accordingly accept the appeal with costs throughout, set aside the decision of the Single Judge of this Court and the lower appellate Court and restore the finding of the executing Court as regards the mortgage rights in the occupancy tenancy in question, to the effect that they are not liable to attachment and sale in execution of the decree.

K.S./R.K.

*Appeal accepted.***A. I. R. 1936 Lahore 371**

BHIDE AND CURRIE, JJ.

Buta Singh and others—Plaintiffs—Appellants.

v.

Gurmukh Singh and another—Defendants—Respondents.

Second Appeal No. 2172 of 1934, Decided on 1st November 1935, from decree of Dist. Judge, Sialkot, D/- 10th August 1934.

Custom (Punjab)—Adoption—Chima Jats of village Gojra—Adoption of daughter's son in presence of collaterals of third degree is invalid.

Among Chima Jats of village Gojra, in the Daska tahsil, the adoption of a daughter's son in the presence of collaterals of the third degree is invalid : 50 P R 1893 and 69 P R 1907, *Ref.*

[P 373 C 1,2]

*M. C. Mahajan and J. R. Agnihotri—*for Appellants.

*Shabir Ahmad for L. Saunders and L. Saunders—*for Respondents.

Currie, J.—The sole point arising for decision in the present second appeal is whether among Chima Jats of Gojra, Tahsil Daska, District Sialkot, the adoption of a daughter's son in the presence of collaterals of the third degree is valid. By a registered deed dated 19th May, 1927 Makhan Singh adopted his daughter's son, Gurmukh Singh. On 12th May 1933 the collaterals of the third degree instituted a suit for a declaration to the effect that the adoption was not valid. The trial

Court decreed the suit, but on appeal the learned Additional District Judge reversed his decision. He however granted a certificate for second appeal on the point of custom. In reaching his decision the learned Additional District Judge expressed the opinion that there is nothing in the entries of the *riwaj-i-ams* which would go to show that the adoption of a daughter's son by Chima Jats of the Daska tahsil is not sanctioned by custom. He further held that the evidence on the record was sufficient to establish that the adoption of a daughter's son was valid even in the presence of collaterals. Mr. Mehr Chand Mahajan, in opening the case for the appellants, referred to the important Full Bench ruling 50 P R 1893 (1), in which Sir Meredyth Plowden examined the whole position regarding adoption in this Province. The learned Senior Judge remarked, at p. 233 :

I think therefore that we are fully warranted in holding generally—creed, tribe and locality apart—that when a sonless man in any land holding group which recognises a power to adopt, asserts that he is competent to adopt a daughter's son or other non-agnate in presence of near agnates, irrespective of their assent, the presumption at the outset is against the power; and in the absence of any admission in the pleadings in a particular case, which may qualify the presumption, the form of the issue should be such as to throw the burden of proof on the person asserting the existence of the unqualified power.

He further pointed out that except in endogamous tribes there is a general prejudice against the adoption of a daughter's son. This ruling dealt with the question of onus in such cases on a wide provincial basis and was not confined to the Jullundur District as the learned Additional District Judge seems to have imagined. The ruling may have lost some of its force in view of the subsequent decisions of their Lordships of the Privy Council, laying down the principle that the *riwaj-i-am* is entitled to great weight as evidence of custom and that the onus lay on the party who seeks to set up a custom contrary to that stated in the *riwaj-i-am*. Nevertheless it is still a very valuable and lucid exposition of the general position as regards the custom of adoption in the Province. As regards Sialkot District, there are three different *riwaj-i-ams* prepared in 1865, 1895 and 1916. No copy of the first has been placed on the file, but its provisions on

1. *Ralla v. Budha*, (1893) 50 P R 1893.

this subject are quoted as follows in 50 P R 1893 (1) at p. 229 :

In Sialkot, according to the Riway-i-am (which has been digested by Munshi Amin Chand, and a translation of the Digest made by Mr. Roe), some *gots* and tribes allow daughter's and sister's sons to be adopted, but many do not; and in all a brother's son has at least a prior claim, whether or not it amounts to a right.

In the two subsequent riway-i-ams there was no difference in the language of Question 71 which ran as follows :

Is there any rule by which it is required that the person adopted should be related to the person adopting? If so, what relatives may be adopted? Is any preference required to be shown to particular relatives? If so, enumerate them in order of preference. Is it necessary that the adopted son and his adoptive father should be (1) of the same caste or tribe, (2) of the same got.

In 1895 the answer was :

Varying answers were given by the different tribes, but they all agree that an adoption *must be within the clan from the near collaterals*. Failing them in the third degree, a daughter's son can be adopted, and in his absence one of the agnates up to the third degree in the descending line. All tribes of the Daska tahsil, say that *in default of collaterals* a daughter's son can also be adopted without any regard being had to the clan.

In 1916 the answer ran :

An agnate or a daughter's son or daughter's grandson or sister's son or sister's grandson may be adopted but *near agnates have preferential claim as compared with the descendants of daughters or sisters*. A great many Jats and Rajputs deny that a sister's or daughter's son can be adopted in the presence of any collaterals. Among Arains, Awans and Kakkezais a daughter's son can be adopted even in the presence of a brother's son. The adopted son need not necessarily be of the same tribe or got.

From these answers, especially the portions in italics it is clear that according to the riway-i-am collaterals of the third degree are preferred to a daughter's son. Thus the onus should have been placed on the daughter's son to prove that by custom his adoption was valid. Actually the trial Court placed the onus of the issue on the plaintiffs, though in the course of his judgment the learned Sub-Judge apparently shifted the onus as he remarked that :

The evidence adduced by the defendant is not sufficient to establish a custom by which adoption of a daughter's son is recognised among Chima Jats of Gojra.

The learned Additional District Judge rightly remarked :

Both parties led their evidence on the point and there is sufficient material on the record to warrant the decision of the point involved without prejudice to the parties.

To turn now to the evidence on the record, Mr. Mahajan has placed no reliance on the oral evidence produced on behalf of the plaintiffs. He pointed out, and I think correctly, that the instances cited in the 1916 riway-i-am show considerable diversity and argued that it would be unsafe to rely on the instances from other tahsils except where they related to Chima Jats. Fifteen instances were cited in the riway-i-am from the Daska Tahsil. No 1 was a case reported in 69 P R 1907 (2), in which it was held that among Sekhu Jats of the Daska tahsil no such custom had been established. The adoption of a daughter's son was set aside in No. 3, (Dhariwal Jats of Sambarilal), and No. 7 (Jats of Mauza Bhopalwala). On the other hand such an adoption was upheld in Nos. 5 (Bhalola Jats), 6 (Jats of Ghazipur), 11 (Jats of Dhuleke) and 14 (Jat Sahi of Daska). The other instances are not strictly relevant. To turn now to the instances cited in the present case; Ex. P-3 is a decision of the Sub-Judge, dated 1st June 1904 in which a Chima Jat of village Amaotra, Tahsil Daska, adopted his daughter's son, a Virk, and the adoption was set aside. Ex. P-4 is a decision of the Divisional Judge, dated 16th April 1906, relating to parties of the same village in which the adoption of a daughter's son was set aside. In that case counsel admitted that he was unable to argue that among Chima Jats the adoption of a daughter's son was valid in the presence of near collaterals. Ex. P-5 is a decision of the Divisional Judge, dated 25th January 1894, relating to this very village. This was the decision in appeal from Ex. D-9, a decision of the District Judge (old style), dated 11th September 1893, the learned Additional District Judge being in error in stating that the decision given in Ex. P-5 was upset on appeal by the decision given in Ex. D-9. The position is exactly the reverse. The decision in Ex. D-9 was upset in appeal by the Divisional Judge in Ex. P-5 in which it was held that the instances cited were insufficient to prove that the adoption was valid. The oral evidence shows that the parties in this case were Chimas. The decision of the Divisional Judge was given after remand for further enquiry. The de-

cision above cited, 69 P R 1907, (2) related to Sekha Jats and is only of importance in so far as it holds that the *riwaj-i-am* of 1865, in which the answer was to the effect that in the absence of sons a brother's son and in his absence a daughter or sister's son could be adopted, had been superseded by the *riwaj-i-am* of 1893, as in that, all tribes of the Daska tahsil stated that it is only in default of collaterals that a daughter's son can be adopted.

Of the instances in support of the custom, Ex. D-3 is a decision of the Extra Assistant Commissioner, dated 8th March 1880, a case among Chima Jats of this village which was decided in accordance with the custom as stated in the *riwaj-i-am* of 1865. In that case it was admitted by the plaintiff that if the adoption was established he had no claim. Ex. D-4 is the decision of the Divisional Judge, dated 25th January 1895. The parties were Muhammadan Chimas of village Bhopalwala and the person adopted was the sister's son who was married to the adoptive father's daughter and was a Khandamad. This instance is therefore of no value. Ex. D-5, a decision of the Divisional Judge, dated 28th May 1913, was a case of gift made for services rendered among Bajwa Jats, and is of no help. Ex. D-6, a decision of the Divisional Judge, dated 2nd May 1911, related to Walana Mahomedan Jats of village Walana in the Sialkot Tahsil. Ex. D-7, another decision of the Divisional Judge, dated 3rd April 1914, related to Mahomedan Jats of Tahsil Sialkot. Neither of these instances is therefore in point, as they come from other Tahsils, apart from the fact that the parties were Mahomedans. Ex. D-8, another decision of the Divisional Judge, dated 18th April 1913 dealt with Awans of a village in the Sialkot Tahsil and is entirely irrelevant.

For the respondents Mr. Shabir Ahmad, suggested that the answers given in the *riwaj-i-am* merely indicated that preference should be given to near collaterals and did not prohibit the adoption of the daughter's son in the presence of near collaterals. There is nothing however to support that view in any of the decisions which have been cited above. Considering the evidence as a whole, I think there can be no doubt that it has been established that among Chima Jats of

village Gojra in the Daska tahsil, the adoption of a daughter's son in the presence of collaterals of the third degree is invalid. I would therefore accept the appeal with costs and restore the decree of the trial Court with costs throughout.

Bhide, J.—I agree.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 373

ADDISON AND ABDUL RASHID, JJ.

Umar Hayat—Defendant—Appellant.
v.

Nazar Muhammad and others—Plaintiffs—Respondents.

Second Appeal No. 944 of 1935, Decided on 6th January 1936, from decree of Dist. Judge, Sargodha, D/- 19th February 1935.

Custom (Punjab) — Succession—Nekokara Qureshis of Jhang District—Sister succeeding brother is succeeded by her sons and not by her husband—Self-acquired property of sister—Husband succeeds in absence of sons.

Amongst Nekokara Qureshis of Jhang District, where a sister succeeds her brother she is succeeded by her sons, but if there are no sons her husband does not succeed. If, however, the land in question is the self acquired property of the sister her husband would succeed in the absence of sons. [P 374 C 1]

Nand Lal and Bhagwat Dayal—for Appellant.

Achhru Ram—for Respondents.

Addison, J.—The sole question in this second appeal is whether the husband of Mt. Nur Bibi, deceased, who succeeded after the death of her mother to the land, the last male holder of which was her brother, is the heir to that land or whether the collaterals are. The parties are Nekokara Qureshis of Jhang district and follow custom. The latest *riwaj-i-am* of that district was prepared in 1929 and the relevant questions are Nos. 74, 76 and 79. According to question No. 76 when a woman dies holding property in her own right, her sons will first inherit it, but if there are no sons, then her husband succeeds and after him daughters. This question corresponded to question No. 26 in the former *riwaj-i-am* where it was clearly brought out what the meaning of 'holding property in her own right' was, namely, holding property which was her own self-acquisition. It seems clear that in the new question and answer No. 76 'holding property in her own right' means that. Further it is stated in answer to question No. 79 that sisters have

the same rights as unmarried daughters till their marriage as laid down in the answer to question No. 39. It is added that in cases when inheritance devolves on sisters, sister's sons would succeed to their mothers' shares in the absence of their mothers, but the husband of a sister is not entitled to succeed in any case. It is obvious from a consideration of the answers to these two questions that where a sister succeeds her brother she is succeeded by her sons, but if there are no sons, as in the present case, her husband does not succeed. If, however, the land in question is the self-acquired property of the sister her husband would succeed in the absence of sons. In this case it was not her self-acquired property. The decision of the District Judge is therefore correct and we dismiss the appeal, but make no order as to costs in this Court.

B.D./R.K.

*Appeal dismissed.***A. I. R. 1936 Lahore 374**

SALE, J.

Sita Ram—Defendant—Appellant.

v.

Harbans Lal—Plaintiff and another—
Defendant—Respondents.

Second Appeal No. 301 of 1935, Decided on 24th July 1935, from decree of Dist. Judge, Rawalpindi, D/- 8th November 1934.

Arbitration—S. 89, Civil P. C., covers all references to arbitration—Words "by any other law for the time being in force" in S. 89 cannot cover O. 23, R. 3—Court superseding arbitration—Course left open is to proceed under Sch. 2, Para. 8.

Section 89, Civil P. C., covers all references to arbitration, whether the reference is or is not made without the intervention of the Court, and whether an award does or does not follow and it says that they shall be governed by the provisions of Sch. 2, Civil P. C. The words in S. 89, Civil P. C., "by any other law for the time being in force" must refer to some law extraneous to the Civil Procedure Code and cannot be legitimately held to cover O. 23, R. 3. Once S. 89, Civil P. C., is held to apply, no reliance can be placed for any purpose on O. 23, R. 3, Civil P. C. The only remedy left is either to proceed with the arbitration or if the Court has superseded the arbitration, to proceed with the hearing of the appeal on the merits as required by Para. 8 of Sch. 2, read with Para. 19: 1921 Lah 232, Foll. [P 375 C 1, 2]

Harnam Singh—for Appellant.*Badri Das*—for Respondents.

Judgment.—On 23rd March 1931 Harbans Lal instituted a suit for rendition of accounts against Sita Ram and

Thakur Singh. The trial Court treated it as a suit for rendition of accounts in a dissolved partnership, but for certain reasons which are not material to this appeal dismissing the suit with costs. Harbans Lal then appealed to the District Judge. During the pendency of the appeal the parties obtained an order from the District Judge adjourning the hearing for compromise. On 3rd July 1934, a written agreement was presented to the Court to refer the question in dispute (which was described as a matter of accounts) to the arbitration of two persons, Sita Ram and Ramji Lal. The District Judge made the necessary order of reference, but on 19th October passed a formal order superseding the reference to arbitration and decided to deal with the appeal on its merits. At the same time, counsel for Harbans Lal presented an application that the document Ex. A dated 5th June 1934, and presented on 3rd July 1934, which purported to be a reference to arbitration, was in reality a compromise and should be treated as an adjustment of the suit under O. 23, R. 3, Civil P. C. The District Judge has accepted this argument and has held that the document Ex. A is in fact a compromise and a virtual admission by Sita Ram, defendant, of the major portion of the plaintiff's claim against him. In pursuance of this compromise, he dismissed from the suit Thakar Singh (a contesting party who had throughout denied that he was a member of the partnership), and holding that the only matter remaining was a settlement of accounts of Sita Ram granted the plaintiff a preliminary decree for rendition of accounts for the period 1st January 1924 to 30th June 1929, and remanded the case to the lower Court for a final decree to be passed. From this decision Sita Ram has preferred a second appeal to this Court.

There is no finding in the District Judge's judgment or elsewhere of the respective shares of Harbans Lal and Sita Ram. It may be mentioned here that the document Ex. A is also silent as to the question of shares; and one of the grounds of appeal by the appellant is that the District Judge should not have passed the preliminary decree without deciding the respective shares of the parties. In the case of the parties as represented before me in second appeal, the shares of the parties are disputed and it

appears to me that for this reason alone it would be difficult to maintain the judgment of the District Judge as it stands. But it is unnecessary to consider this matter as, in my view, the District Judge's order must be set aside on the ground that the matter in dispute having been referred by the District Judge to arbitration, the case is governed by S. 89, Civil P. C., and this section, as interpreted by this High Court, precludes the parties from invoking the provisions of O. 23, R. 3. It appears that this aspect of the case was not brought to the notice of the District Judge, but this is, of course, no reason why it should not be raised for the first time in second appeal. S. 89, Civil P. C., lays down that save in so far as is otherwise provided by the Indian Arbitration Act or by any other law for the time being in force, all references to arbitration shall be governed by the provisions contained in Sch. 2. The material words are "or by any other law for the time being in force." There is a divergence of opinion amongst the various High Courts as to whether these words do or do not include the Civil Procedure Code itself, but a Division Bench of this High Court has ruled in 67 I C 123 (1), that these words refer to some law extraneous to the Civil Procedure Code and cannot be legitimately held to cover O. 23, R. 3. It is true that this authority is not on all fours with the present case because it dealt with a case in which the parties without the intervention of the Court, referred a dispute during the pendency of an appeal to the decision of an arbitrator who gave an award.

In the present case the Court was asked to intervene since a written agreement was presented to the Court on 3rd July 1934, asking for a reference to an arbitrator. Moreover, there was no award in the present case. Counsel for the respondent urges that in these circumstances the ruling has no application, and that the real point in issue in 67 I C 123 (1) was the applicability of O. 23, R. 3, Civil P. C., to a case where there had been an award, to which the parties had consented. It is apparent however that the ratio decidendi in that case applies equally to the circumstances of the present case. S. 89, Civil P. C., covers all

references to arbitration, whether the reference is or is not made without the intervention of the Court, and whether an award does or does not follow and says that they shall be governed by the provisions of Sch. 2, Civil P. C. Clearly therefore the reasoning in 67 I C 123 (1), will apply to any case in which there has been a reference to arbitration. The Division Bench held that the words in S. 89, Civil P. C., "by any other law for the time being in force" must refer to some law extraneous to the Civil Procedure Code and cannot be legitimately held to cover O. 23, R. 3, in other words that once S. 89, Civil P. C., is held to apply, no reliance can be placed for any purpose on O. 23, R. 3, Civil P. C.

The only remedy left is either to proceed with the arbitration or, if, as in this case, the District Judge has superseded the arbitration, to proceed with the hearing of the appeal on the merits as required by Para. 8 of Sch. 2 read with Para. 19. No authority of this Court has been brought to my notice which takes a contrary view or holds that O. 23, R. 3, can be invoked in a case governed by S. 89, Civil P. C. Mr. Badri Das has attempted to avoid the difficulty by urging that there was no proper agreement to refer to arbitration and that therefore the case is not governed by S. 89. It is true that the document Ex. A does not specifically refer to matters previously in dispute and purports to limit the dispute to the mere taking of accounts as between Harbans Lal and Sita Ram for a definite period; nevertheless, inasmuch as the Court was asked to refer the question of the settlement of accounts as between the parties for this period (which is after all the essential point in dispute in this case) to a decision by arbitration. I must take the document Ex. A to be a reference to arbitration within the meaning of S. 89, Civil P. C. I must hold therefore that the respondent is precluded from invoking the provisions of O. 23, R. 3, Civil P. C., and that the District Judge was wrong in holding that there has been any adjustment between the parties either wholly or in part. I therefore accept the appeal, set aside the lower Court's order and remand the case to the lower appellate Court for a decision of the appeal on merits. Since the appeal has succeeded on a point which was not agitated before the lower Court I leave the parties to

1. Hari Prosad v. Seogni Devi, 1921 Lah 232 = 67 I C 123.

bear their own costs. Court-fee on appeal to be refunded.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 376

JAI LAL, J.

(Lala) Piara Lal (Ram) — Decreeholder—Appellant.

v.

Amir Chand and others—Judgment-debtors—Respondents.

Misc. First Appeal No. 1292 of 1935, Decided on 22nd November 1935, from order of Dist. Judge, Mianwali, D/- 21st June 1935.

Insolvency—Generally Court should not take action under S. 4, Provincial Insolvency Act, after property is sold—Minor adjudged insolvent—Such order is illegal—Minor unable to take proceedings due to minority—In such case Court can take action under S. 4.

Section 4, Provincial Insolvency Act, itself does not say anything as to the stage up to which the Court is competent to take proceedings under S. 4, but under sub-s. (2), the intention of the Legislature seems to be that the Insolvency Judge should not take action under S. 4 after the property has been sold. That should be the ordinary practice and a convenient practice but where a minor is adjudicated an insolvent and the order has been found to be illegal, and where the property was taken possession of by the Official Receiver and even when it was sold the minor could not raise any objection under S. 4 and owing to his minority he could not contest the validity of the order adjudicating him an insolvent, S. 4 is wide enough to cover the case as it is the duty of the insolvency Judge to do justice between the parties and to restore to the person his property which has been seized under an illegal order; specially when the order has been cancelled by the Judge. [P 376 C 2; P 377 C 1]

Mehr Chand Mahajan—for Appellant.
Badri Das—for Respondents.

Judgment.—This firm Daulat Ram-Udai Bhan was adjudicated insolvent. The appellant Piara Ram was a partner of the firm but was a minor at the time of the order of adjudication. The whole property of the insolvents, that is to say of the firm constituted by the two partners including Piara Ram, was taken possession of by the Official Receiver and sold on 3rd June 1930 when Piara Ram was still a minor. Possession, however, was not given to the auction purchasers for more than four years. Consequently they made an application on 16th August 1934 to be put in possession of the property purchased by them from the Official Receiver. This application was made to the Insolvency Judge. To this applica-

tion objection was raised by Piara Ram. Piara Ram also made an application on 26th November 1934, alleging that he being a minor had been illegally adjudicated an insolvent.

The learned District Judge has held that Piara Ram was adjudicated an insolvent illegally and that it must be assumed that no order adjudicating him an insolvent exists. The question now arises what should happen to the property, if any, of Piara Ram which has been sold by the Official Receiver but possession whereof has not yet been given to the purchasers. The learned District Judge has decided that Piara Ram should secure a decision of this question by instituting a civil suit. He does not appear to have decided that the case is not covered by S. 4 or that in exercise of his discretion he would not adjudicate in the matter under S. 4, Provincial Insolvency Act. It is contended by Mr. Mehr Chand Mahajan on behalf of the appellant that having regard to the fact that the Court has found that the order adjudicating Piara Ram an insolvent is illegal and in view of his minority at the time of the adjudication order and also at the time of the sale of the property, it is unfair that he should be driven to a civil suit to get possession of his property, if any, from the Official Receiver. Mr. Badri Das on the other hand contends that under the Hindu law the property of Piara Ram vests in the receiver and is saleable by him and therefore the appellant has no right to any relief in these proceedings. That however is a matter to which the attention of the learned District Judge does not seem to have been invited and I am therefore unable to decide it at this stage.

The other contention of Mr. Badri Das is that S. 4, Provincial Insolvency Act, does not empower the Insolvency Judge to adjudicate upon the rights of persons concerned after the sale of the property by the Official Receiver. The section itself does not say anything as to the stage up to which the Court is competent to take proceedings under S. 4, but sub-s. (2) is relied upon by Mr. Badri Das in support of his contention that the intention of the Legislature was that the Insolvency Judge should not take action under S. 4 after the property has been sold. That perhaps should be the ordinary practice, and a convenient practice,

but the facts of this case are peculiar. This is not a case in which a valid order of adjudication has been passed and a third person, who is interested in the property taken possession of by the Official Receiver, has slept over his right. Here a minor was adjudicated an insolvent and the order has been found to be illegal. When the property was taken possession of by the Official Receiver and even when it was sold he could not raise any objection under S. 4, and owing to his minority he could not contest the validity of the order adjudicating him an insolvent. It may be that after attaining majority he did not promptly go to the Court asking for the cancellation of the order adjudicating him an insolvent, but that by itself does not imply that he is not entitled to the relief, which he would otherwise be entitled to, if he can establish that any property which belong to him, and which could not therefore vest in the Official Receiver has been illegally sold by him. I consider that S. 4 is wide enough to cover a case like the present, and in any case it would be the duty of the Insolvency Judge to do justice between the parties and to restore to the person his property which has been seized under an illegal order: specially when the order has been cancelled by the Judge.

I accept this appeal and send the case back to the learned District Judge with directions to hold an enquiry whether any property belonging to the appellant Piara Ram, or any interest in any property which vests in Piara Ram, has been taken possession of by the receiver and has been disposed of by him, and, if it is possible to make restitution of the same to the minor in these proceedings, to do so. This order also is in the interest of the auction purchasers because, if it is found afterwards that the property has been sold to them which did not vest in the Receiver, or could not vest in the Receiver they may run the risk of being deprived of that property in subsequent proceedings without a chance of refund of their money in such proceedings. The order therefore that I have passed is in the interests of all concerned. I return the case to the District Judge. Costs will abide the result.

B.D./R.K.

*Case remanded.***A. I. R. 1936 Lahore 377**

JAI LAL, J.

Satram Das—Defendant—Petitioner.
v.*Sadhu Singh* — Plaintiff and *others*—
Defendants—Respondents.

Civil Revn. No. 389 of 1935, Decided on 10th December 1935, from decree of Sm. C. Judge, Jhang, D/- 28th February 1935.

Provincial Small Cause Courts Act (1887), Art. 8—Co-sharers transferring right to recover rent—Transferee bringing suit against other co-sharer for recovery of rent realized by him—Such suit is maintainable in Small Cause Court.

Some of the co-proprietors of land transferred their right to recover their share of rent from the tenants to the plaintiff. The plaintiff brought a suit against the non-transferor co-proprietor to recover the share of rent transferred to him:

Held: that exception in Art. 8 did not apply because the defendant was not a tenant of transferor and the suit was not for arrears of rent. The suit was not excepted by Art. 31 because the action was not a claim for immoveable property. The expression "belonging to the plaintiff" as used in Art. 31, applies to immoveable property and not to profits. So the suit in the Small Cause Court was maintainable.

[P 378 C 1]

Ganesh Datta—for Petitioner.*Ram Chand Manchanda*—for Respondent (Plaintiff).

Order.—This is a petition for revision of a decree passed by the Judge, Small Cause Court, Jhang. The only ground raised is that the suit was not cognizable by a Small Cause Court. The objection was raised before the trial Judge but was overruled and a decree passed subsequently. The facts, as alleged by the plaintiff-respondent, are these: Sunder Singh, Kirpal Singh and Sat Ram Das were co-owners of land which was under the cultivation of tenants who paid rent to the landlords. Sunder Singh and Kirpal Singh transferred their right to recover their share of rent from the tenants to Sardar Singh and Sardar Singh transferred the same right to Sadhu Singh. Sadhu Singh then instituted a suit against Sat Ram Das for a decree for the amount alleged to be due to him on account of Sunder Singh and Kirpal Singh's share in the produce of the land recovered by Sat Ram Das from the tenants of the land. The plea of Sat Ram Das, defendant, appears to be that Sunder Singh and Kirpal Singh had no share in the land. The learned Judge, Small Cause Court, has decreed the suit.

The question is whether such a suit is cognizable by a Small Cause Court. The learned counsel for the petitioner relies upon two articles of the Provincial Small Cause Courts Act in support of his contention that the suit is excepted from the jurisdiction of a Small Cause Court, Art. 8, which excepts a suit for the recovery of rent, and Art. 31, which excepts a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant. It is obvious that the suit is not for the recovery of rent because Sat Ram Das is not the tenant of Sunder Singh and Kirpal Singh. He is, according to the allegation of the plaintiff and the finding of the trial Judge, a co-sharer in the land. It is not also a suit such as is mentioned in Art. 31 because the plaintiff does not claim the immoveable property in dispute. He is only a transferee of the right to recover the share of the income of the property of Sunder Singh and Kirpal Singh. I think the expression "belonging to the plaintiff, as used in Art. 31, applies to immoveable property and not to profits. Neither of the two articles relied upon by the petitioner's counsel therefore governs the case. Therefore the suit was cognizable by the Small Cause Court and I dismiss this petition; but the question was an arguable one and therefore I make no order as to costs.

B.D./R.K.

*Petition dismissed.***A. I. R. 1936 Lahore 378**

BHIDE, J.

Mt. Laso Devi—Appellant.

v.

Mt. Jagtambha Devi—Respondent.

Misc. First Appeal No. 1518 of 1935, Decided on 20th December 1935, from order of Senior Sub-Judge, Simla, D/- 27th May 1935.

(a) Succession Act (1925), S. 299—Letters of administration—Subordinate Judge having powers of District Judge—Order by such Judge covered by S. 299, Succession Act.

An order by a Senior Sub-Judge invested with powers of a District Judge for the grant of letters of administration is covered by S. 299, Succession Act. [P 378 C 2]

(b) Succession Act (1925), S. 255—Probate Court is only concerned with due execution of will—S. 255 does not empower Court to question validity of will with reference to Hindu law.

The probate Court is concerned only with the proof of the due execution of the will. The

Judge has no jurisdiction to go into the question of validity of the provisions of the will with reference to Hindu law under S. 255. S. 255 deals with those cases only wherein certain properties have to be excepted from the letters of administration for special reasons.

[P 378 C 2]

*M. C. Sud—*for Appellant.*J. L. Kapur—*for Respondent.

Judgment.—This appeal arises out of an application for letters of administration to the estate of one Behari Lal, deceased, by his widow Mt. Laso Devi. The application was opposed by Mt. Jagtambha Devi, the daughter-in-law of Mt. Laso Devi, on the ground that the provisions of the will of the deceased were invalid in so far as they limited her right to maintenance and stridhan. The learned Senior Subordinate Judge has granted letters of administration, subject to the proviso that any provision of the will restricting the rights of Mt. Jagtambha Devi to her stridhan or her maintenance will be inoperative under S. 255, Succession Act. From this decision the present appeal has been preferred. A preliminary objection was taken that no appeal was competent inasmuch as the order in question was passed by a Senior Subordinate Judge, and S. 299 applies only to orders passed by a District Judge; but in the present instance the Senior Subordinate Judge was invested with powers of a District Judge for the grant of letters of administration and in the circumstances it seems to me that the case would be covered by S. 299, Succession Act, cf. 1933 Pat 276 (1) and Ss. 30 and 39, Punjab Courts Act. The contention of the learned counsel for the appellant is that the order passed by the learned Senior Subordinate Judge was without jurisdiction inasmuch as S. 255, Succession Act, under which it purports to be passed, was inapplicable. The contention appears to me to be correct. The objections of Mt. Jagtambha Devi were really an attack on the validity of the provisions of the will under Hindu law. The probate Court is however concerned only with the proof of the due execution of the will, cf. 20 P R 1912 (2); 55 P R 1894 (3). The factum of the execution of the will in this case was not challenged.

1. Baroda Debya v. Phutumani, 1933 Pat 276 = 145 I C 375 = 14 P L T 285.

2. Indar Narain v. Onkar Lal, (1912) 20 P R 1912 = 10 I C 130.

3. Mt. Bali v. Mt. Husain Bibi, (1894) 55 P R 1894.

It seems to me that the learned Senior Subordinate Judge had no jurisdiction to go into the question of validity of the provisions of the will with reference to Hindu law under S. 255, Succession Act. That section appears to me to deal with those cases wherein certain properties have to be excepted from the letters of administration for special reasons. I accordingly set aside the order of the learned Senior Subordinate Judge, relating to the proviso subject to which the letters of administration have been granted. In view of all the circumstances, I make no order as to costs.

B. D. R. K.

Order set aside.

A. I. R. 1936 Lahore 379

YOUNG, C. J. AND DIN MOHAMMAD, J.

(Sardar) Mohan Singh — Plaintiff—Appellant.

v.

Narain Singh and others—Defendants—Respondents.

Second Appeal No. 857 of 1928, Decided on 13th July 1934, from decree of Dist. Judge, Montgomery, D/- 21st December 1927.

Civil P. C. (1908), O. 2, R. 2—Lease—Surety for lease amount — Default—Suit against both sureties and tenants in Revenue Court—Suit as against tenants decreed and amount partly realized—Suit in Civil Court against surety for balance—Default in payment of another instalment in meantime not included in such suit—Subsequent suit against surety in respect of second default held not barred by O. 2, R. 2.

The lessors of a contract of a lease had also entered into a contract with sureties making the latter liable on default by the tenants in payment of rents. On the first default, a suit was filed in Revenue Court against both tenants and sureties and the Revenue Court decreed the suit as against the tenants. The lessors realized part of the amount and for the balance sued the sureties in the civil Court. In the meantime default had been committed by the tenants in payment of second instalment, but this was not included in the suit against the sureties. Subsequently the lessors filed a suit against the sureties in civil Court in respect of such default. It was contended that the suit was barred by O. 2, R. 2, as the plaintiffs ought to have included this amount also in their first suit:

Held: that the suit was not barred by O. 2, R. 2, for, if the plaintiffs had included the latter amount also in the first suit, they would have been in the unfortunate position of having elected to sue one of the two equally liable sets of persons and their right of action against the tenants would have lapsed. [P 380 O 2]

S. N. Bali—for Appellant.

Muhammad Din Jan for A. I. Khosla and Harnam Singh—for Respondents.

Judgment.—This is a second appeal from the decision of the learned District Judge of Montgomery District. The plaintiffs leased land to certain lessees. The lessees bound themselves to pay the sum of Rs. 9,750 per harvest and the term was for four harvests. The lessors also as a consideration of the lease entered into a contract with the other defendants as sureties, the contract of suretyship making the sureties liable on any default of the other defendants. The first instalment was unpaid and in March 1921, a suit was brought in the Revenue Court for the sum then due, Rs. 4,750, against both the tenants and the sureties. The Revenue Court gave a decree against the tenants only and out of that decree the plaintiffs realized Rs. 3,678 leaving a balance of Rs. 2,000. The plaintiffs then brought a suit in November 1923, against the sureties for this balance of Rs. 2,000. Eventually the District Judge decreed this suit against the sureties for this amount. In the meantime, in May 1921, another instalment of Rs. 4,750 had become due. The suit filed in May 1924 was against both tenants and sureties for Rs. 4,750. This suit was sent to the Collector as the Civil Court had no jurisdiction against the tenants. There was, in the month of August 1925, a decree against the tenants and the case against the sureties was returned to the Civil Court. In October 1925 the plaintiffs made an application to the Civil Court in their action against the sureties. It is this case which is now before us. The lower appellate Court dismissed the suit under O. 2, R. 2, Civil P. C., on the ground that when the plaintiffs brought a suit in 1923 against the sureties for Rs. 2,000, the balance owing them by the tenants, they should have included a claim for Rs. 4,750 the instalments, which at that time had become due as well.

It is argued in appeal that it would not have been possible for the plaintiffs to have brought a suit against both the tenants and the sureties for the two sums of Rs. 2,000 and Rs. 4,750. It is urged that the plaintiffs brought a suit against the sureties on the basis of the deed of suretyship which involved the sureties alone. As regards the amount

of Rs. 2,000 the tenants were in no way liable in the suit. The liability of the tenants upon the lease which was separate document had been exhausted in the suit in the Revenue Court and the liability on the lease had merged against the tenants in that decree. Therefore, if the claim against the tenants had been included in the suit in 1923, for the sum of Rs. 2,000 there would have been two claims based on separate causes of action, therefore, there would have been a misjoinder and there would have been a risk of the suit not succeeding on that ground. It has been argued, however, on behalf of the respondents that the plaintiffs could have brought a suit against the sureties for Rs. 2,000 plus Rs. 4,750 which also had become due on the surety bond itself as the tenants had defaulted. If, however, the plaintiffs had adopted this course and sued the sureties alone they would have been in the unfortunate position of having elected to sue one of two equally liable sets of persons, the principals and sureties. Having sued the sureties, the right of action against the principals would have lapsed. On these grounds we think the suit was not barred by O. 2, R. 2, Civil P. C. The appeal, therefore, must be allowed. The case will be remanded to the lower appellate Court for decision on the other issues according to law. The Court-fee paid will be refunded. The costs will abide the event.

K.S./R.K.

Appeal allowed.

* A. I. R. 1936 Lahore 380

YOUNG, C. J. AND MONROE, J.

Hussaina—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 862 of 1935, Decided on 23rd October 1935, from order of Sessions Judge, Delhi, D/- 18th July 1935.

* Confession — Confession made to police officer, whether before commencement of investigation or after it, is entirely inadmissible.

S. 25, Evidence Act, enacts that no confession made to a police officer shall be proved as against a person accused of any offence. S. 25, itself makes no distinction between a confession made before investigation and confession made after investigation. It is a confession to a police officer made at any time which is inadmissible. [P 381 C 1]

*Asadullah Khan—*for Appellant.*Des Raj Sawhney—*for the Crown.

Young, C. J.—Hussaina has been condemned to death for the murder of Chand Khan. The murder in this case was committed because of a woman. Abdur Rahman had a wife, Mt. Mariam. Three months before the crime the accused took away Abdur Rahman's wife and lived with her. The deceased Chand Khan who was an uncle of the woman, interested himself in endeavouring to get her back. Some 20 days before the murder Chand Khan, his son-in-law, Mohammad Shafi and Abdur Rahman discovered where the woman was and took her away from Hussaina when he was absent. The woman was then placed in Mohammad Shafi's house and Hussaina moved his house to near where she was living. At 7 p. m. on the evening of the murder Chand Khan went to his brother's house for a conference with Abdur Rahman and Mohammad Shafi as to what was to be done. On returning with Mohammad Shafi, Chand Khan was passing Hussaina's house. When Hussaina saw him, he came out and started to abuse Chand Khan. Mutual abuse followed and then Hussaina took out a knife and plunged it into Chand Khan's chest killing him at once. Mohammad Shafi was there and saw the murder. Another eyewitness Nawaz Khan was there at the time too and also witnessed the murder. Another Chand Khan saw Hussaina running away after the murder. About half an hour later a police constable Shujait Ali Khan, P. W. 6, saw Hussaina approaching him. He was suspicious because Hussaina obviously wished to avoid him. He arrested Hussaina and Hussaina is alleged to have said that he had killed Chand Khan. That he said this is obvious as the policeman knew nothing of the murder of Chand Khan and he informed at once his police officer. A knife was taken from the accused which has been proved to be stained with human blood.

The above are the facts. There was a defence but counsel in this Court concedes that it is worthless and we agree with him. The eyewitnesses' evidence cannot be attacked in any way, neither can that of the witness who saw Hussaina running away. The evidence of motive has also been proved and we cannot doubt that there was ample motive for the murder.

Hussaina objected strongly to the interference of Chand Khan in this matter. The evidence of the constable who arrested Hussaina cannot be attacked as regards the actual arrest. The learned Sessions Judge however admitted in evidence the confession of the accused to this police constable. The learned Judge says:

This statement of the accused was made apparently before the commencement of the investigation and was therefore clearly admissible.

In our opinion the learned Judge was wrong in admitting this confession. S. 25, Evidence Act is perfectly clear on the point. It enacts that no confession made to a police officer shall be proved as against a person accused of any offence. The section itself makes no distinction between a confession made before investigation and a confession made after investigation. It is a confession to a police officer made at any time which is inadmissible. The question of the admissibility or otherwise of the confession, however makes no difference to the proof of this case. The evidence recited above is ample to sustain the conviction. It has been argued by counsel who appears for the accused in this Court that this was a sudden affair and that there had been mutual abuse and that therefore the sentence ought to be commuted to transportation for life. We cannot agree. Hussaina wished undoubtedly to murder Chand Khan. He it was who came out of the house when Chand Khan was passing; he it was who started the abuse and finally he killed this old man by using a knife upon him. The provocation in this case came entirely from Hussaina. In this view of the matter we see no reason to interfere with the sentence passed upon Hussaina. We confirm the sentence of death and dismiss the appeal.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 381

ADDISON AND DIN MOHAMMAD, JJ.

Budha Mal—Creditor—Appellant.

v.

Amar Nath and another—Debtor and Official Receiver—Respondents.

Letters Patent Appeal No. 70 of 1933, Decided on 19th December 1934, from order of Dalip Singh, J., D/- 1st June 1933.

Provincial Insolvency Act (1920), S. 42—Insolvent young man of 20 and carrying on business with father—Absolute discharge held could not be granted merely on this ground.

At the time of the transactions, the insolvent was a young man of 20 years and was carrying on business with his father under the latter's direction and control. On these, he was given an absolute discharge:

Held: that though these circumstances could be taken into consideration, it would be going too far to grant an absolute discharge on these grounds. [P 381 C 2]

Manohar Lal Sachdev—for Appellant.

Ram Lal Anand (I)—for Respondents.

Judgment.—This is a Letters Patent appeal from the order of a Judge of this Court, granting an absolute discharge to Ram Saran Das, while his father Amar Nath was granted a conditional discharge subject to his paying Rs. 50 per mensem for five years from the date of the Judge's order. Amar Nath has since died and we are no longer concerned with him. Although the conditions necessary for granting an order of discharge required by S. 42, Insolvency Act, were not satisfied in the case of Ram Saran Das, the Judge granted him an absolute discharge because at the time of the transactions he was a young man of 20 years of age or thereabout and was carrying on business with his father Amar Nath, which, in the circumstances, was held to be under his direction and control. The Judge therefore did not think it proper to penalise him further. It seems to us however that though these circumstances can be taken into consideration, it would be going too far to grant an absolute discharge on those grounds. We therefore accept this appeal and, setting aside the order of the Single Bench, grant Ram Saran Das a conditional discharge subject to his paying the sum of Rs. 7-8-0 per mensem for two years from the date of this order. The first payment will be due on 1st January 1935. We have fixed the amount stated as we consider that is sufficient for a man in his position to pay. We make no order as to costs.

K.S./R.K.

Appeal accepted.

*** A. I. R. 1936 Lahore 382**

JAI LAL, J.

Dist. Bar Association, Hoshiarpur—
Plaintiff—Petitioner.

v.

Bawa Ram Singh and others—Defen-
dants—Respondents.Civil Revn. No. 381 of 1935, Decided
on 24th October 1935, from decision of
Dist. Judge, Hoshiarpur, D/- 27th April
1935.(a) Legal Practitioners' Act (1879) S. 36—
District Judge's inquiry on resolution of Bar
Association declaring certain persons touts
—Members of Association, as witnesses, stat-
ing inability to say whether they adhered
to resolution even after considerations before
them as witnesses—Statement held did not
amount to repudiation of resolution.An inquiry was started by the District Judge
on a resolution of a District Bar Association,
which was forwarded to him and whereby cer-
tain persons were declared touts. Some pro-
minent members of the Association were ex-
amined as witnesses and all that they stated was
that they were unable to say whether, in view
of the considerations placed before them as
witnesses, they still adhered to the resolution:*Held:* that the statement of witnesses did
not amount to a repudiation of the resolution.
[P 384 C 1]* (b) Legal Practitioners' Act (1879), S. 36
—District Bar Association's meeting resol-
ving unanimously declaration of certain per-
sons as touts—Contention in inquiry before
District Judge that all members present were
not entitled to vote, hence resolution invalid—
Matter held domestic concern of Association
and contending party had no concern—Hence
resolution not invalid.At a meeting of a District Bar Association, in
which a resolution was passed declaring certain
persons to be touts, the members present voted
for the resolution unanimously. In an inquiry
before the District Judge it was contended that
all the members were not entitled to vote as
some of them were defaulters and hence the
resolution was invalid:*Held:* that it was entirely the matter for the
Bar Association to decide whether the default-
ing members have ceased to be its members and
that it was purely a domestic matter with which
the contending party had no concern. Hence
the resolution did not become invalid on that
ground. [P 384 C 1](c) Costs—Bar Association declaring cer-
tain persons touts—Inquiry by District Judge
thereon—Association invited to assist in
inquiry—Persons not found touts—Associa-
tion ordered to pay costs of inquiry to per-
sons—Association held not party, hence order
illegal.In an inquiry started by the District Judge
on a resolution of a District Bar Association
declaring certain persons to be touts, the Asso-
ciation was invited to assist the Judge. The
District Judge found that there was no evidence
to show that the persons were touts and orderedthat the Association should pay to the persons
the costs of the inquiry:*Held:* that the Association was not a party
to the proceedings and hence the order as to
costs was illegal. [P 384 C 2](d) Government of India Act, (1915), S. 107
—Inquiry under S. 36, Legal Practitioners'
Act on Bar Association's resolution—Subjects
of inquiry not found touts—Bar Association's
petition to High Court against order—Ob-
jection that Association had no right to pre-
sent petition—High Court held could take
cognisance of proceedings on information
from any person—High Court held could
allow Association to supply material to it for
doing justice though Association not entitled
to appear as of right.In an inquiry under S. 36 (1), Legal Practi-
tioners Act, the District Judge found that the
persons against whom the inquiry was instituted
were not touts. The District Bar Association
on whose resolution the inquiry was started
made a petition to the High Court against the
order of the District Judge. An objection was
raised on behalf of the respondents that the Asso-
ciation had no right to present the application:*Held:* that under S. 107, Government of India
Act, it was open to the High Court to take
cognisance of the proceedings on information
supplied by any person.*Held further:* that though the Association
was not entitled to appear before the High
Court as of right it was within the power of the
High Court to allow the Association to place the
proper material before the High Court to enable
it to do justice. [P 384 C 2](e) Practice—Procedure—District Bar As-
sociation's resolution declaring certain per-
sons touts—Inquiry by District Judge—No
opportunity given to persons to show cause
against passing resolution—Persons held not
entitled to be heard before Association under
any provision of law.A District Bar Association declared certain
persons as touts by its resolution. An inquiry
was thereupon held by the District Judge. It
was contended that the Association should have
given an opportunity to persons to appear before
it to show cause why the resolution should be
passed:*Held:* that there was no provision of law
under which the persons were entitled to be
heard in such proceedings before the Associa-
tion. [P 384 C 2]*Abdul Aziz and Jagan Nath Aggarwal*
—for Petitioner.*J. G. Sethi and T. D. Khanna*—for
Respondents.**Order.**—The District Bar Associa-
tion of Hoshiarpur, at their meeting spe-
cially convened for the purpose, passed a
resolution declaring the ten respondents
before me to be touts. The resolution
was passed by the unanimous vote of the
57 members of the Association who were
present at the meeting. I understand there
are about 100 members of the Association.

This resolution was duly forwarded to the District Judge who, on receipt thereof, directed the Senior Subordinate Judge of Hoshiarpur to hold an enquiry. On 22nd February 1935, the Senior Subordinate Judge wrote to the Bar Association asking them to inform him of the material and the evidence on which they desired to establish the accusations brought against the respondents. The reply to this was sent by the District Bar Association which was not happily worded. The attitude taken by the Bar Association was that the resolution passed by them was quite sufficient to declare the respondents as touts. Now S. 36, Legal Practitioners' Act, under which the resolution of the Bar Association was passed, empowers inter alia a District Judge to frame or publish lists of persons proved to his satisfaction, by evidence of general repute or otherwise, habitually to act as touts. The explanation to sub-s. (1) of this section is that the passing of a resolution declaring any person to be or not to be a tout by a majority of the members present at the meeting specially convened for the purpose of an association of persons entitled to practise as legal practitioners in any Court shall be evidence of the general repute of such persons for the purposes of this sub-section. An enquiry such as is contemplated by sub-s. (1) may be held under the orders of the District Judge by any Court subordinate to him, but the District Judge is bound to hear the persons against whom proceedings are proposed to be taken before entering their names in the list of touts. It was, therefore, open to the District Judge to treat the resolution of the Bar Association as evidence of the general repute of the respondents and, after giving them an opportunity to be heard, to enter their names in the list of touts. It was also open to him to hold further enquiry through the Senior Subordinate Judge as he did in this case.

When the Bar Association was called upon by the Senior Subordinate Judge to furnish him with information as to the evidence that could be produced against the respondents, the Association should have supplied that information. They, however, properly altered the attitude taken by them originally when the Senior Subordinate Judge intimated to them that he had fixed 25th March 1935 for

enquiry into the matter for which notices had also been given to the respondents. In reply to the notice the Bar Association informed the Senior Subordinate Judge that whatever evidence they had to produce would be produced on the date fixed, i.e., 25th March 1935. For some reason best known to him the Senior Subordinate Judge sent the case back to the District Judge on 11th March with a suggestion that he should hold the enquiry himself. He has given some reasons in his report, but they do not appeal to me. The District Judge thereupon transferred the case to his own record on 11th March fixing 12th March as the date for the hearing of the case. Telegraphic notices of this were given to the respondents and a notice was also given to the Bar Association. It is obvious that the time given to the Association to produce evidence was not adequate. The Association thereupon passed a resolution appointing six of its members to represent it in the proceedings. These gentlemen appeared before the District Judge and were examined at some length and their right to appear in the absence of a power of attorney from the Association was questioned and finally they had to drop out of the proceedings. I am unable to understand why a power of attorney was considered necessary.

The enquiry continued and it consisted mostly of evidence called by the respondents. Some prominent members of the Association also were examined as witnesses and they were questioned whether they had any personal knowledge of any transaction in which any of the respondents had acted as touts. Their answers were in the negative. No questions were put to them whether previous to the passing of the resolution or even afterwards they had heard of the reputation of the respondents, as these, in the face of the resolutions of the Bar Association, would have been proper questions to be asked: as the resolution of the Bar Association is that the respondents have the reputation of being touts; and it is evidence only of such reputation. Finally, the District Judge held that the respondents had not been proved to be touts. He rejected the application and directed the District Bar Association to pay the costs of the proceedings before him to the respondents. The learned

District Judge is of opinion that the resolution of the Bar Association is of no value, because some of the members who were present at the meeting appeared before him and were not prepared to support it, that the resolution was invalid because out of nearly 100 members only 57 attended the meeting and only 19 of such members were qualified to vote at the meeting of the Association, the rest being defaulters in the payment of their dues to the Association. With regard to the first objection, I do not find anything in the statements of the members concerned, which may lead me to infer that they repudiated the resolution passed by the Association even if such repudiation really affected the case. All that the witnesses stated was that they were unable to say whether, in view of the considerations placed before them in their examination as witnesses, they still adhered to the resolution; this does not amount to repudiation.

With regard to the presence of defaulting members at the meeting, it is to be noted that the resolution was passed unanimously by those present at the meeting and at any rate there were 19 members who even according to the respondents were qualified to vote and not one out of them voted against the resolution. On the other hand, they all unanimously voted for the resolution. In my view this matter is no concern of the respondents. It is entirely a matter for the Bar Association to decide whether the defaulting members have or have ceased to be its members. It is, to use the expression of the learned counsel, purely a domestic matter with which the respondents have no concern. The resolution, in my opinion, does not become invalid on this ground. There are several other matters discussed in the order of the learned District Judge which it is unnecessary for me to discuss at this stage in view of the order that I have decided to pass on this application.

After examining the record of the proceedings I have reached the conclusion that there has not been such an enquiry into this matter as is contemplated by the law. The Bar Association, on whose resolution these proceedings were initiated, did not have proper opportunity to present its case before the District Judge. It had declared its desire to produce evidence and had appointed six members to

represent it in the proceedings before the District Judge. Some extraneous matters were introduced in the discussion before me, but I have purposely refrained from alluding to them. It is true that it is hard on the respondents that these proceedings should have been protracted and there is a likelihood of their facing another enquiry; but the proceedings indicate that they themselves raised certain points before the District Judge which were not relevant to the enquiry and which apparently influenced the District Judge to drop the proceedings.

It is true, as contended by the respondents' counsel, that before me and also before the District Judge the Bar Association had no right to appear as a party, but it was invited by the Senior Subordinate Judge and subsequently by the District Judge to assist them in the enquiry. I am unable to understand how it could be held liable for the costs of the respondents. The order as to payment of costs by the Bar Association must be set aside as illegal. An objection was taken that the Bar Association has no right to present this application, but the case is before me under S. 107, Government of India Act of 1915, and it is open to me to take cognizance of these proceedings on information supplied by any person. Though the Bar Association is not entitled to appear before me as of right, it is within my power to allow it to place the proper material before me to enable me to do justice in the case and consequently, I have allowed the Bar Association to assist me in the disposal of these proceedings.

A contention was raised before me and this contention also seems to have found favour with the learned District Judge that the Bar Association should have given an opportunity to the respondents to appear and show cause before it why the resolution should not be passed. This resolution, it may be mentioned, was passed by the Bar Association in pursuance of a report of a Sub-Committee appointed by it to enquire into the conduct of certain persons. I am not aware of any provision of law under which the respondents were entitled to be heard in such proceedings before the Bar Association. In fact the very nature of the proceedings of the Association indicates that it is not contemplated that it should

hold a judicial enquiry. It is the function of the District Judge to hold such an enquiry. In view of what I have stated above, I consider that there should be further enquiry into the matter by the District Judge, an enquiry in which either the District Bar Association should be allowed to produce evidence in support of its resolution, or the District Judge should ascertain from the Bar Association what evidence could be produced in support of the resolution and examine the evidence and material placed before him by it.

In order to safeguard the respondents from, what their counsel describes, unnecessary trouble by protracted proceedings, I direct that before the District Judge proceeds with the further enquiry directed by me, the District Bar Association, Hoshiarpur, should call another meeting specially convened for the purpose of passing a resolution declaring the respondents or any of them to be or not to be touts. This meeting shall be convened within one month from to-day and a copy of the resolution passed thereat certified by the President and the Secretary of the Association shall be submitted to the District Judge within three days from the date on which the meeting is convened. The District Judge will fix a date about six weeks from to-day for the hearing of the case and will then proceed with the enquiry in accordance with law. At such enquiry the respondents shall be given an opportunity to produce such further evidence as they may desire to produce. The learned District Judge should, unless he sees any reason to the contrary, allow the Bar Association to be represented by its representatives in the enquiry before him, to lead evidence and to cross-examine witnesses. The order of the District Judge passed on 27th April 1935 is hereby set aside including the order as to costs. No order as to the costs of these proceedings.

S.R./R.K.

*Order accordingly.***A. I. R. 1936 Lahore 385**

BHIDE, J.

Nila—Defendant—Appellant.

v.

Punun—Plaintiff and another—Defendant—Respondents.

Misc. Second Appeal No. 1416 of 1935,
Decided on 18th December 1935, from
order of Dist. Judge, Ambala, D/-15-6-1935
1936 L/49 & 50

Res judicata—Previous suit in representative character and conducted without any negligence—Suit disposed of under O. 17, R. 3, Civil P. C.—Decision operates as res judicata.

A decision under O. 17, R. 3, Civil P. C., in a previous suit of a representative character and conducted without any negligence is to be deemed to be a decision on merits and such a decision falls within the scope of S. 11 of Civil P. C. : 1929 *Mad* 404 and 1918 *All* 333, *Ref.*
[P 386 C 2]

Nanak Chand—for Appellant.*Shamair Chand* — for Respondents

Judgment.—This second appeal arises out of a suit for a declaration that an alienation of certain land effected by one Indar in favour of Nila, defendant 1, was without necessity and consideration and should not affect the plaintiff's reversionary rights. The suit was dismissed by the trial Court, but on appeal the learned District Judge has remanded it for re-trial. From this decision the present appeal has been preferred. It appears that a similar suit for a declaration had been instituted by Kartar Singh, eldest brother of the present plaintiff, but was dismissed on 2nd June 1926. The dismissal was under O. 17, R. 3, Civil P. C., Kartar Singh having failed to produce evidence on the date fixed. Further opportunity to produce evidence was refused and the case was dismissed. No appeal was preferred by Kartar Singh and the decision in the previous suit thus became final.

The learned counsel for the appellant contends that the previous suit being of a representative character the decision therein was binding on the plaintiff and that though the case was decided under O. 17, R. 3, Civil P. C., the decision is deemed to be on merits for the purposes of S. 11, Civil P. C. In support of his contentions the learned counsel for the appellant relied on 1929 *Mad* 404 (1). The view taken by the learned District Judge on the above point was that the previous decision was not on merits as Kartar Singh had failed to produce the necessary evidence and the plaintiff who is a minor was not bound by the previous decision. He pointed out that even if the plaintiff had instituted the previous suit through Kartar Singh as next friend he could have challenged the decision on the ground of gross negligence on the part of the next friend. The fact that a suit of the present type is of a representative

1. *Govindoss Krishnadoss v. Rajah of Karvetnagar*, 1929 *Mad* 404=122 I O 519.

character and any decision arrived at therein is binding on all the reversioners was not disputed by the learned counsel for the respondents, but he distinguished the present case on the ground that the plaintiff was a minor and he also adopted the argument of the learned District Judge that, if Kartar Singh had instituted the previous suit on behalf of the plaintiff who is a minor, the plaintiff could have maintained the present suit on the ground that Kartar Singh was guilty of negligence in conducting the previous suit.

The decision of the point at issue depends on the question whether Explanation 6 to S. 11, Civil P. C., applies to the circumstances of this case. According to that Explanation, when persons litigate bona fide in respect of a public or private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of the section, be deemed to claim under the persons so litigating. Now, there can be no doubt that Kartar Singh was litigating in the previous suit in respect of a right common to all the reversioners. There is no suggestion that the previous suit was collusive, or that Kartar Singh was guilty of fraud. All that has been urged is that (i) Kartar Singh was guilty of negligence in not depositing the process fees in Court in time and (ii) that as a result there was no decision of the case on merits. As regards the first point, the facts were that Kartar Singh had made over diet money to his pleader's clerk but the latter decamped with it. The pleader on coming to know of this went to Court ten days before the hearing and deposited the process fees and diet money. But the Court refused to adjourn the case for want of service. The learned District Judge has himself remarked that the Court was not justified in throwing out the case in such circumstances. This finding means that the learned District Judge was of the opinion that Kartar Singh had done all that could be reasonably expected and was not guilty of any negligence. And yet the learned District Judge went on to remark that, if Kartar Singh had instituted the previous suit as a next friend on behalf of the present plaintiff, the latter could have maintained the present suit on the ground that Kartar Singh was guilty of gross negligence. I do not

see how these findings can be reconciled. The learned counsel for the respondent has cited 1926 All 36 (2) in which the terms 'negligence' and gross negligence have been explained, with reference to a suit by a minor to set aside a decision in a previous suit on account of gross negligence on the part of his guardian. The test laid down for deciding what amounts to 'negligence' was the conduct of the average man in like circumstances and with like knowledge and means of knowledge. I do not see how Kartar Singh can be said to have been guilty of any negligence from the standpoint of this test and, as pointed out above, the learned District Judge himself appears to have been of this opinion, judging from his remark that the previous suit should not have been thrown out. The question as to why Kartar Singh did not appeal from the decision in the previous case, was apparently not raised in the Courts below. He may have been advised that an appeal would not succeed, or may have had other good reasons for not appealing. In the absence of any allegation or proof of negligence in this respect, it is unnecessary to discuss this point.

As to the second point, viz. that the decision was not on merits, the ruling cited by the learned counsel for the appellant viz. 1929 Mad 404 (1), supports his contention that a decision under O. 17, R. 3, Civil P. C., in circumstances like those of the previous suit by Kartar Singh, is to be deemed to be a decision on merits, and such a decision falls within the scope of S. 11, Civil P. C.; cf also 40 All 590 (3). In my judgment the decision of the trial Court was correct, and the previous decision in the suit by Kartar Singh must be held to be binding on the present plaintiff. I accept the appeal and setting aside the order of remand dismiss the suit but in view of all the circumstances leave the parties to bear their costs throughout.

B.D./R.K.

Suit dismissed.

2. Brij Lal v. Ram Sarup, 1926 All 36=90 I C 749=48 All 44=23 A L J 901.
3. Hingo Singh v. Jhuri Singh, 1918 All 338=46 I C 390=40 All 590=16 A L J 462.

* A. I. R. 1936 Lahore 387

TEK CHAND AND DALIP SINGH, JJ.

Dost Mohammad and another—Defendants—Judgment-debtors—Appellants.
v.

Miraj Din and others—Plaintiffs—Decree-holders and *another*—Defendant—Judgment-debtor—Respondents.

First Appeal No. 278 of 1933, Decided on 13th November 1935, from decree of Senior Sub-Judge, Amritsar, D/- 20th May 1932.

* Mortgage—Interest—Suit under O. 34, R. 6, Civil P. C.—Claim for personal decree for principal amount barred by time—Interest for 6 years preceding suit cannot be passed.

Interest cannot be held to accrue to a principal amount which is not legally recoverable, interest itself being essentially not an inherent right, but a right which is given by law. Hence where in a suit under O. 34, R. 6, Civil P. C., the claim for personal decree for principal amount is barred by time, claim for interest during 6 years preceding institution of suit is also barred: 1928 Lah 653, *Expl. and Disting.* [P 388 C 1]

Jagan Nath Malhotra—for Appellants.

Muhammad Monir, Mohammad Amin and Qatul Chand—for Respondents (Plaintiffs).

Dalip Singh, J.—The plaintiffs in this case sued on the basis of a registered mortgage deed dated 9th November 1915. The suit was brought on 4th January 1928 and a preliminary decree was obtained for the principal amount, Rupees 3,000 plus Rs. 3,500 interest, and interest during the pendency of the suit, Rupees 78-12-0; the total amount came to Rupees 6,578-12-0 exclusive of costs which amounted to Rs. 649-8-0. This sum with future interest at the rate of Annas 14 per cent per mensem, the mortgage rate, from the date of suit till the date of recovery was to be realised by sale of the mortgaged property. Subsequent to this a final decree was obtained on 17th November 1928 wherein the preliminary decree was duly converted, on failure of the mortgagors to pay the amount due, into a final decree for sale. On the mortgaged property being sold there was a short fall between the sale proceeds and the mortgage amount under the decree, whereupon the mortgagees applied for a personal decree against the mortgagors under O. 34, R. 6, Civil P. C. The application was opposed on the ground that

the claim for personal decree was barred by time. The learned Senior Subordinate Judge held that the claim for a personal decree for the principal amount was undoubtedly barred by time, but he held that the claim for interest during the six years immediately preceding the institution of the suit was not barred relying on a ruling of this Court reported as 1928 Lah 653 (1). He therefore decreed the application to the extent of Rupees 2,304-8-0, the sum which he found due as interest for six years immediately preceding the institution of the suit. The mortgagors have come in appeal.

Their first contention is that the personal liability was time barred and they have cited in support of this contention 7 All 502 (2), a Privy Council ruling, 1926 P C 56 (3) and 1929 Mad 53 (4), a Full Bench ruling. In these cases it was laid down that in a mortgage the personal liability, as distinct from the liability to have the property sold for the amount due, is governed by different Articles of the Limitation Act; in other words that the mortgage viewed as a debt due from the mortgagor personally is governed by the same period of limitation as an ordinary debt arising under a loan, while the mortgage viewed as a charge on a certain property with a right to bring that property to sale is governed by Art. 132, Lim. Act. The distinction sought to be drawn in the ruling of this High Court referred to namely 1928 Lah 653 (1), appears to be that the interest which is a recurring right arises every year even after the six years' period of limitation for return of the principal has expired because the debt arising is not extinguished though the remedy may be barred and that therefore interest accruing due in the seventh year also carries a personal liability, and until the expiry of the period for the recovery of the debt from the mortgaged property, presumably 12 years, the personal liability to repay the interest would continue to arise. The difficulty of applying this generally would appear from the consi-

1. *Ralia Ram v. Hira Lal*, 1928 Lah 653=111 I C 808.
2. *Ram Din v. Kalka Prasad*, (1885) 7 All 502=12 I A 12=4 Sar 619 (P O).
3. *Ganesh Lal v. Khetra Mohan*, 1926 P C 56=95 I C 839=53 I A 134=5 Pat 585 (P O).
4. *Ratnasabapathy Chettiar v. Devasigamony Pillai*, 1929 Mad 53=116 I C 817=52 Mad 105=56 M L J 10 (F B).

deration of the fact that in any ordinary loan the debt is not extinguished though the remedy is barred, and at first sight, it would appear that the reasoning of this ruling would allow a creditor to bring suits for interest for three years preceding the suit on the principal amount which had been time barred. This startling proposition of law was actually contended by the learned counsel for the respondents. I am however unable to see any force in this contention, nor, in my opinion, can interest be held to accrue to a principal amount which is not legally recoverable, interest itself being essentially not an inherent right but a right which is given by law. On a closer examination of the ruling itself, however it would appear that (as at present advised) that ruling was based on the peculiar terms of the mortgage deed in that case.

Their Lordships referred in that case to the personal liability for the payment of interest under the covenant contained in the instrument of mortgage and that it would not go beyond 12 years, and it is possible that it was due to the existence of this peculiar clause, containing a right to hold the mortgagor personally liable, which led their Lordships to hold as they did in that particular case. No such peculiar clause has been pointed out under the present mortgage deed. I would therefore so far as this point is concerned, hold that the claim to recover interest for six years immediately preceding the institution of the suit was also barred by time in the same way as the claim for personal liability for the principal amount was barred by time. The learned counsel for the respondents however has supported the judgment of the trial Court *qua* the amount found on the ground that, at any rate, the mortgagors were personally liable for the amount of the costs incurred in the preliminary decree in the suit which was followed by a final decree, namely Rs. 649-8-0, and that there is no bar of time *qua* this amount. The learned counsel for the appellants has really nothing to say in reply to this contention except that it was not urged in the Court below, which appears to be correct but does not affect the right of the learned counsel for the respondents to support the amount found due on this reasoning in this Court. I would, therefore, accept this appeal so far as to reduce the amount to Rs. 649-8-0. For this amount

the judgment-debtors will be personally liable. The parties will bear their own costs in this Court.

Tek Chand, J.—I agree in the order proposed by my learned brother.

K.S./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 388

AGHA HAIDAR, J.

Des Raj—Decree-holder—Appellant.

v.

Fazal Karim—Judgment-debtor—Respondent.

Misc. First Appeal No. 1559 of 1935, Decided on 16th January 1936, from order of Senior Sub-Judge, Sargodha, D/-8th July 1935.

(a) **Practice—Judgment—‘Consigned to record room’ means ‘dismissed.’**

Words “file may be consigned to the record room” is an unscientific expression sometimes used by untrained Judges, but it is tantamount to an order of dismissal of execution.

[P 389 C 1]

(b) **Res judicata—Application for personal decree under O. 34, R. 6, Civil P. C., is substantive application—Personal decree not granted—It should be taken to have been refused—Fresh application is barred by S. 11, Expl. 5.**

An application under O. 34, R. 6, Civil P. C., is not an application in execution but a substantive original application for a new decree in the suit. The procedure applying to this application would be governed by S. 141, Civil P. C. Where, therefore, a definite application had been made for a decree under O. 34, R. 6 and no prayer was granted by the Court for passing of a personal decree, the provisions of Expl. 5, S. 11, Civil P. C., would apply with the result that the relief which was not expressly granted shall be deemed to have been refused. [P 389 C 2; P 390 C 1]

Badri Das and Vishnu Datta—for Appellant.

Niaz Ali—for Respondent.

Judgment.—The plaintiff brought a suit on a mortgage. On 5th December 1931 a preliminary decree was passed. On 21st December 1931 an order was made for a final decree but no formal decree was drawn up. On 4th February 1932 the decree-holder applied for sale. A certain house was put for auction and sold. On 13th August 1932 the sale was confirmed. After the confirmation of the sale it was found on taking accounts by the decree-holder that a balance of Rs. 5,458 was left outstanding in his favour under the decree. On the same date the decree-holder made an application asking the Court to grant him a decree for the balance against the person and other pro-

party of the judgment-debtor. This application was clearly one under O. 34, R. 6, Civil P. C. An issue was raised as to whether the application was within time. On 23rd March 1933 the objection of the judgment-debtor raising the plea of limitation was overruled. The decree-holder stated on solemn affirmation before the Court that he would apply for fresh execution and that the present file may be consigned to the record room. The Court accordingly made an order in these terms in pursuance of the statement of the decree-holder. This is an unscientific expression sometimes used by untrained Judges, but it is tantamount to an order of dismissal. The judgment-debtor came in appeal to the High Court (Civil Appeal No. 997 of 1933) against the order of 23rd March 1933 which had decided the plea of limitation against him. A point was raised on behalf of the respondent decree-holder that there could be no appeal against a mere judgment. This contention prevailed and the learned Judge held that the appeal of Fazal Karim was misconceived though it may be open to him to file an appeal when a decree was drawn up. The learned Judge further held that :

At present no decree has been passed. The prayer for a decree contained in the application of 13th August 1932 has not been given effect to.

The appeal was dismissed. On 23rd July 1934 the decree-holder made an application under S. 151, Civil P. C., asking that the Court should add to its order dated 23rd March 1933 the words "a personal decree against the judgment-debtor which had been left out owing to forgetfulness is hereby passed". On 2nd March 1935 the decree-holder made another application under O. 34, R. 6, and S. 151, Civil P. C. The two applications came up before the learned Senior Subordinate Judge who framed the following among other issues: (1). Whether the present petition is not maintainable, and (2). Whether it is barred under S. 11, Civil P. C. The learned Judge on issue 1 held that the first application under S. 151, Civil P. C. was not maintainable inasmuch as O. 34, R. 6, Civil P. C. prescribes the legal procedure under which an application could be made and therefore S. 151 was not applicable. The learned counsel for the appellant has accepted this contention and no argument was addressed on the point. As regards the second application he held that it was barred by the provisions of S. 11, Civil P. C., inasmuch as the Court

in its order dated 23rd March 1933 had not made an order under O. 34, R. 6, Civil P. C., which the plaintiff had asked for and that therefore it was open to the decree-holder to raise the question again. He accordingly dismissed the application of 2nd March 1935 as well. The decree-holder has come up to this Court in appeal. It was argued that the application of 23rd July 1934 should be treated as one under S. 152, Civil P. C., for correcting an accidental slip or omission and the Court should have granted relief.

So far as the dismissal of this application is concerned I am of opinion that an additional ground for its dismissal would have been to refuse to pass a new and distinct order in continuation of the order already passed by the Court on 23rd March 1933. It must be remembered that the decree-holder himself had intimated to the Court that he would apply for fresh execution and had prayed that the papers should be consigned to the record room. It was not therefore open to him at this distance of time to ask the Court to write an order which would be, to all intents and purposes, an entirely new order raising new questions and making fresh decisions. I do not think S. 152, Civil P. C., has any application. As regards the dismissal of the application dated 2nd March 1935 the matter stands on a different footing. An application had been made by the decree-holder on 13th August 1932 asking for a personal decree against the judgment-debtor under the provisions of O. 34, R. 6, Civil P. C. The Court in its order dated 23rd March 1933 did not make any order on this application; in fact the learned Judge of this Court in appeal, while considering the order of the Subordinate Judge, has also observed that the prayer for (personal) decree contained in the application of 13th August 1932 has not been given effect to. Now an application under O. 34, R. 6, Civil P. C., is not an application in execution but a substantive original application for a new decree in the suit. The procedure applying to this application would be governed by S. 141, Civil P. C.

The position therefore is that a definite application had been made on 13th August 1932 for a decree under O. 34, R. 6, and no prayer was granted by the Court for passing such a decree. This being so the provisions of Expl. 5 to

S. 11, Civil P. C. would apply with the result that the relief which was not expressly granted under the order of 23rd March 1933 shall be deemed to have been refused. The decree-holder was himself instrumental in bringing about this result. It is true that he has stated that he would apply for fresh execution. This however is not the point because, as already indicated, the application under O. 34, R. 6, dated 13th August 1932, is not an application for execution, but an original application for fresh decree: vide 126 I C 648 (1) and 1925 Cal 834 (2). This being so it follows that the present application is barred by the provisions of S. 11, Expl. 5 and the rule of res judicata applies. The result therefore is that the appeal is dismissed. I make no order as to costs.

B.D./R.K.

Appeal dismissed.

1. A. K. R. P. L. A. Chettyar Firm v. S. Meher Singh, 1930 Rang 257=126 I C 648=8 Rang 316.
2. A. Francis Higgins Pell v. Minnaie Gregory, 1925 Cal 834=89 I C 1=52 Cal 828=29 C W N 678 (F B).

* A. I. R. 1936 Lahore 390

JAI LAL AND SALE, JJ.

Punjab National Bank, Ltd., Lahore
—Plaintiff—Appellant.

v.

Jagdish Sahai and others—Defendants
—Respondents.

First Appeal No. 1232 of 1934, Decided on 19th June 1935, from preliminary decree of Senior Sub-Judge, Rawalpindi, D/- 11th April 1934.

(a) **Transfer of Property Act (1882), S. 74**
—Provisions are not exhaustive.

The provisions of the Transfer of Property Act regarding subrogation as laid down in S. 74 are not exhaustive. [P 392 C 2]

(b) **Transfer of Property Act (1882)—Applicability to the Punjab**—Though principles are applicable, rules of procedure do not apply.

Though the principles of the Transfer of Property Act have been applied to the Punjab as based on justice, equity and good conscience, the rules of procedure have not been so applied. [P 392 C 2]

(c) **Subrogation—In the Punjab right can be conferred on lender even by oral agreement.**

In the Punjab an oral agreement would be sufficient to confer a right of subrogation on the lender. [P 392 C 2]

(d) **Hindu Law—Partition**—In the Punjab son cannot enforce partition during lifetime of his father.

In the Punjab during the lifetime of his father a son is not entitled to enforce partition of joint family property. [P 393 C 1]

* (e) **Hindu Law—Joint family—Debts incurred by manager of joint business**—Adult coparceners operating upon account and participating in business are liable personally and not merely to the extent of their interest in joint family property.

The rule of Hindu law that under certain circumstances the adult co-parceners are liable only to the extent of their interest in the joint family property for the debts incurred by the manager of the joint Hindu family business has no application where the adult co-parceners by their conduct, in operating upon the account and by participating in the business of the firm, have made themselves liable as contracting parties, and as such they are personally liable: 1919 Mad 690, Rel. on.; 22 Mad 166, Ref.

[P 393 C 2]

Badri Das and Har Gopal—for Appellant.

Ram Lal Anand 1, R. C. Soni, H. L. Bhagat and Achhru Ram—for Respondents.

Jai Lal, J.—The undisputed facts are that on 9th February 1914 Rai Sahib Lala Gobind Ram, as managing proprietor of N. D. Hari Ram and Sons of Rawalpindi, mortgaged a number of items of moveable and immoveable property in favour of the Punjab National Bank, Limited to secure the repayment of three lacs of rupees which he had borrowed from the Bank. There were two mortgages, one for Rs. 1,25,000 by deposit of title deeds and the other was for Rupees 1,75,000 by means of a registered deed. A portion of the property in dispute in the present litigation was mortgaged by one and the rest by the other of these two transactions. N.D. Hari Ram and Sons is a joint family trading concern. It carries on ancestral business. It consisted of Rai Sahib Lala Gobind Ram and his five sons, Jagdish Sahai, Narpal Rai, Narindra Nath, Dev Raj and Lakhpat Rai, the last of whom was a minor, and Rai Sahib Lala Gobind Ram was the karta of the family and described himself as the managing proprietor of the firm. The balance due on these mortgages was paid to the Bank by the firm in 1919. This balance at the time of payment was Rs. 1,94,000 and was borrowed from the Bank of Northern India Limited, Rawalpindi. The amount was paid to the Punjab National Bank Limited by the representative of the

Bank of Northern India Limited, Rawalpindi, who was accompanied by the mortgagor. It was paid by the Bank of Northern India Limited on the authority of a letter which is printed at p. 100, Vol. 2, of the printed paper book and is dated 9th October 1919. It is addressed to the Manager of the Punjab National Bank Limited, Rawalpindi and is as follows:

Dear Sir,—We have authorized the Manager, the Bank of Northern India, to pay up our joint loan with you. So kindly receive the amounts due separately both from Lalas Radha Kishan and Dholan Shah and Lalas Gobind Ram and Mukand Ram, late partners in the firm of N.D. Hari Ram and Bros., and hand over all the documents, title deeds, pro-notes and mortgage deeds duly discharged to the said Manager of the Bank of Northern India and oblige.

It appears that when the payment was made to the Punjab National Bank Limited, the title deeds were not taken by the Bank of Northern India Limited, but they were returned to the mortgagor who deposited them with the Bank of Northern India Limited subsequently. In 1921 a suit was instituted by the Bank of Northern India Limited against N. D. Hari Ram and Sons for the recovery of the amount which the bank alleged was secured on the property now in dispute by means of an equitable mortgage by deposit of title deeds. This suit was compromised and as a result of the compromise the bank was declared to be the holder of a mortgage on the property in dispute. This declaration was given because apparently the mortgagor denied that a valid mortgage by deposit of title deeds had been created in favour of the bank at any time between October 1919 and 1921. In execution of this decree the Bank of Northern India Limited attempted to sell the property which had been held to be subject to a mortgage in their favour. This was in 1929. In the meantime the firm of N. D. Hari Ram and Sons commenced dealings with the Punjab National Bank Limited again, and it appears that in 1923 they applied for a loan. This application is signed by Rai Sahib Lala Gobind Ram and one of his sons, and it is to be noted that the property now in dispute is stated in that application to be subject to a mortgage with the Bank of Northern India Limited. Money was advanced by the Bank to the firm in pursuance of this application on the security of some property. Subsequently, on 17th November 1925, a registered

mortgage-deed for Rs. 37,200-7-0, the amount due to the Punjab National Bank from the firm N. D. Hari Ram and Sons on account of the previous transactions, was executed by Rai Sahib Gobind Ram describing himself as the managing proprietor of the firm N. D. Hari Ram and Sons. The property in dispute was mortgaged by means of that deed to the Punjab National Bank. In connexion with this deed it is to be noted that originally it was drafted to be executed by Rai Sahib Gobind Ram for himself and his minor son and by his four major sons, but owing to some discussion the nature of which will have to be adverted to hereafter, the names of all the sons as executants of the deed were scored out and deed was altered so as to be executed by Rai Sahib Gobind Ram alone as proprietor of the firm. The major sons of Rai Sahib Gobind Ram have signed this document, but it does not appear from the document itself whether they signed as parties or as witnesses. It is alleged by them that they signed merely as witnesses.

The Bank of Northern India Limited went into liquidation and the liquidators attempted to sell the property in dispute in execution of their decree mentioned above. Thereupon the Punjab National Bank Limited instituted this suit for recovery of the money due on their mortgage of 7th November 1925, alleging that they held a first mortgage on the property in dispute and that the Bank of Northern India Limited in liquidation had no mortgage on the same as claimed by them. Rai Sahib Gobind Ram having died, his five sons were impleaded as defendants in addition to the Bank of Northern India Limited in liquidation. In addition to the usual prayer for sale of mortgaged property, a personal decree was claimed against the sons of Rai Sahib Gobind Ram. The suit was defended by the Bank of Northern India Limited in liquidation on the ground that the lien of this Bank had priority over the plaintiff Bank. The sons of Rai Sahib Gobind Ram defended the suit principally on the ground that they were not personally liable under the Hindu law. The trial Judge has held that the Bank of Northern India Limited in liquidation has a prior mortgage on the property in dispute as compared to the Punjab National Bank Limited and that the

sons of Rai Sahib Gobind Ram are not personally liable to discharge the debt due to the Punjab National Bank Limited, but that the remedy of the Bank is limited to the extent of the joint family property. It has been found that Rai Sahib Gobind Ram and his five sons constituted a joint Hindu family and that the business of the firm, N. D. Hari Ram and Sons is owned and carried on by that family and that it is an ancestral business. Rai Sahib Gobind Ram, it has been found, was during his life-time the karta of the family and carried on business in that capacity. It has also been found that the sons of Rai Sahib Gobind Ram used to help him in carrying on the business; in other words that they actually participated in the carrying on of the joint business and they operated upon the account with the Punjab National Bank to satisfy which the mortgage deed in favour of the Punjab National Bank was executed in 1925.

The Punjab National Bank has appealed to this Court, and the first contention raised by the learned counsel on its behalf is that the view of the trial Court that the Bank of Northern India Limited had priority over the appellant bank is wrong. I may mention that it is not the case of the respondents now that an equitable mortgage was created in their favour either in 1919 or 1921. On the other hand they claimed to be entitled to priority over the appellants in respect of their mortgage of 1925 by claiming to be subrogated to the mortgages of the Punjab National Bank Limited which they had discharged by payment of Rs. 1,94,000 in 1919. It is contended on behalf of the appellants, with reference to S. 92, T. P. Act, that in order to entitle the Bank of Northern India Limited to claim a right of subrogation it must be established that there was an agreement in writing registered between the mortgagor and the bank that the latter would keep the mortgages in favour of the Punjab National Bank Limited alive for their benefit. The Transfer of Property Act however is not in force in this Province and S. 92, which was for the first time enacted in its present form in the year 1929, provides that a person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been

redeemed if the mortgagor has by a registered agreement agreed that such a person should be so subrogated. Prior to 1929, S. 74, T. P. Act, which has now been repealed, conferred a right of subrogation principally on the second or subsequent mortgagees of property. There is however ample authority that the provisions of the Transfer of Property Act in this respect were not exhaustive and though the principles of the Act have been applied to this Province, as based on justice, equity and good conscience, the rules of procedure have not been so applied. When this difficulty was pointed out to the learned counsel for the appellant, he conceded that he could not support his contention that the agreement to confer the right of subrogation on the lender must be by means of an agreement in writing registered. An oral agreement would it is conceded be sufficient to confer such a right on the lender.

The respondents' counsel suggested that even an implied agreement would be sufficient. In fact he went to the extent of urging that the right of subrogation arises in favour of a lender in the absence of express or implied agreement if circumstances show that there was an intention on the part of the lender to keep the security alive for his benefit. It is not in my opinion necessary to give a definite opinion on this contention of the respondents. I will assume for the purposes of this case that an agreement between the lender and the mortgagor should be proved. (His Lordship then examined the evidence and held that the agreement was proved. The judgment proceeded.) Coming to the question of the personal liability of the sons of Rai Sahib Gobind Ram, respondents 1 to 5, it is admitted on behalf of the respondents, that their interest in the family property is saleable in execution of the decree of the Punjab National Bank including that of the minor respondent. It is however contended that apart from their interest in the joint family property there is no personal liability of these defendants, that is to say any property separately owned by them is not liable to satisfy the claim of the plaintiff bank. On behalf of the appellant it is conceded that defendant-respondent No. 5 being a minor, there can be no personal liability in his case beyond the liability

of his interest in the family property. The question that remains to be determined therefore is whether defendants respondents 1 to 4, that is to say the major sons of Rai Sahib Gobind Ram, are personally liable to satisfy the appellant's claim. Now the trial Judge has held and this conclusion is supported by ample evidence on the record and the respondents' counsel did not make any attempt to attack this finding—that the firm N. D. Hari Ram and Sons was a joint family firm of Rai Sahib Gobind Ram and his Sons, defendants 1 to 5, that the major sons of Rai Sahib Gobind Ram, i. e., Jagdish Sahai, Narpatt Rai, Narindra Nath, and Dev Raj operated upon the account which admittedly N.D. Hari Ram had with the Peshawar, Rawalpindi and Srinagar branches of the Punjab National Bank Limited and with the Bank of Northern India Limited, Rawalpindi. He has also found that:

It is no doubt true that defendants 1 to 4 actively participated in the business of the firm N. D. Hari Ram and Sons and could be held personally liable for the debts which formed the consideration for the mortgage deed Ex. P-1.

But for reasons, which I am unable to follow, the learned Judge adds:

But this fact is not sufficient for making defendants 1 to 5 personally liable under the mortgage deed Ex. P-1.

Probably he was influenced by the fact that these defendants were originally intended to be the executants of the mortgage deed, but their names were subsequently scored off. This is probably attributable not to any objection raised by these defendants but to an objection by Rai Sahib Gobind Ram who considered himself to be the only person competent to deal with the family property. It is well known that in this province it has been held by this Court that during the life time of his father a son is not entitled to enforce partition of joint family property. Rai Sahib Gobind Ram naturally considered that his associating his sons with him in transferring the property would mean an interference with the authority as karta of the family to bind the family by his acts. In my opinion the facts found by the learned Subordinate Judge as to the part taken by defendants 1 to 4 in the joint family business are sufficient to make them personally liable in this case in the same manner as an ordinary partner in a con-

tractual partnership would be liable for the debts due from the firm. The rule of the Hindu law that under certain circumstances the adult co-parceners are liable only to the extent of their interest in the joint family property for the debts incurred by the manager of the joint Hindu family business, has no application to the facts of this case, because here, the adult co-parceners by their conduct in operating upon the account and by participating in the business of the firm have made themselves liable as contracting parties.

Reference was made by respondents' counsel to 22 Mad 166 (1), but the later judgment of the Madras High Court in 41 Mad 824 (2) goes against his contention. That case was heard by a Full Bench of the Madras High Court. The facts were that a Hindu father started a business during the minority of his undivided son and this business was continued after the son became a major. The son was helping in the business during his minority and was taking an active part in it after attaining majority. The question arose as to the liability of the son to be adjudicated as an insolvent along with his father in respect of the debts incurred in the business. The business was found to be a joint family business of the father and the son; it was also found that the debts in respect of which the adjudication order was made had been incurred for the business during the minority of the son who is described in the judgment as defendant 2. Sir John Wallis, C. J., held that defendant 2 by taking an active part in the business after attaining majority had made himself personally liable for obligations of the business contracted after attaining majority; but as no debts were incurred since he attained majority he could not be adjudicated an insolvent. And also that:

Defendant 2 is only personally answerable for and liable to be adjudicated an insolvent in respect of the debts incurred since he attained majority.

Spencer, J., concurred in this opinion. Sadasiva Ayyar, J., differed from this opinion and held that defendant 2 was personally liable not only for the debts incurred since he attained majority but

1. Chalamayya v. Varadayya, (1899) 22 Mad 166=9 M L J 3.

2. Official Assignee of Madras v. Palaniappa Chetty, 1919 Mad 690=49 I O 220=41 Mad 824=35 M L J 473 (F B).

even for those incurred during his minority as after attaining majority he assisted his father in the business. He based this conclusion both on S. 248, Contract Act, and on the rules of the Hindu law independently of the Contract Act. It would thus be observed that all the learned Judges who constituted the Full Bench were agreed that a minor member of a joint Hindu family becomes personally liable for the debts incurred by the father for carrying joint Hindu family business if he takes an active part in the business after attaining majority. In the present case the appellant's claim relates to debts incurred by Rai Sahib Gobind Ram for the joint family business after the first four respondents, that is to say the major sons had attained majority and it has been found that these sons had actually associated themselves with their father in carrying on the business. Other cases cited by the respondents do not afford much assistance in deciding the question in issue because the matter has not been discussed in detail therein, nor are the facts on which the decisions are based mentioned in the judgments. In my opinion having regard to the circumstances of the present case respondents 1 to 4, that is to say the major sons of Rai Sahib Gobind Ram must be held personally liable to satisfy the decree of the appellant.

I would therefore dismiss the appeal with costs as against the Bank of Northern India Limited in liquidation and accept the appeal with costs as against respondents 1 to 4 and hold them personally liable to satisfy the decree of the appellant bank. The appeal as against defendant 5, the minor son of Rai Sahib Gobind Ram, is dismissed, but there will be no order as to costs.

Sale, J.—I agree.

K.S.

Appeal dismissed.

A. I. R. 1936 Lahore 394

COLDSTREAM AND ABDUL RASHID, JJ.
Dhuman Khan and others—Plaintiffs
—Appellants.

v.

Gurmukh Singh and others—Defendants—Respondents.

Second Appeal No. 1412 of 1928, Decided on 24th July 1935, from decree of Dist. Judge, Jhelum, D-/ 11th February 1928.

(a) Custom (Punjab)—Alienation—Abadi—Pinanwal village — Non-proprietor has no right to alienate house sites.

A non-proprietor in Pinanwal village has no right to alienate the site of his house in the abadi of the revenue estate, without the consent of the proprietors of the village.

[P 396 C 1]

(b) Custom (Punjab) Alienation—Abadi—Village developing into town—Proprietors retain right to control alienation in Abadi Deh unless it is shown that they have renounced it.

The mere fact that a village has developed to the state of a town does not justify the presumption that the village proprietors have lost or abandoned their customary right of control over the alienations of sites in the abadi Deh. As long as the proprietors have not acted in such a way as to show that they have no regard for their proprietary rights and have abandoned them the presumption will not be justified: 119 P R 1884, *Foll.*

[P 397 C 1]

(c) Custom (Punjab)—Alienation by non-proprietors—Acquiescence by landlord—No implication of renunciation of right to object to subsequent alienation.

The fact that proprietors acquiesced in previous alienations does not necessarily imply a renunciation of their discretionary right to object to a subsequent alienation and the evidence of a number of previous alienations without objection does not prove a custom of unrestricted alienation

[P 398 C 2]

(d) Custom (Punjab)—Alienation—Abadi—Non-proprietors not able to alienate village site—Absence of provision in wajib-ul-arz—No presumption in favour of right of alienation.

The mere absence of any provision in the wajib-ul arz forbidding alienations by non-proprietors will not raise any presumption that a non-proprietor has by custom a right to alienate a village site: 12 I C 532, *Foll.*

[P 399 C 2]

(e) Landlord and Tenant—Limitation—Tenant mortgaging his property—Mortgagee bringing property for sale under mortgage decree—Landlord knowing of mortgage for long time but not taking any step to challenge it—Landlord objecting to sale under mortgage decree—Objection dismissed—Dismissal of objection does not give fresh time for claim which is already barred.

Plaintiff, a landlord, for a long time knew of the mortgage executed by his tenant. He did not take any step to challenge the mortgage. Eventually the mortgagee brought a suit on his mortgage and put the property for sale under his mortgage decree. The plaintiff objected to the sale, which objection was dismissed. At the time of objection plaintiff's claim against his tenant was barred. Plaintiff brought a suit to set aside the sale within one year of the date of dismissal:

Held: that there lay no objection at law and its dismissal could not give a fresh period of limitation.

[P 400 C 1]

(f) Landlord and Tenant—Limitation—Deed of alienation executed by tenant—Deed subsequently registered—Landlord challenging alienation by filing of suit—Suit is in time if

brought within proper period which commences to run when deed is executed.

Plaintiff landlord brought a suit against defendant tenant challenging alienations made by him. The alienation was evidenced by a deed which was subsequently registered. Plaintiff's suit was within time from the date of registration, but was barred from the date of execution of deed. The question was when did the time commence to run:

Held: that Art. 143, Lim. Act, applies and under Art. 143 time began to run when the forfeiture was incurred, i. e. when the deed was executed. [P 400 C 1, 2]

Shuja-ud-din and Asadullah Khan—for Appellants.

J. N. Aggarwal and Asa Ram Aggarwal—for Respondents.

Coldstream, J.—This judgment will dispose of the six appeals Nos. 1412, 1413, 1414, 1499, 1500 and 1501 of 1928, which arise out of the following circumstances: Dhuman Khan and others, members of the proprietary body of the revenue estate of Pinanwal in Pind Dadan Khan of Jhelum District, instituted five suits in the Court of the Subordinate Judge, 2nd Class, Jhelum, at different times from April 1916 to January 1922 against different defendants who are admittedly non-proprietors, attacking the alienations by the defendants of five residential sites in the abadi of Pinanwal which is a large village or small town with a population of about 3,000. The defendants had sold the sites in dispute in two of the suits, and in the other three cases the sites had been attached in execution of decrees against the persons in possession. The plaintiffs' case in each suit was that the sites belonged to the proprietary body of Pinanwal revenue estate and could not be alienated by the persons in possession who were not proprietors without the permission of the proprietors. The defendants pleaded that Pinanwal having become a town, the plaintiffs had no power according to custom to restrict the alienations impugned. The question whether the non-proprietors had by usage acquired a right to alienate the sites of their houses without interference by the proprietors was put in issue in each case. Other pleas, for instance the plea of limitation, were also taken and the issues arising from them were struck in each case, but the Subordinate Judge disposed of all five suits in one judgment on the question of custom alone, and holding that if the proprietors had ever had the power

under custom to restrict non-proprietors from alienating sites in their possession, they had lost it by their conduct in permitting such alienations for a long time, dismissed the suits on 22nd March 1924. On appeal the District Judge of Jhelum reversed this finding and remanded all five suits to the Court of first instance purporting to act under O. 41, R. 23, Civil P. C., for a decision on the remaining issues. Against this judgment the defendants appealed to the High Court, having been granted the certificates required by S. 41 (3) Punjab Courts Act. The learned Judges before whom the appeals came for hearing accepted a contention urged by the appellants' counsel that the remand ought properly to have been made under R. 25 of O. 41, Civil P. C. They accordingly accepted the five appeals and ordered the remand to be made by the District Judge under that rule observing that when he had finally disposed of the cases after the order of remand had been complied with, it would be for him to decide whether or not a certificate on the question of custom should be granted. Their judgment clearly left open for final decision the question whether the custom alleged by the plaintiffs existed. This judgment was delivered on 1st November 1926.

The suits were then dealt with by the Senior Subordinate Judge there being then no Court of a Subordinate Judge of the 2nd Class at Jhelum. The suits were heard in one proceeding, the parties having agreed that the evidence should be treated as common to them all. The Subordinate Judge's report was submitted to the District Judge on 10th December 1927. The District Judge decided the cases as follows on 11th February 1928. I. Suit No. 9/2, instituted on 24th January 1917. The site in dispute had been sold by Gurmukh Singh defendant to Karam Singh father of the other defendants on 6th December 1906. The plaintiffs were granted a decree for Rs. 300 as compensation for loss of the site. II. Suit No. 10 instituted on 24th January 1917. Ganpat Rai defendant had sold the suit property to Gujar Singh defendant on 22nd December 1904. A decree for possession was passed. III. Suit No. 120/31, instituted on 19th April 1916. Nanak Singh defendant had put to sale a house and site in execution of a mortgage

decree against Kirpa Ram and Sukh Ram. The suit was dismissed, it being held that the mortgage had not been attacked within the period of limitation IV. Suit No. 84 instituted on 25th January 1922. The site had been attached by Hoshnak Rai, defendant in execution of mortgage decrees against the sons of Lal Din. The suit was dismissed, the ground being the same as in III. V. Suit No. 665 instituted on 12th March 1920. The site had been attached by Hoshnak Rai in execution of a money decree against Rahim Shah. The plaintiffs were granted the declaration they sought.

Against these decisions the plaintiffs have preferred the appeals Nos. 1412 (case No. 9/2), 1413 (Case No. 120/31) and 1414 (case No. 84). The defendants in appeals Nos. 1501, 1499 and 1500 have asked for the dismissal of the suits Nos. 9/2, 10 and 665. In four of these appeals the question whether the proprietors have the right to restrict alienations by non-proprietors of the sites of their buildings is material and it will be convenient to dispose first of this matter. It is to be noted that the plaintiffs proprietors confine their claim to the sites only of the buildings sold or attached.

It is not disputed that there is a universal and well recognized custom in the Punjab that a non-proprietor in a village has no right to alienate the site of his house in the abadi of the revenue estate, without the consent of the proprietors of the village : see para. 236 of Rattigan's Digest of Customary Law. It is further admitted that this rule did formerly exist in Pinanwal, and was recorded in the *Wajib-ul-arz* of 1880 as was noticed in 39 P R 1912 (1). The onus of proving that the custom no longer exists in their village was therefore rightly placed upon the non-proprietors and to this no objection has been taken by the latter at any stage of the proceedings. Since 1884 the onus in such cases has consistently been placed upon the person denying the proprietors' right to restrict alienations by non proprietors and has been regarded as one not lightly to be discharged : see 119 P R 1884 (2). From the beginning the case of the non-proprietors has been that the custom has ceased to exist, the abadi sites having by long usage come to

be recognized by all parties as the property of the persons to whom the houses upon them belonged, and the matter for determination now is simply whether the evidence produced by them establishes their case.

For the non-proprietors counsel opened his argument with the contention that Pinanwal is not now a village the inhabitants of which form a compact agricultural community and therefore there is a presumption that customs based on the proposition that the site of the abadi belongs exclusively to the proprietors of the village land (*malikan-i-deh*) do not now prevail. Such a presumption is legitimate when a place is unmistakably a town at the time of suit and has been so beyond the memory of man, but as pointed out by Chatterji, J., in Case No. 991 of 1897 (3):

It is difficult to see why the growth of a village should take away the ownership of the abadi from the proprietary body and vest it in the residents.....for the growth of the village is not in itself adverse to the right of the proprietors and the loss of their right ought to be affirmatively established even though at the time of the trial the place has developed into a town.

In support of this view the following remarks of Plowden, C. J. in 119 P R 1884 (2) cited by Chatterji, J., are strong authority:

When a place is indisputably a town it may undoubtedly be the case that a presumption at once arises that the occupants of houses in streets or bazars are owners of the sites occupied, and not the biswadars, if any such body can be found to exist. But when there is a proprietary body and it is debatable whether the locality is a village or a *qasba* or town, to put the matter in issue is merely to miss the true point in issue and substitute a false point for enquiry and decision. In villages the proprietary right in the abadi is as a rule vested in the proprietary body. The mere material expansion of the villages does not destroy that proprietary right. Non-proprietors may come and settle in numbers more or less considerable on portions of the site and construct houses and occupy sites. Such settling does not necessarily deprive the proprietary body of their right of ownership or transfer it to the non-proprietary residents.

The question therefore whether Pinanwal is a large village or a small town does not appear to be pertinent and there is no necessity to refer to the rulings cited before us which indicate the principles on which it has been decided whether a place is a village or a town for the application of the statutory provi-

1. *Sawan Singh v. Jaffar*, (1912) 39 P R 1912= 13 I C 405.

2. *Aman Singh v. Kalu*, (1884) 119 P R 1884.

3. *Sobha Singh v. Nathu Shah*, Case No. 991 of 1897, decided on 9th November 1900.

sions of the Punjab Pre-emption Act. Assuming however that the presumption that the customary right of the proprietors exists arising from the fact that it existed once and was recorded in the wajib-ul-arz of 1880 would be weakened if Pinanwal is found to be a town, I need only say that for the reasons given by the lower appellate Court in its judgment of 30th January 1925, I am of opinion that Pinanwal is a village and that circumstances that its population is over 3,000, that there are in it 24 shops, a Middle School, several mosques and religious buildings and many pucca houses and that the proprietary body now contains persons of different castes and communities do not justify a presumption that the village proprietors have lost or abandoned their customary right of control over the alienations of sites in the abadi deh. We have to see whether the proprietors have acted in such a way as to show that they have no regard for their proprietary rights and have abandoned them. For the non-proprietors reliance is placed before us on admissions made by Miran Bakhsh and Ali Mohammad lambardars in 1887 and a judgment of the Settlement Officer of 15th June 1877 and on the evidence of a large number of alienations of immovable property in Pinanwal abadi by persons other than members of the proprietary body from 1871 onwards.

The value of the admissions made in 1877 has been considered by the District Judge at pp. 24 and 25 of the printed judgment. The statement of Miran Bakhsh was that non-proprietors could sell and mortgage. He did not admit that they could sell sites in the abadi. Ali Mohammad's statement was that there was no custom according to which persons other than proprietors can sell or mortgage a kotha:

But in Pinanwal proper there has been a practice for the last five or ten years that a resident can sell his kotha without the permission of the proprietor regardless of the fact whether the material belongs to him or the proprietor.

It would appear that Ali Mohammad was referring to the custom subsequently recorded in the wajib-ul-arz by which a non-proprietor had no right to sell even the materials of his house unless he has paid for the site and constructed the house at his own expense. The evidentiary value of these statements is negligible in view of the entry in the subse-

quently compiled wajib-ul-arz attested by the village proprietary body, including these lambardars, and the village tenants which in para. 5, headed "rights of proprietors in the village abadi" states that a non-proprietor can build on the shamilat land of the abadi without the proprietors' permission and can sell the material of his building if he leaves the village only if he has paid for the site and constructed the building at his own cost. As against these admissions we have an important one made by Arjan Singh a witness for the defendants in Suit No. 120, that the houses occupied by his family in three of the abadis of Pinanwal were taken possession of by the proprietors when abandoned by the occupants. The judgment of the Settlement Officer dated 15th June 1877 was on an appeal, lodged apparently by non-proprietors against a decision by the Settlement Superintendent, Pind Dadan Khan, that by custom Darbara Singh, an appellant, was not entitled to sell a kotha. Whether the site was in dispute is not made clear. The appeal was accepted and the case remanded for further enquiry.

The real nature of the suit is not clear for it seems that Darbara Singh had pleaded that he had purchased the kotha or acquired the right to mortgage it from Bakht a proprietor, and the questions to be decided after remand were whether Bakht had mortgaged it to Darbara Singh and whether he had sold it to Darbara Singh's son.

This judgment, like the admissions referred to above, has no weight in view of the entry in the wajib-ul-arz made three years later. I come now to the instances of alienations upon which the non-proprietor appellants rely. Sixty seven of these are mentioned in the list attached to the trial Court's judgment (pp. 12 to 17 of the printed book in Appeal No. 1412). These have been considered by the learned District Judge at pp. 23 and 24 of his printed judgment. On examination of these instances, I agree with the District Judge's conclusions that they certainly do not prove that the proprietors have renounced their rights in the abadi site. According to the evidence of the Patwari the proprietary body of Pinanwal includes Rajput Jalaps, Aroras, Pathans, Khandoyas, Khattris (Dohlis and Ghais), although in Patti Allah Khan, to which the plaintiffs be-

long, they and two other Rajput Jalaps are the only proprietors. It was for the defendants to prove that the alienations they relied upon were by non-proprietors. The documents on the record do not show in what patti the property to which they relate was situated and we can have regard therefore only to those instances in which the alienors were not members of these tribes. Of the 67 instances in this list there are only 25 alienations by non-proprietors, 14 being sales, 10 mortgages and one a gift. Of the sales, five are of houses, the sites of which had been purchased from proprietors, four are sales now in dispute, four were open to challenge at the time of the first suit and two have not been properly proved. Of the 10 mortgages, two are in suit, four were with possession and in one the property concerned had been purchased from an original proprietor. Three others have been redeemed.

Counsel has also referred us to documents relating to a number of alienations mentioned in two lists compiled by the appellant Hoshnak Rai himself. The first at pp. 201-205 of the typed record, contains six sales and 18 mortgages: one was before 1880, one to a brother, in two the property was purchased from the proprietor and only two in 1894 and 1898 are really relevant as evidence. These last two were for small sums (Rs. 65 and Rs. 40) and by unregistered deeds. The mortgages of which only three were with possession were it seems all except four by unregistered deeds. One of those by registered deeds is in suit; one was in 1920, another was in 1917 and in another the property was purchased by the alienor from a proprietor. The second of these lists contains 20 instances six being of sales. Of the latter in one case the site was bought from a proprietor and in another the property was sold by deed for only Rs. 30. Two of the sales are challenged in the present litigation. Another was within limitation when the first of the present suits was instituted. In one alone was the site mentioned and that was in 1917. All the mortgages were without possession. One is now in suit, one was effected after the date of the first suit and four others were still open to challenge. One of 1914 was of property bought from a proprietor and of the 14 deeds nine were unregistered. The last lot of instances are those in the list put

in by the registration clerks of Pind Dadan Khan, D. W. 8, and Jhelum (D. W. 9). Counsel has referred us to 21 of those mentioned by D. W. 8. All these were open to attack when the first suit was instituted, 13 being of a date after it was instituted. Of the alienations in the list submitted by D. W. 9, 16 have been referred to by counsel, 11 being sales and 5 mortgages. Of the mortgages 4 are without possession and of the deeds evidencing the sales only one mentions the site expressly.

All these instances are not, in my opinion, sufficient to prove that the proprietors have by their conduct renounced their proprietary rights and that the non-proprietors are by custom entitled to dispose of the sites of their houses. It has been laid down in several cases by the Chief Court and by this Court that the fact that proprietors acquiesced in previous alienations does not necessarily imply a renunciation of their discretionary right to object to a subsequent alienation and that the evidence of a number of previous alienations without objection does not prove a custom of unrestricted alienation. To quote the judgment of Plowden and Brandreth, JJ., in 85 P R 1882 (4):

Proof of particular sales having taken place without objection would be very good evidence of the title of the purchaser to the land sold, and while such sales would give good title to individuals, in particular portions of the village site, they would not prove that the rights of the proprietary body over the remainder of the site had been extinguished.

See also 97 I C 263 (5), Campbell and Dalip Singh, JJ., and 111 I C 716 (6), where Tek Chand, J., remarked that this proposition is well established. In 1923 Lah 467 (7) (Abdul Raoof and Moti Sagar, JJ.) which decided three appeals in cases in which the evidence was common, it appears that the non-proprietors had produced no less than 252 documents including documents evidencing 61 mortgage deeds and 59 sale deeds executed by non-proprietors. The learned Judges followed the rule laid down in 1882, finding that there was no evidence disclosing the circumstances under which these alienations were made. In the present case also there is no such evidence. No

4. Kharak Singh v. Allah Ditta, (1882) 85 P R 1882.

5. Jaswant Singh v. Tola Ram, 1926 Lah 622=97 I C 263=27 P L R 653.

6. Sant Ram v. Nagina, (1928) 111 I C 716.

7. Sewa Singh v. Ghulam, 1923 Lah 467=82 I C 522.

doubt there are cases for instance 7 Lah 451 (8) in which non-proprietors have succeeded in proving a special custom by which they are entitled to alienate the sites of their buildings. But those decisions were based upon the particular evidence in each case, and cannot be regarded as setting up any new rule of law. The defendant-appellants' counsel has drawn our attention to 39 P R 1912(1), in which it was held, on general presumptions rather than upon the evidence of instances, that a malik qabza in Pinawal had, in the absence of proof to the contrary, the same rights over his house in the village site as he has over the cultivated land in his malkiyat, and that therefore the original proprietors had no right to interfere with the sale of the house. This decision does not help the defendants, who are not malikan qabza and whose case was simply that by custom the rights of the proprietors to restrict alienations by non-proprietors had been abrogated.

That decision was in a second appeal, the first having been dismissed, against a decision of the Munsiff, 1st Class, Jhelum in 1907 in five suits. From the Munsiff's judgment it appears that at the trial the main question on which issue was joined was whether ghair maliks had the right to alienate without the consent of the maliks. The learned Munsif, who took into consideration the judgment of the Settlement Officer of 1877, to which reference has been made above, decided that the defendants, who were malikan qabza and not members of the proprietary body, had not the right they claimed but were entitled merely to remove the materials of their houses. The judgment of the Chief Court decided nothing about non-proprietors who were not malikan qabza but merely that a malik qabza was not a non-proprietor within the purview of the clause in the Wajib-ul-arz of 1880 which provided that non-proprietors had no power to dispose of the sites upon which their houses stand.

Counsel for the proprietors has asked us to attach importance to the omission from the wajib-ul-arz drawn up for the village in 1900 of the entry recording the rights recorded in para. 5 of the Wajib-ul-arz of 1880. This omission is, how-

ever, explained by a note in the wajib-ul-arz itself which shows that the old entry was omitted and an enquiry into the custom recorded in it not made in consequence of a special order passed in view of the fact that the revenue department had no jurisdiction in the matter. The omission is, therefore, of no consequence. As pointed out by Chevis, J., in 12 I C 532 (9) the mere absence of any provision in the wajib-ul-arz forbidding alienations by non-proprietors will not raise any presumption that a non-proprietor has by custom a right to alienate a village site. It remains to deal with the several appeals upon the points arising in each, it being settled that the defendants had not the right to alienate the sites of their buildings without the proprietors' consent.

Appeal No. 1412 of 1928.—In this case the learned District Judge has found that the plaintiffs were entitled to challenge the alienation by Gurmukh Singh in favour of Karam Singh (who re-sold to his son Hari Singh), that when Karam Singh began building upon the site or adding to the buildings there, the plaintiff Jafar Khan served him with a notice that he had no title in the site and would continue building at his own risk (the evidence is that notice was first given verbally by Jafar Khan accompanied by the Patwari and that a second notice was given in writing and that the plaintiffs had not acquiesced in the continuance of the construction. Nevertheless he has considered it appropriate to refuse a decree for possession in view of the circumstances (presumably because of the delay in instituting the suit) and has granted the plaintiffs a decree for Rs. 300 as compensation. In supporting this decision defendants' counsel has cited a number of judgments in which compensation only was awarded in cases where the trespasser had occupied the disputed property for a long period and built upon it in good faith. In none of these cases, however, had the wrongful occupant deliberately acted in defiance of notice given by the rightful owner. The mere fact that the occupant has spent more money on the site than the site itself is worth is not a sufficient reason for compelling the owner to sell his

8. Maqbul Singh v. Sadhu Ram, 1926 Lah 502= 95 I C 247=7 Lah 451=27 P L R 695.

9. Ali Mardan v. Mohar Singh, (1911) 12 I C 582.

property. In this case, I do not think that the principle in S. 51, T. P. Act applies, for Karam Singh cannot be said to have acted in good faith or been merely negligent. I would accordingly accept this appeal and setting aside the decree appealed against grant the plaintiffs a decree for joint possession with the rest of the proprietary body of the patti with costs throughout. The defendants will be at liberty to remove their malba within four months.

Appeals Nos. 1413 and 1414 are by the proprietors who contest the correctness of the learned District Judge's decision that the suits Nos. 120/31 of 1916-20 and 84 of 1922 were barred by limitation. Appellants' counsel has not been able to show us that the lower Court's decisions are wrong. Suit No. 84 of 1922 was for setting aside a sale under a mortgage decree passed in 1916, the mortgage charge having been created in 1904 and 1906. The appellants' counsel suggested that limitation began to run when the Court refused to set aside the sale, but he is unable to give us any authority for this proposition. In suit No. 120/31 of 1916-20 the property had been mortgaged in 1903. The mortgagee obtained a mortgage decree and proceeded to sell the property. An objection to the sale by the plaintiffs was dismissed in October 1915 and the plaintiffs lodged their suit in April 1916. It is contended that the suit was within time as it was brought within a year from the date of the dismissal of the objection, but no objection lay at law and its dismissal could not give the plaintiffs a fresh period of limitation. These appeals, Nos. 1413 and 1414, are dismissed with costs.

Appeal No. 1499.—In this case the plaintiffs challenged a sale by Ganpat Rai to Gujar Singh by deed executed on 22nd December 1904, but registered on 24th January 1905. If time ran against the plaintiffs from the date of registration, the suit was within time, but it was barred by limitation if started to run when the deed was executed. The trial Court held the suit to be barred. The learned District Judge has, however, granted a decree holding that it was not until registration that the plaintiffs had notice of the alienation. Under Art. 143, Lim. Act (the applicability of which is admitted) time began to run when the forfeiture was incurred and S. 47, Regis-

tration Act is clear to the effect that when a document is registered it operates from the date of its execution. The learned District Judge's decision on the point was wrong. The appeal is accepted, the lower Court's decree set aside and the plaintiffs' suit dismissed with costs throughout.

Appeal No. 1500 of 1923.—The only question for determination here is that of custom and this matter having been decided against the appellants, the appeal fails and is dismissed with costs.

Appeal No. 1501 is the cross appeal by the defendants-respondents in appeal No. 1412. In view of the decision on the point of custom and the decision in appeal No. 1412 that the plaintiffs are entitled to possession, this appeal must fail. It is dismissed with costs.

Abdul Rashid, J.—I agree.

S.R./R.K.

Order accordingly.

A. I. R. 1936 Lahore 400

YOUNG, C. J. AND MONROE, J.

Kartar Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1011 of 1935, Decided on 20th November 1935, from order of Sess. Judge, Amritsar, D/- 7th September 1935.

Criminal Trial—Approver—Corroboration is necessary—Corroboration should connect accused with crime itself—Certain person giving threats of death—Evidence corroborating approver's evidence regarding threats available—Accused cannot be connected to offence of murder through such threats only.

No matter how strong a motive is proved, it is unsafe to convict on the evidence of an approver unless there is corroboration connecting or tending to connect the particular accused with crime itself. The mere uttering of a threat some months before the murder took place, even if it was established by satisfactory evidence over and above to that given by the approver that such a threat had been proved, cannot of itself be taken to show that the person uttering the threat was connected with the death, which took place some months later, of the person against whom the threat had been uttered. [P 401 C 1]

*S. A. Mahmud—*for Appellant.

*D. R. Sawhnay—*for the Crown.

Young, C. J.—Kartar Singh, Basant Singh and Hazara Singh were charged with the murder of Surain Singh. Kartar Singh was convicted and sentenced to death and the other two accused were acquitted. The motive alleged for the crime was that Surain Singh had in-

stituted a suit for recovery of Rs. 150 against Kartar Singh and also that sometime previously Surain Singh had endeavoured to get Kartar Singh removed from the office of lambardar. It is unnecessary to discuss the prosecution evidence at length. It is based on the evidence of Dalip Singh approver. There is no doubt that his story, if believed, would implicate not only Kartar Singh, but the other two accused who were acquitted. The sole question which arises is whether there is corroboration of the evidence of the approver in the case of Kartar Singh. The learned Sessions Judge said that he considered that there was sufficient corroboration in the evidence of Mohan Singh (P. W. 7) that he had heard Kartar Singh threaten to kill the deceased and the exceptionally strong motive that Kartar Singh had to kill Surain Singh. In our opinion neither the evidence of Mohan Singh concerning the threat nor the strength of the motive can be considered in law as corroboration of the evidence of the approver. The learned Sessions Judge refers to the case of 1925 Lah 526 (1) in which it was said that the evidence of an approver supported only by strong evidence of motive was insufficient for a conviction.

The learned Sessions Judge goes on to say that he does not understand that case to have laid down any general principle. The principle is however well established that no matter how strong a motive is proved it is unsafe to convict on the evidence of an approver unless there is corroboration connecting or tending to connect the particular accused with the crime itself. The mere uttering of the threat some months before the murder took place, if it was established by satisfactory evidence that such a threat had been proved, which cannot be said in this case, could not of itself be taken to show that the person uttering the threat was connected with the death, which took place three months later, of the person against whom the threat had been uttered. We hold that the approver's statement in this case is not corroborated: we allow the appeal, set aside the conviction and the sentence and acquit the accused.

B.D./R K.

Appeal allowed.

1. Jit Singh v. Emperor, 1925 Lah 526=86 I C 811=26 Or L J 875=26 P L R 124.

A. I. R. 1936 Lahore 401

ADDISON AND ABDUL RASHID, JJ.
Peoples Bank of Northern India,
Ltd., Lahore—Petitioner—Appellant.

v.

Fateh Chand & Co. and another—Respondents.

Civil Misc. Petn. No. 294 of 1935, Decided on 17th January 1936, from order of Addison and Din Mohammad, JJ., D/- 2nd January 1935.

(a) Companies Act (1913), S. 171—Suit instituted by company under liquidation without leave of Court—Leave obtained within period of limitation for such suit—Suit should not be dismissed.

If a suit by a company in liquidation has been instituted without leave of Court under S. 171, Companies Act, but such leave has been obtained within the period of limitation, it would obviously be useless to dismiss the suit and to compel the plaintiff to bring another suit after obtaining the leave. [P 402 C 2]

(b) Companies Act (1913), S. 171—Interpretation of—Meaning of words 'or commenced'—Meaning of commencement and institution is same.

It is impossible to hold that the words "or commenced" in S. 171, Companies Act, are otiose. They were put in to show that no suit could be instituted or other legal proceeding commenced without the leave of Court after the company had gone into liquidation. The words immediately preceding them, namely "shall be proceeded with", were put in merely in order to meet the case of those suits or legal proceedings which were pending at the time the liquidation started. The word "commenced" has been used because a proceeding is usually said to be commenced just as a suit is usually said to be instituted, but the meaning of the two words is the same. S. 171 means that after liquidation has started, a suit cannot be instituted and other legal proceedings cannot be commenced until the leave of the Court is given. [P 402 C 2]

D. C. Ralli—for Petitioner.

Mehr Chand Sud and Norman Edmund—for Respondents.

Addison, J.—There was before the District Judge of Lahore, acting as Liquidation Judge, a three cornered contest between the Punjab Pulp and Paper Mills. Limited, (in liquidation), Messrs. Fateh Chand and Co., Limited, (in liquidation) and the Peoples Bank of Northern India, Limited. He gave his decision on 20th August 1934 and an appeal to this Court was dismissed in limine by a Division Bench on 2nd January 1935. On 2nd April 1935 the Peoples Bank of Northern India put in a petition for leave to appeal to His Majesty in Council against the order of this Court, citing Messrs. Fateh Chand and Co., in liquidation and the

Punjab Pulp and Paper Mills in liquidation as respondents. This was the last day of limitation for such an application. It may be mentioned that on 22nd May 1935 an order was passed by this Court for the compulsory liquidation of the Peoples Bank of Northern India, Limited, itself. The petition came before a Division Bench on 17th May 1935, when objection was taken that the application was incompetent without leave from the High Court in the case of the Punjab Pulp and Paper Mills Limited in liquidation and from the District Court in the case of Messrs. Fateh Chand and Company Limited, in liquidation, as these two Courts were respectively in charge of the liquidation of these two concerns. The petitioner's counsel asked for time to prepare himself to meet the point taken and we granted an adjournment conditional on his paying costs to the two liquidators. The case came on for hearing again today and we have ascertained that this Court has given leave with respect to the Punjab Pulp and Paper Mills Limited, in liquidation, on 10th July 1935 and the District Judge gave leave with respect to Messrs. Fateh Chand and Co. Limited, in liquidation, some time in October 1935. A preliminary objection was however taken that the petition should be dismissed as time barred as it was incompetent until such leave had not been obtained and as the leave had been obtained till long after the period of limitation had expired, the petition was barred by time. This depends on the meaning of S. 171, Companies Act, which runs as follows:

When a winding up order has been made, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

Mr. Ralli on behalf of the petitioner contended that he could legally institute or commence the proceedings without the leave of the Court but that after he had done so, his petition could not be proceeded with until he had obtained such permission. He also relied upon 52 All 430 (1) and 34 Bom L R 683 (2), p. 692. Neither of these rulings however

is in point as no question of limitation was involved in them. If a suit has been instituted without such leave but such leave has been obtained within the period of limitation, it would obviously be useless to dismiss the suit and to compel the plaintiff to bring another suit after obtaining the leave. Further, Mr. Ralli's argument comes to this: that the words "or commenced" in S. 171 have no meaning. If his argument is correct, it would have been sufficient for the section to run as follows: When a winding up order has been made, no suit or other legal proceeding shall be proceeded with against the company except by leave of the Court, and subject to such terms as the Court may impose.

It is impossible for us to hold that these words "or commenced" are otiose. They were put in to show that no suit could be instituted or other legal proceedings commenced without the leave in question after the company had gone into liquidation. The words immediately preceding them, namely "shall be proceeded with" were put in merely in order to meet the case of those suits or legal proceedings which were pending at the time the liquidation started. As regards them the section enacts that they cannot be proceeded with until leave of the Court is granted and they remain pending for some time till such leave is granted or refused. With respect to new suits or other new legal proceedings it was enacted that they shall not be commenced until the leave of the Court is granted, if liquidation has started before they are brought into Court. The word "commenced" has been used because a proceeding is usually said to be commenced just as a suit is usually said to be instituted, but the meaning of the two words is the same. We consider that the section means that after liquidation has started, a suit cannot be instituted and other legal proceedings cannot be commenced until the leave of the Court is given. This means that the petition was not properly before the Court until the second Court gave permission in October 1935, so that the petition is long barred by time. We are unable to come to any other conclusion as, if we did so, the words "or commenced" in the section would be useless. Mr. Ralli's argument amounts to this that: he can put in a petition after liquidation has started and

1. Peoples Industrial Bank, Ltd. v. Ram Chander, 1930 All 503=124 I C 28=52 All 430=1930 A L J 373.

2. Bhimaji Bhibhutmal v. Chunilal Javerchand, 1932 Bom 344=138 I C 824=34 Bom L R 683.

that the Court must leave it untouched until such time as he cares to apply for leave, however long that period may be. We are satisfied that this is not the meaning of the section and we dismiss the petition, but make no order as to costs, as we have already granted costs of the adjournment to both counsel for the different concerns.

It was not contended before us that this was a fit case in which we should, if we could, extend the time.

B.D./R.K. *Petition dismissed.*

A. I. R. 1936 Lahore 403

ADDISON AND ABDUL RASHID, JJ.

Gulab and others—Plaintiffs—Appellants.

v.

Umar Bibi and others—Defendants—Respondents.

First Appeal No. 920 of 1935, Decided on 13th November 1935, from decree of Sub-Judge, First Class, Sialkot, D/- 6th March 1935.

Custom (Punjab)—Succession—Dillu Jats of Sialkot District.

Among Dillu Jats of Sialkot District married daughters cannot inherit in presence of collaterals. [P 404 O 1]

Barkat Ali—for Appellants.

M. S. Khan and T. D. Khanna—for Respondents.

Abdul Rashid, J.—One Khawaj Din a Dillu Jat of village Godha in the Sialkot District, died sonless in 1899. His landed property was mutated in the name of his widow Mt. Umar Bibi, who continued to enjoy the estate till 1929. On 24th May 1929, Mt. Umar Bibi made a gift of the entire land of her deceased husband in favour of her daughter Mt. Rasul Bibi. The plaintiffs, who are collaterals in the 11th degree of Khawaj Din, the last male holder, instituted the present suit for a declaration to the effect that the gift by the widow shall not affect their reversionary rights. A portion of the land was gifted by Mt. Rasul Bibi in favour of her husband Khair Din and he was also impleaded as a defendant. The defendants pleaded that the land in dispute was not ancestral qua the plaintiffs, that Mt. Rasul Bibi was the lawful heir of her father, and that the plaintiffs being very remote collaterals, were not entitled to succeed in preference to her. The trial Court held that the plaintiffs had succeeded in proving that they were collaterals of Khawaj Din in the 11th

degree. It was further found that the property in dispute was not ancestral qua the plaintiffs. On the question of custom the trial Court held that Mt. Rasul Bibi was entitled to succeed in preference to the plaintiffs. The plaintiffs' suit having been dismissed, they have preferred the present appeal to this Court. On the question of custom the trial Court framed the following issues :

Whether the plaintiffs have got superior right of inheritance than Rasul Bibi in case the land is proved to be ancestral or non-ancestral qua the plaintiffs.

In his judgment the learned Subordinate Judge did not refer to the provisions of the *Riwaj-i-am* of the Sialkot District, and decided the question of custom in favour of the daughter on the strength of certain rulings dealing with different tribes in districts other than Sialkot. No evidence was produced by either party on the question of custom, which was decided in favour of the daughter on the ground that the general custom of the province was that daughters were preferred to distant collaterals in succession to acquired property of their father. In view of the observations of their Lordships of the Privy Council in 45 P R 1917 (1) to the effect that the entries in the *Riwaj-i-am* are a strong piece of evidence in support of a custom and that it is for the party asserting a custom contrary to the entries in the *Riwaj-i-am* to establish such custom it is necessary to examine the provisions of the Customary Law of the Sialkot District. Question 47, Customary Law of the Sialkot District, compiled at the revised settlement in 1916 runs in the following terms:

Under what circumstances can daughters inherit (1) the immoveable or ancestral, (2) the moveable or acquired, property of their father? Are they entitled to inherit to the exclusion of sons, or the widow, or the near male kindred of the deceased? If they are excluded by the near male kindred, is there any fixed limit of relationship within which such near kindred must stand towards the deceased in order to exclude his daughters?

Answer.—In the absence of male lineal descendants and of widows, unmarried daughters take possession of their father's property till marriage but not subsequently. Married daughters do not inherit in the presence of collaterals. This is the general rule; but under the influence of judicial decisions some people assert that daughters succeed in preference to collaterals of the 5th or more remote degrees.

1. *Beg v. Allah Ditta*, 1916 P O 129=38 I O 854=44 I A 89=44 Cal 749=45 P R 1917 (PO).

Question No. 47 in the Customary Law of the Sialkot District compiled in the year 1895 is identical with Question No. 47 of the Customary Law compiled in 1916. The answer in the 1895 Riway-i-am is that if there is any male kindred, a daughter cannot inherit property of any description. It is also stated in the Manual of Customary Law of 1895 that "in answer to question No. 12 of the Riway-i-am of 1865, it was said that a daughter cannot inherit." It is clear therefore that from 1865 to 1916 the entry in the Riway-i-am has remained unchanged, and is to the effect that married daughters do not inherit in the presence of collaterals in any case. In the present appeal we are concerned with a married daughter. In the absence of any evidence to the contrary, the entries in the Riway-i-ams of 1865, 1895 and 1916 constitute an important piece of evidence in favour of the plaintiffs and as this evidence stands un rebutted, it must be held that the plaintiffs have established a custom whereby they are entitled to succeed to the property in dispute in preference to Mt. Rasul Bibi. For the reasons given above, we accept this appeal, set aside the judgment and the decree of the trial Court and grant the plaintiffs a declaration to the effect that the gift made by Mt. Umar Bibi in favour of her daughter Mt. Rasul Bibi with respect to the property in dispute shall not affect their reversionary rights after the death of Mt. Umar Bibi. We leave the parties to bear their own costs throughout.

B.D./R.K. *Appeal allowed.*

A. I. R. 1936 Lahore 404

JAI LAL, J.

Shib Lal and others — Plaintiffs — Appellants.

v.

Sri Kishen Das — Defendant — Respondent.

Second Appeal No. 1669 of 1935, Decided on 30th January 1936, from decree of Dist. Judge, Delhi, D/- 22nd May 1935.

Hindu Law — Joint family — Co-parcenary property situated in village — Member of joint family being co-parcener becomes co-proprietor and can retain possession of village common land.

A member of a joint Hindu family being a co-parcener in the co-parcenary property situated in a village is by virtue of that fact a co-sharer in the village and therefore will be one

of the village proprietors, who can retain possession of village common land until partition: 1924 Lah 68; 1925 P C 18; 7 All 184 and 35 P R 1908, Appl.; 9 W R 483, Ref. [P 405 C 1]

Bhagwat Dayal — for Appellants.

Mehr Chand Mahajan and *R. C. Soni* — for Respondent.

Judgment. — The only question in these two appeals is whether the respondent is a proprietor in the village in which the land in dispute is situated. The land in dispute is a part of the village common land and has been in possession of the respondent. The appellants are the other village proprietors and they claim that the respondent is a trespasser. The respondent, on the other hand, claims that being himself a village proprietor, he is entitled to remain in possession of part of the village common land till partition. The respondent is a member of a joint Hindu family and that family admittedly owns land in the village. The contention of appellants, the other village proprietors, is that the joint family is a village proprietor but not in its individual members. The question is not covered by any direct authority. Counsel relies upon 9 W R 483 (1) and also discussion by Mulla in his Hindu Law on the nature of the right of a member of a joint Hindu family. It is stated in the reported case and also by Mulla that a member of a joint Hindu family has no separate individual right in any item of the co-parcenary property, that his right is only to secure partition in respect of his share in such property as a member of the joint family. This however does not directly bear on the question involved in these appeals.

On behalf of the respondent, 7 All 184 (2), 35 P R 1908 (3), 79 I C 448 (4) and 6 Lah 1 (5) are cited. All these cases relate to pre-emption suits and establish the proposition that a member of a joint Hindu family is a co-sharer and as such has the locus standi to maintain a suit for pre-emption. These cases, in

1. *Chukan Lal v. Poran Chunder Singh*, (1869) 9 W R 483.
2. *Gandburp Singh v. Saheb Singh*, (1884) 7 All 184=1884 A W N 326 (FB).
3. *Ishri Prasad v. Basheshar Nath*, (1908) 35 P R 1908=179 P L R 1908.
4. *Sanwal Das v. Jagio Mal*, 1924 Lah 68=79 I C 448.
5. *Sat Narain v. Behari Lal*, 1925 P C 18=84 I C 883=52 I A 22=6 Lah 1 (PC).

my opinion, indirectly lay down the proposition that a member of a joint Hindu family being a co-parcener in the co-parcenary property situated in a village is by virtue of that fact a co-sharer in the village, and therefore a co-sharer in the village will be one of the village proprietors. The matter is not free from difficulty but this seems to be the logical view to take in this case. I accordingly dismiss both these appeals with costs.

B.D./R.K. *Appeals dismissed.*

*** A. I. R. 1936 Lahore 405**

ADDISON AND ABDUL RASHID, JJ.

Arur Singh—Plaintiff—Appellant.

v.

Mt. Santi and others—Defendants—Respondents.

Second Appeal No. 609 of 1935, Decided on 28th October 1935, from decree of Dist. Judge, Amritsar, D/- 11th December 1934.

*** Estoppel—Mortgagee in Punjab not getting his mortgage recorded in revenue records—Mortgagor making alienations—Transferees finding property unencumbered from revenue records—Mortgagee is estopped from challenging such transfers on account of his negligence.**

In the Punjab transfers may be oral and frequently are so. For this reason more importance is attached to the revenue records in the Punjab than in the other provinces as in them transfers must usually be by means of registered deed. The searching of the registration records therefore in the case of agricultural land is not a practice commonly done. What is looked at is the entry in the revenue records. So where a mortgagee does not get his mortgage entered in the revenue records and thus allows the mortgagor to remain ostensible owner, such mortgagee cannot question the alienations made by the mortgagor to others who from the revenue records found the property free from encumbrance. The mortgagee in such a case is estopped by his own negligent conduct in not getting his mortgage entered in the revenue records: 1929 Rang 161 and 333, *Appl.*; 1931 Nag 144, *Dissent.* [P 405 O 2]

Lala Chiranjiva Lal—for Appellant.

J. L. Kapur—for Respondents 3 to 6.

S. L. Puri—for Mansa Ram and Mohd. Hussain.

Addison, J.—Two questions have been argued in this second appeal. The first is with reference to Khasra No. 2145 min. The suit was dismissed as regards this Khasra number on the ground that Mohammad Hussain had not been made a defendant until the suit was barred by limitation. The lower appellate Court held that he was in possession of the

land and there was a registered deed of transfer executed in his favour. In these circumstances, it cannot be said that the decision is wrong. The suit was also dismissed with respect to Khasra No. 2138 as well as Khasra No. 2145 min. On an application of the principle underlying S. 41, T. P. Act. The plaintiff sued for possession as a mortgagee and there is no question that he was entitled to take possession under his mortgage. The land was agricultural land. He took no steps to get possession for a very long period, neither did he have his mortgage mutated in the revenue papers. This allowed the mortgagor to sell various parts of his holding to the other defendants. On these grounds it was held that under the principle underlying S. 41 the plaintiff was entitled to no relief as regards these Khasra numbers. It was said in 1927 Lah 666 (1) that:

Where the revenue entries show a person as the sole proprietor of a certain land and there are no other circumstances leading the purchaser of such land from the proprietor to go behind the revenue records and make any further enquiry, the vendees are fully protected by the principle underlying S. 41.

In the Punjab transfers may be oral and frequently are so. For this reason more importance is attached to the revenue records in the Punjab than in the other provinces as in them transfers must usually be by means of registered deed. The searching of the registration records therefore in the case of agricultural land is not a practice commonly done. What is looked at is the entry in the revenue records and in the present case the entry showed that the land was unencumbered. The plaintiff waited till the period of limitation had nearly expired and so allowed his mortgagor to dispose of the land on which houses also were built by the transferees. 7 Rang 110 (2), is an authority for the proposition that the mortgagor may be unable to hold himself out as the ostensible owner by negligence on the part of the mortgagee (vide p. 125 of the report). Another Rangoon decision is 1929 Rang 333 (3), where a lessee was similarly held estopped from setting up his lease against subsequent

1. Mahomed Din v. Sardar Bibi, 1927 Lah 666=103 I O 45.
2. Ram Das v. Kannamal, 1929 Rang 161=117 I O 245=7 Rang 110.
3. Chettyar Firm v. Maung Kyaing, 1929 Rang 333=119 I O 217=7 Rang 276.

transferees from his lessor. 134 I C 676 (4) is a decision to the opposite effect, but we prefer to follow the other decisions and to hold that in this case the provisions of S. 41, T. P. Act, apply. For the reasons given, we dismiss the appeal with costs.

B.D./R.K.

Appeal dismissed.

4. Narayan v. Purushotam, 1931 Nag 144=134 I C 676=27 Nag L R 144.

A. I. R. 1936 Lahore 406

ADDISON AND ABDUL RASHID, JJ.

Praphull Dev—Plaintiff—Petitioner.

v.

Sham Lal and others—Defendants—Opposite Parties.

Civil Misc. Petn. No. 484 of 1935, Decided on 30th January 1936, for leave to appeal in forma pauperis against order of Sub-Judge, First Class, Lahore, D/- 8th May 1935.

Pauper — Appeal — Appeal can be only against decree as a whole and not against orders which are not decrees.

A person can file a petition to appeal in forma pauperis only against a decree as a whole, and not against any order which is not a decree and which does not dispose of a case finally : 1933 Lah 692, *Rel. on.* [P 406 C 2]

S. L. Puri—for Petitioner.

J. N. Aggarwal and Asa Ram—for Opposite Parties.

Ram Lal—for the Crown.

Addison, J.—This is a petition by Praphull Dev for leave to appeal in forma pauperis against an order of a Subordinate Judge, First Class, dated 8th May 1935. The plaintiff instituted a suit against ten persons in forma pauperis. By the order appealed against dated 8th May 1935, the Subordinate Judge found certain issues against the plaintiff to the effect that Hindu law applied to the disposal of the estate of the deceased which was in dispute, that the will made by the deceased which disposed of his entire self-acquired property was valid in law and enforceable and that the plaintiff had thus failed to establish the main grounds on which he based his attack on the will in question. Having come to this finding the Subordinate Judge, First Class, directed the plaintiff to produce his evidence on the remaining issues on 16th May 1935. The plaintiff appeared on 16th May and his counsel stated that he had no evidence to produce in support of the other

issues. The plaintiff's counsel further stated that he was unable to support issue 3 which was framed as follows : "Whether the suit as framed is maintainable?" The Subordinate Judge therefore proceeded to hold that the suit was not maintainable in the form in which it was framed and as the plaintiff did not want to amend his plaint, he dismissed the suit on 18th May 1935.

This application for leave to appeal in forma pauperis against the order of 8th May 1935 only and not against the decree dismissing the suit, dated 18th May 1935, was put into this Court on 4th June 1935, and the petitioner's attention was drawn to the fact that he apparently was not appealing against the decree dismissing the suit. He replied to the effect that though he, in compliance with the office objection, put in a copy of the final order dated 18th May 1935, and a copy of the decree-sheet of that date, he was still limiting his appeal to the order of 8th May. In these circumstances it seems to us that his petition for leave to appeal in forma pauperis against the order of the Subordinate Judge, First Class, dated 8th May 1935, must be dismissed on the short ground that he is not entitled to prefer an appeal against that order (see the wording of O. 44, R. 1, Civil P. C.) His whole suit had been dismissed before he put his appeal into this Court and he should have appealed against the decree as a whole. The order of 8th May 1935 did not dispose of the case, so that at that stage there was no case decided : See 14 Lah 715 (1). The order passed then cannot be treated as a decree. Besides, by the time he preferred his appeal, the final decree had been passed, against which however he has refused to put in an appeal. In these circumstances, we have no other course open to us except to dismiss this application for leave to appeal in forma pauperis against the order dated 8th May 1935. We make no order as to costs.

B.D./R.K.

Application dismissed.

1. Ram Sarup v. Mohan Lal, 1933 Lah 692=143 I C 309=14 Lah 715=34 P L R 651.

* A. I. R. 1936 Lahore 407

JAI LAL, J.

Tulsi Ram—Judgment-debtor—Petitioner.

v.

(Firm) *Fleming Shaw Co., Amritsar*, and others—Creditors—Opposite parties.

Civil Revn. No. 583 of 1935, Decided on 18th December 1935, from order of Addl. Dist. Judge, Amritsar, D. 14th May 1935.

* Insolvency—Person made insolvent under Punjab Laws Act and order of discharge not obtained Fresh application for adjudication under Provincial Insolvency Act is not barred.

There is nothing either in the Provincial Insolvency Act or any other provisions of law which debars either a creditor or a debtor from proceeding by a fresh application under the Provincial Insolvency Act, even where the debtor has been made insolvent under the Punjab Laws Act and has not yet obtained an order of discharge : 1929 Oudh 149, *Disting.*

[P 408 C 1]

S. N. Bali for *Dev Raj Sawhney* and *Dev Raj Sawhney*—for Petitioner.*Mehr Chand Mahajan* and *Rattan Lal Chawla*—for Opposite Parties.

Order.—This is a petition by *Tulsi Ram* whose application for adjudication under the Provincial Insolvency Act, has been dismissed on the ground that prior to the passing of the Provincial Insolvency Act of 1907 he was made an insolvent under the Punjab Laws Act, and he has not up to this time obtained an order of discharge in respect of that insolvency. The relevant provisions of the Punjab Laws Act, are that a person whose debts amount to Rs. 500 or upwards, and any creditor or creditors, to whom an aggregate sum of not less than Rs. 500 is due from any such debtor, may petition the insolvency Court that the debtor be adjudicated an insolvent, and if it appears to the Court that the debtor's liabilities amount to more than Rs. 500, the Court may call upon the debtor to make a statement of his assets and liabilities, invite persons claiming to be creditors to record claims against the debtor, register such claims and call upon the debtor to give reasonable security for his appearance, and in default order his confinement in civil jail, attach the debtor's property in the Punjab, moveable or immoveable, and pass an order exempting the person and property of the debtor from further legal process, pending inquiry and the final

orders of the Court. The debtor in respect of whom the order in the above terms has been passed is to be deemed an insolvent.

The Act then provides that when the sale or administration of the insolvent's property is complete, the Court may order the insolvent to be discharged, on his signing an agreement to liquidate, from any property which he may subsequently acquire, such portion of his debts as remain unpaid. Such order of discharge shall preclude any creditor whose claim is registered from suing the debtor in respect of such claim, unless it be shown that the debtor has acquired property since the order of discharge, out of which the claim might have been defrayed. It is expressly provided in the Act, that any order passed under it shall not affect the remedy of any creditor against the debtor in respect of property which at the time of the insolvency of such debtor was not in the Punjab. It would thus be observed that the effect of an application of insolvency under the provisions of the Punjab Laws Act is that only the property in the Punjab can be attached and sold by the Court and only the debts of those creditors can be satisfied out of sale proceeds who have proved their debts. Those creditors who have not proved their debts do not get anything out of the sale proceeds and they are not debarred from pursuing the ordinary remedy that may be open to them against the debtor and further the debtor has to pay in full all the debts proved in the insolvency, even out of the property which he may acquire after the order of discharge. The scheme of the Act, therefore, is substantially different from the scheme of the present Provincial Insolvency Act under which the entire property of the insolvent after an order of adjudication has been passed, vests, in the Court or the Receiver, and all the creditors must in order to get rateable share out of the assets of the insolvent prove their debts. After an order of adjudication no creditor is entitled to maintain independent proceedings for the realization of his debt.

In 1929 Oudh 149 (1), it was held that after an order of adjudication has been made under the Provincial Insolvency

1. *Ram Das v. Sultan Hussain*, 1929 Oudh 149=115 I C 107=6 O W N 100.

Act, and the insolvency proceedings are pending in Court, no fresh application for the adjudication of the same debtor lies. This ruling, however, applies only to an adjudication which has been made under the Provincial Insolvency Act and it is not therefore necessary for me to consider the contention of the petitioner's counsel that the law laid down therein is not supported by anything in the Provincial Insolvency Act, a contention with which, as at present advised, I am not prepared to agree. The case, however, has no application to an order of insolvency passed under the Punjab Laws Act, the provisions of which are quite different from those of the Provincial Insolvency Act, the effect of an order of insolvency under the Punjab Laws Act being limited as indicated by me above. There is no vesting order and the property outside the province is immune from attachment at the instance of the Insolvency Court, and all the creditors are not bound to prove their debts and are not debarred from taking any action for the recovery of their debts. I am of opinion that under the circumstances there is nothing either in the Provincial Insolvency Act, or any other provisions of law which debars either a creditor or a debtor from proceeding by a fresh application under the Provincial Insolvency Act, even where the debtor has been made an insolvent under the Punjab Laws Act and has not yet obtained an order of discharge. I accept this petition and set aside the order of the Courts below and remand the case to the Insolvency Judge with directions to proceed with the application for adjudication in accordance with law. There will be no order as to the costs of this appeal.

K.S./R.K.

*Petition accepted.***A. I. R. 1936 Lahore 408**

YOUNG, C. J. AND MONROE, J.

Peoples Bank of Northern India, Ltd.
(in Liquidation) and another — Petitioners.

v.

(Lala) Harkishen Lal—Opp. Party.

Civil (Original Side) Petn. No. 74 of 1935, Decided on 29th November 1935.

Company — Chairman of Bank taking money from bank by illegal and unauthorized way—Money converted to personal use by purchase of property — Bank going into liquidation—Chairman held trustee of Bank's

moneys—Liquidator held could claim such property — Court is entitled to give possession of property although its title is in dispute.

A Chairman of a Bank took certain money from the Bank in a way which amounted to the taking of the money wholly illegally and without any authority. He converted this money for his own use by purchasing property in his own name. Afterwards the Bank went into liquidation and the receiver applied to Court to deliver possession of the property so acquired by the chairman. It was contended on behalf of the chairman that the money he took from the Bank amounted to a loan and the receiver was not entitled to take over the property by the application of S. 63, Trusts Act. It was also contended that as title to the property was in dispute, Court could not give possession of the property to the receiver under S. 185, Companies Act:

Held: that there never was a loan by the Bank to the chairman. Certain formalities had to be carried out before a loan could be advanced to any customer. The Board itself had to authorise any loan. This transaction amounted to the chairman himself, without any authority, and wholly illegally, taking the funds of the Bank and converting them to his own use. Chairman was a trustee of all the moneys of the Bank. Apart from any criminal responsibility, he clearly had committed a breach of his duties as a trustee. So by virtue of S. 63, Trusts Act, receiver could claim such property. Moreover under S. 185, Companies Act, the Court was not authorised to come to a final decision as to title only. The liquidator who was entitled *prima facie* to the property could be given possession by the Court.

[P 409 C 1,2]

Nawal Kishore and Bhagwat Dayal—for Petitioner.

Ajit Ram—for Opposite Party.

Young, C. J.—Under an order of this Court, dated 11th June 1935, the Official Liquidator of the Peoples Bank of Northern India Limited was authorized under S. 185, Companies Act, to take possession of the Amber Nath Mills situated near Bombay. The attorney for Lala Harkishen Lal, who was the ostensible owner of the Mills, filed objections. The matter has come before us to day for decision.

The Liquidator claims that the Mill was bought by Lala Harkishen Lal out of the funds of the Bank and that he is, therefore, entitled under S. 63, Trusts Act, to take possession of the Mill as the proceeds of money illegally taken by Lala Harkishen Lal from the funds of the Bank. We have heard the evidence of Data Ram Bhatia, who at all material times was the accountant of the Bank. He has proved from a reference to the books of the Bank that on 9th December 1930

Lala Harkishen Lal, then Chairman of Board of Directors of the Bank, sent a chit to the Manager ordering him to remit to Bombay the sum of Rs. 2,40,000 to be placed at his disposal there. On the same day a telegraphic transfer of Rs. 3,00,000 was made to Bombay marked to be at the disposal of Lala Harkishen Lal. Rs. 2,40,000 of the money thus put at his disposal was used by Lala Harkishen Lal to purchase the Amber Nath Mills. On 19th December the Manager of the Bank sent a note to the Chairman asking him to which of his accounts this sum was to be debited. The reply from Lala Harkishen Lal was "Place before Board, meanwhile take a promissory note". It is to be noted that this promissory note was subsequently antedated back to 9th December. It is obvious that the promissory note did not come into existence until 19th December. This in our opinion was clearly done in order to cover the tracks of Lala Harkishen Lal. On the 22nd of December the sale was completed by execution of the sale deed.

The matter was ordered by Lala Harkishen Lal to be placed before the Board, the suggestion being that the Board should treat this as a loan to Lala Harkishen Lal. Periodically this matter came before the Board of Directors of the Bank, but up to the date of the suspension of the Bank in the month of September 1931 no action was taken by the Board of Directors at all. The Directors apparently did not like the transaction but had not the courage to oppose Lala Harkishen Lal and, therefore, adjourned the discussion of this particular piece of business from one meeting to another without coming to any decision. To go back a little : on 30th December 1930 the money was debited to Lala Harkishen Lal's suspense account. Eventually on the authority of Lala Harkishen Lal alone this amount was debited to his account on 9th January 1931.

It has been argued by counsel for Lala Harkishen Lal that this money must be looked upon as a loan from the Bank to Lala Harkishen Lal and that, therefore, the property in the Mill bought with his own money is in Lala Harkishen Lal and S. 63, Trusts Act, has no application. On the facts above stated it is clear that there never was a loan by the Bank to the Chairman. Certain formalities had

to be carried out before a loan could be advanced to any customer. The Board itself had to authorise any loan. This transaction amounts to the Chairman himself, without any authority, and wholly illegally, taking the funds of the Bank and converting them to his own use. Lala Harkishen Lal as Chairman is a trustee of all the moneys of the Bank. Apart from any criminal responsibility he clearly has committed a breach of his duties as a trustee. It has been argued, however, that S. 185, Companies Act, does not authorise the possession of the Liquidator in a case where the title is disputed. The section reads as follows :

The Court may, at any time after making a winding up order, require any contributory for the time being settled on the list of contributories and any trustee, receiver, banker, agent, or officer of the company to pay, deliver, surrender or transfer forthwith, or within such time as the Court directs, to the Official Liquidator any money, property or documents in his hands to which the company is *prima facie* entitled.

This section authorises the Court to order any trustee, . . . , banker, . . . to convey or surrender or transfer to the liquidator any money, property etc., to which the company is *prima facie* entitled. The Court is not authorised under this section to come to a final decision as to title. That may subsequently be done under S. 186 or 235, Companies Act. On the facts stated above, there can be no doubt that the Bank through the Liquidator is entitled *prima facie* to this property. We, therefore, confirm the order of this Court, dated 11th June 1935.

B.D./R.K.

Order confirmed.

A. I. R. 1936 Lahore 409

MONROE AND RANGI LAL, JJ.

Indar Pal—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 558 of 1935, Decided on 11th July 1935, from order of Addl. Sess. Judge, Lahore, D/- 12th April 1935.

(a) Criminal Trial — Certificate under S. 339, Criminal P. C. — Public Prosecutor conducting case can grant certificate— Public Prosecutor need not be Public Prosecutor when granting certificate.

The person who is authorized to grant a certificate under S. 339, Criminal P. C., is the Public Prosecutor who conducted the case in which the pardon was granted and he need not necessarily occupy the position of Public Prosecutor on the date on which he grants the certificate.

[P 410 C 2]

(b) **Criminal Trial—Charge—Accused must know precise accusation against him before entering on defence.**

It is one of the elementary principles of criminal law that an accused person must know what the precise accusation against him is before he is called upon to enter on his defence.

[P 411 C 1]

(c) **Criminal Trial—Forfeiture of pardon—Certificate under S. 339, Criminal P. C., need not give particulars of forfeiture.**

The certificate granted under S. 339, Criminal P. C., cannot be said to be defective because it does not mention the particulars in regard to which the pardon is alleged to have been forfeited. S. 339, Criminal P. C., does not require that any such particulars shall be given in the certificate.

[P 411 C 2]

(d) **Evidence — Presumption in favour of official acts being done properly — Investigating officer not acting in straightforward manner and making false statements — Presumption stands destroyed.**

The presumption in favour of official acts being properly done is destroyed when it is established that the investigating officers have not acted in a straightforward manner and have clearly made false statements in Court.

[P 412 C 2]

(e) **Criminal Trial — Identification parade — Use of policemen can be made with caution.**

There is no objection to the use of policemen for identification parade if proper precautions are adopted

[P 414 C 2]

(f) **Evidence — Identification of accused — Evidence should be carefully scrutinized.**

No sweeping conclusion can be recorded on the merits of the identification parades generally; however evidence in regard to the identification of accused person during the investigation has to be scrutinized with special care.

[P 415 C 1]

(g) **Evidence — Approver in police custody — Approver not subjected or threatened with ill-treatment—Statement is admissible.**

Where in spite of being in police custody an approver is neither subjected nor threatened to be subjected to any ill-treatment, the statement made by him will not become inadmissible under S. 24, Evidence Act : 1928 *Lah 320, Disting.*

[P 415 C 2]

Appellant in person with *Sham Lal* and *Faqir Chand Mithal* — for Appellant.

Jawala Parshad—for Respondent.

Monroe, J. — Indar Pal, appellant in this case, was an approver in what is known as the Second Lahore Conspiracy case, which was tried by a special tribunal appointed under Act 4 of 1930. After the conclusion of that case, he was sent up for trial because the Public Prosecutor certified under S. 339, Criminal P. C., that:

He had by wilfully concealing facts concerning some of the accused, namely Jahangiri Lal,

Rup Chand, Gulab Singh, Amrik Singh, Kundan Lal, son of Behari Lal, Bhim Sen, Gokal Chand, Hari Ram, Krishnan Gopal, Jai Parkash, Dina Nath Rai, Dharam Vir and Kundan Lal, son of Rallia Ram, and also by giving false evidence, not complied with the condition on which the tender of pardon was made to him.

He was charged with various offences and he did not deny having committed any of them except one at Sheikhpura. His chief plea was that he had complied with the condition on which pardon was granted to him. The trial Court held that he had not complied with that condition and convicted him on all the charges detailed in the charge sheet printed as Sch. B to the judgment (page 28, Vol. 4). He has been sentenced to death on a charge under Ss. 302/109, I. P. C., to transportation for life on various other charges and to transportation for 20 years under S. 4 (b), Act 6 of 1908, these sentences to run concurrently. He has appealed through his brother Dina Nath and the appeal has been argued before us by Mr. Sham Lal, who was appointed by the Crown on his behalf. The case is also before us for confirmation of the sentence of death. Mr. Sham Lal raised two technical objections at the outset. The first was that Rai Bahadur Pandit Jawala Parshad, who granted the certificate mentioned above under S. 339, Criminal P. C., on 13th December 1933, was not Public Prosecutor on that date and the certificate was therefore invalid. The official Civil List however shows that Rai Bahadur Pandit Jawala Parshad did occupy the office of Public Prosecutor of Lahore on that date.

The presumption of correctness attaching to the entry in the Civil List has not been rebutted. Moreover, we are inclined to think that the person who is authorized to grant a certificate under S. 339, Criminal P. C., is the Public Prosecutor who conducted the case in which the pardon was granted and he need not necessarily occupy the position of Public Prosecutor on the date on which he grants the certificate. It is beyond question that Rai Bahadur Pandit Jawala Parshad was appointed Public Prosecutor for the purpose of conducting the Second Lahore Conspiracy case. This objection has therefore no force. The second objection is that the certificate was defective because it did not specify the matters which Indar Pal

had concealed, or the points on which he had given false evidence. It was also pointed out that the request of the accused for this specification was complied with neither before the committing Magistrate nor before the Sessions Judge. On these grounds it was contended that the accused had been gravely prejudiced in his defence. The record shows that the learned Sessions Judge called upon the Public Prosecutor

to give as vividly and categorically as possible in his opening address his grounds for holding that the pardon has been forfeited.

It was noted that "this course should and will satisfy the defence and meets the ends of justice." The Public Prosecutor did specify in his opening address certain matters on which the prosecution relied for establishing that the pardon had been forfeited, but he was not able to say before us that he had specified all those matters which have been referred to by the learned Sessions Judge in his judgment. It is somewhat surprising that the Court did not insist on such a specification being made in writing. If this had been done, the trial could possibly have been considerably shortened and attention could have been concentrated on a few important incidents. We agree with the contention of the defence that it is one of the elementary principles of criminal law that an accused person must know what the precise accusation against him is, before he is called upon to enter on his defence. In this case, Indar Pal's statement which is the basis of his prosecution lasted for five and a half months and covers 337 printed pages. The incidents referred to therein are almost innumerable and vary considerably in importance. The prosecution could easily have picked out a few important incidents in regard to which Indar Pal was believed to have given false evidence or concealed essential particulars. The task of the prosecution as well as the defence could then perhaps have been very much simplified. The question which now arises is whether Indar Pal has actually been prejudiced in his defence. His statement shows that he has tried to give his explanation in regard to a great many of the incidents relied on by the prosecution. His attention was also directed to these incidents by his cross-examination when he appeared as a witness. It can-

not, therefore, be said that he was in any way hampered in his defence, though he might have felt a certain amount of embarrassment on account of the lack of precision in the prosecution case. According to the certificate granted by the Public Prosecutor, the case for the prosecution was that Indar Pal had tried to shield some of the accused in the Second Lahore Conspiracy case. In order to establish this charge, it is perhaps more or less necessary to consider the effect of his statement as a whole. The Public Prosecutor has supplied us with a statement showing the particulars in which Indar Pal is said to have departed from the truth and to which his attention was called during the trial. We would confine our attention only to these particulars and this procedure will, in our opinion, meet the ends of justice.

The certificate cannot be said to be defective because it does not mention the particulars in regard to which the pardon was alleged to have been forfeited. S. 339, Criminal P. C., does not require that any such particulars shall be given in the certificate. We now proceed to consider the merits of the case. Indar Pal was arrested on 26th August 1930. He admittedly made certain disclosures from 28th August 1930 onwards. According to the prosecution, he made a continuous statement from 28th August to 2nd September 1930; it was recorded by Sayed Ahmad Shah, Deputy Superintendent of Police, and Malik Barkhurdar Khan, Sub Inspector, in turns: it was concluded on 2nd September 1930 and was sent at once to the Superintendent Police, Political, and remained with him till it was produced at the trial. This statement is said to be Ex. P/E.W. Indar Pal accepted the tender of pardon made to him on 25th October 1930 and was produced before Mr. Hassan Mahmood, S. 30 Magistrate, on 27th October 1930. On the same day Mr. Mahmood commenced recording his statement and finished it on 8th November 1930. According to the record the statement was read over to Indar Pal on 10th November and was admitted by him to be correct and he then signed it and dated it.

The contention of the defence is that Ex. P/E.W. was not written at the dictation of Indar Pal from 28th August to 2nd September, as alleged by the prosecution, but was compiled long after-

wards and contained not only the information supplied by Indar Pal, but many other facts which the prosecution desired after investigation to put into the mouth of Indar Pal. It is further alleged that Indar Pal was under such fear of the police that he repeated the contents of Ex. P/E. W. before the Magistrate with the help of Malik Barkhurdar Khan who was always there to prompt him. It is also urged that Indar Pal knew that he would remain in police custody even after he had made his statement before Mr Mahmood and could not, therefore, afford to offend the police in any way. He appeared as a witness at the trial on 9th January 1931 and for four days made his statement in harmony with his statement before Mr. Mahmood. On 13th January 1931, he represented to the Court that he should be removed from police custody because he had reached the stage when he would have to depart from his statement before Mr. Mahmood, if he was to tell the truth. His prayer was refused, but still from that day onwards he resiled from his previous statement in several important particulars. He was subsequently removed from police custody under the orders of the High Court. His contention now is that the statement made by him before the Court is true in every detail and is in accordance with his original statement to the police which is being suppressed.

It is much to be deplored that this case has become so complicated and has assumed such enormous proportions owing to the utterly untenable positions taken by the investigating police officers when they appeared in Court as witnesses. It has been established by incontrovertible evidence, internal as well as external, that Ex. P/E. W. was not the statement of Indar Pal recorded from 28th August to 2nd September 1930. The original statement, if it was recorded in the form of a narrative at all, must have undergone numerous changes from time to time before it assumed the shape of Ex. P/E. W. There are excellent reasons in support of this conclusion, but it is not necessary to state them here. The learned Sessions Judge himself declined to accept the statements of the police officers that Ex. P/E. W., was the original statement made by Indar Pal from 28th August to 2nd September

1930. He also held that corrections and alterations were made in the original statement from time to time, though the precise date on which it assumed its final shape could not be ascertained. The learned Public Prosecutor was not able to challenge the correctness of this finding, though he urged that the additions and alterations were made with the consent of Indar Pal. We are not prepared to consider this explanation when the police officers concerned do not admit that any additions and alterations were made after 2nd September 1930. It has been rightly urged that the presumption in favour of official acts being properly done has been destroyed because it has been established that the investigating officers have not acted in a straightforward manner and have clearly made false statements in Court. It is, however, unnecessary for us to record a clear finding as to whether Ex. P/E. W., is or is not a true record of the final statement of Indar Pal made voluntarily before the police. It can be used only for the purpose of arriving at a conclusion as to whether the subsequent statement before Mr. Mahmood could be believed or not. The accusation against the accused is that he had resiled from his statement before Mr. Mahmood. The question for determination, therefore, is whether that statement was a free and voluntary one, and how far we can act on it. On behalf of the defence it is contended that Mr. Mahmood was under the thumb of the police and that the statement recorded by him is more or less a 'mechanical reproduction' of Ex. P/E. W. We shall now proceed to consider the points urged by the counsel in support of this contention:

1. It is alleged that the Magistrate re-wrote a whole sheet and substituted it for the original in order to correct the mistakes made by Indar Pal as to the date and the proceedings of a political meeting. There is clear evidence to show that the mistakes were discovered on 30th October 1930, while the statement containing the mistakes was recorded on 27th October. The correction of the magisterial statement required a corresponding correction in the police statement and we find that the sheet containing the correction in the police statement is in the handwriting of Malik Barkhurdar Khan, while the previous

and the subsequent sheets are in the handwriting of Sayed Ahmad Shah. The sheet in question begins and ends with unfinished sentences, thereby indicating that it was a copy and not the original. The sheet in the magisterial statement containing the corrections has in one place an addition on the margin of matter which would exactly cover one line. It is urged that this line was omitted when copying. This omission was natural and arose because this line and the line above ended with the same words. The correct date of the meeting mentioned above is, 8th April 1928, while the wrong date given was 16th December 1928. Indar Pal was at that stage stating the events which took place in December 1928 and not in April 1928. The likelihood therefore is that he gave the date of the meeting as 16th December 1928. We also find that a marginal abstract made by Niaz Ahmad Khan, Deputy Superintendent Police, on Ex. D/E C., which is a copy of the police statement of Indar Pal, shows the date of the meeting to be 16th December 1928. All these facts taken together raise a very strong suspicion in our minds that the sheet in question was re-written by the Magistrate. We are prepared to believe that this substitution was made with Indar Pal's consent, but the emphatic denial of the Magistrate on this point throws a great doubt in our minds on his fairness as a Magistrate and his veracity as a witness.

2. It is admitted that the Magistrate made over the completed statement of Indar Pal to the police in contravention of the clear provisions of S. 164, Criminal P. C. According to the defence, each day's record was made over to the police. It is alleged that the statement recorded on 27th October 1930 was not brought by the police on the following day and the Magistrate therefore had to continue the statement on a fresh sheet. This is the only occasion on which the unfinished statement was continued on the following day on a fresh sheet. The Magistrate was unable to give any explanation in regard to this matter. Considering that he did not consider that it was wrong to deliver the completed statement to the police, we are inclined to believe that he made over each day's record to the police. His denial on this point is much to be deplored because it

affects his testimony on more important matters.

3. According to the defence the statement of Indar Pal was not read over to him as noted on the record. Mr. Mahmood does not say that he read it over at the Fort. Before the Tribunal, when his memory was fresh, he said very definitely that he had not read it over at the Fort. Mirza Ata Ullah, Inspector, says that the statement could only have been read over at Mr. Mahmood's house, because the latter stayed at the Fort only for ten minutes on that day and the accused was afterwards sent to his house. The police diary for that day does not however show that Indar Pal was taken to Mr. Mahmood's house on that day. Mr. Mahmood reported on 9th November to the Additional District Magistrate that he was suffering from an attack of severe cold and was therefore unable to hold an identification parade on the following day. The reading over of the statement could not have taken less than six hours. It is doubtful whether Mr. Mahmood who was suffering from a severe cold on the previous day was well enough to undertake the physical effort involved in reading over a statement of that length. It is not alleged that the services of a subordinate were requisitioned for reading over the statement. The deposition of Mr. Mahmood in regard to this matter when he was under cross-examination is extremely unsatisfactory. A great many verbal mistakes were found in the statement and at least some of them would have been corrected if the statement had been read over. After a careful consideration of all these facts, we are constrained to say that we are not satisfied that the statement was read over to the accused before he signed it.

4. A comparison of Ex. P/E. W. with the magisterial statement which is marked Ex. D shows that the latter is almost in exact harmony with the former. The learned counsel for the accused has cited a great many instances to show that names of persons and articles are given in the same order in both statements and minor and unimportant incidents are frequently mentioned in the same sequence. The learned Public Prosecutor has also cited some instances in which names are not mentioned in the same order in both statements. He has

also referred to certain unimportant facts which appear in Ex. P/E.W. and not in Ex. D/A and vice versa. It is admitted that Malik Barkhurdar Khan was present throughout while the statement was being recorded. Mr. Mahmood is not in a position to deny that Malik Barkhurdar Khan always had Indar Pal's police statement with him. Indar Pal says that he had been told to learn the contents of Ex. P/E.W. by heart and that he had done so. It is undeniable that Indar Pal has a good memory. We are therefore not prepared to hold that Ex. D/A is a 'mechanical' reproduction of Ex. P/E.W. as alleged by the defence, though there is little doubt that the later statement closely follows the former even in unimportant details.

5. Kharaiti Ram was one of the approvers in the second conspiracy case. His statement was recorded by Mr. Mahmood in English, while the Reader of the Court recorded it in Urdu. The English statement is a verbatim translation of the statement of Kharaiti Ram before the Police. The Urdu statement recorded by the Reader is not an exact copy of the police statement, but the changes are merely nominal. Both statements cover 29 $\frac{3}{4}$ pages in print and every incident is mentioned in exactly the same order. Kharaiti Ram is said to be a dull-witted person and could not be expected to repeat like a parrot what he had stated before the Police. Mehr Ali Mohammed Sub-Inspector says that he gave the police statement of Kharaiti Ram to the Magistrate. The latter denies it. Under these circumstances, the magisterial statement cannot be said to be an independent statement of Kharaiti Ram. This matter is not relevant in this case, except in so far as it goes to show that implicit confidence could not be placed in the proceedings of the Magistrate.

6. It is alleged that the Magistrate made an alteration in the statement of Saran Das, approver, by adding the words 'adam' and 'the' in order to make it agree with that of Indar Pal on a certain point. The record shows that Saran Das was then relating an incident which occurred in his presence. The additions were made in order to show that he was absent, though the context was left unaltered. The Magistrate says that he made the alteration either when the statement was being recorded or when it was read

over. We are inclined to accept this explanation in view of the fact that the position of Saran Das and Indar Pal has throughout been that Saran Das was not present at the incident. It is possible that the Magistrate misunderstood Saran Das when he first recorded his statement on this point and did not take the trouble of making the correction properly.

7. The Magistrate conducted a great many identification parades. He admits that he wrongly certified on each occasion that he had himself taken precautions to see that the proceedings were in every way fair to the accused, though as a matter of fact he had left everything in the hands of the police. We find that it was only on one occasion that a list of the outsiders who were mixed with the accused was prepared. Subsequently even this formality was dispensed with. The list mentioned above includes six men who bore the names of policemen then stationed in the Fort. It is difficult to believe that they were not policemen, but happened to have the same names. It is in evidence that on one occasion one Girdhari Lal, son of Faqir Chand, Brahman, of Gujranwala, was actually identified as a culprit by one of the witnesses. It is admitted that a person answering to that description was a policeman employed in the Fort at that time. These facts fully support the oral evidence that in forming identification parades, policemen were often made use of. There is no objection to the use of policemen for this purpose, if proper precautions were adopted. But the most deplorable feature of the matter is that the officers responsible for conducting the parades have emphatically denied this fact. It is admitted that the objections raised by the accused at the time of identification were never noted, and if a wrong person was identified, the note simply showed that the witness had failed to identify the proper person. Certain specific instances were cited to show that the proceedings at these parades were not always above board. It is not necessary to consider these instances, because no general conclusion could be based on them. The learned Sessions Judge observed as follows in regard to this matter:

I concede that the Magistrate did not rise to the height of the occasion. They might not have possessed either the means or inclinations

to make all the requisite arrangements for these numerous parades themselves, but they should not have been content with performing their duty in a mechanical and perfunctory manner. It would have been much better if the responsibility for the righteousness of these parades had been left entirely to Police Officers of rank. Their own sense of honour and weight of responsibility could then be trusted to perform their duty in an honourable way. When a Magistrate is invited to supervise a proceeding and he acts in a complacent and pusillanimous manner, the result is anything but satisfactory. An unscrupulous Police Officer then easily tries to outwit the accused person and the Magistrate and feels the satisfaction of having done so. For deceiving one's own self an officer should be more utterly depraved and unconscientious.

This is strong condemnation of the part played by Magistrates in these proceedings, but we agree with the learned Judge that no sweeping conclusion can be recorded on the merits of the identification parades generally. It is however clear that the evidence in regard to the identification of accused persons during the investigation has to be scrutinized with special care.

8. On 30th September 1930, 21 persons were called to identify Indar Pal. The police prepared a list of these persons. The last name on the list is "Pir Bakhsh, Lasuriwala well, Lahore." It is admitted that Pir Bakhsh was a witness to an incident at the Bhed Kuttanwala well and that the Police Officer who prepared the list was under the wrong impression that Pir Bakhsh had witnessed an incident at the Lasuriwala well. Pir Bakhsh appeared as a witness and stated that he had nothing to do with the Lasuriwala well and had stated before the Magistrate that he had seen the accused at the Bhed Kuttanwala well. Still we find in the memo prepared by the Magistrate at the time of the identification the following entry:

Pir Bakhsh identified the accused as the person seen by him on the Lasuriwala well near the Ravi river.

The inference is that the Magistrate did not attend to what the witness said, but made his memo in conformity with the list supplied to him by the police. All these facts taken together detract a great deal from the value of Ex. D/A as a free and independent statement of Indar Pal. On behalf of the defence, it is contended that the statement is altogether inadmissible because Indar Pal was at that time in police custody which was subsequently held to be illegal and was threatened with all kinds of torture if he

did not repeat the statement which had been prepared for him by the police. S. 24, Evidence Act, on which reliance has been placed runs as follows:

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

In the case of an approver there is no doubt that his statement is made under an inducement and a promise. S. 339 (2), Criminal P. C., therefore enacts that the statement made by a person who has accepted the tender of pardon may be given in evidence against him at his trial. The learned counsel contends that if a statement is obtained from an approver under threats, it cannot be admitted in evidence under S. 339 (2), Criminal P. C. Reliance was placed in this connexion on 9 Lah 608 (1) in which it has been held that it is only when an approver's disclosure is extorted as the result of undue duress, such as threats or violence, that S. 24, Evidence Act, is applicable and the statement must be ruled out of evidence. This ruling has no application to the facts of this case, because we are not satisfied that in spite of being in police custody, which was subsequently held to be illegal, Indar Pal was either subjected or threatened to be subjected to any such ill-treatment as would make the statement inadmissible under S. 24, Evidence Act. Apart from Indar Pal's own statement, there is no evidence to show that he was in any way ill-treated by the police. We cannot therefore exclude Ex. D/A from consideration. At the same time, the atmosphere in which it was obtained and recorded makes it unsafe for us to act on it unless it is corroborated from other sources in important particulars. We cannot therefore hold that Indar Pal has forfeited his pardon merely because he had resiled in certain particulars from his statement before Mr. Mahmood.

We shall now proceed to consider the important incidents regarding which Indar

1. Ram Nath v. Emperor, 1928 Lah 820 = 108
I O 514 = 29 Cr L J 413 = 9 Lah 608.

Pal is said to have given false evidence or concealed facts within his knowledge in order to help some of his friends who were on their trial. It is beyond dispute that he was a party to a conspiracy for causing simultaneous bomb explosions at Gujranwala, Lyallpur, Sheikhpura, Lahore, Amritsar and Rawalpindi, on the morning of 19th June 1930. The plan was that a double set of bombs should be placed in a house in each of these places, that one of the bombs should be exploded by lighting a candle and the other and a more deadly one, should be deposited in a box and should be so designed as to explode as soon as the box was lifted. This explosion was meant to kill or injure police officers who would visit the spot on hearing of the first explosion. In pursuance of this conspiracy an explosion took place at Gujranwala and caused the death of Ahmad Din, Head Constable, and injuries to several other police officers. The statement of Indar Pal in regard to this incident in Ex. D/A is as follows :

I asked Gulab Singh to take Amrik Singh with him that very day, explain the process to him and leave him at Gujranwala for lighting a wax candle. I further asked him to take from the baithak the bomb set which was received back from Lyallpur. I also gave him a few copies taken from Jahangiri Lal for distribution in Gujranwala. I also gave him Rs. 10 to meet his travelling expenses. . . . Gulab Singh went to my house at about 9 a. m., on the 18th June. He told me that he had fitted the bomb at Gujranwala and left Amrik Singh there to light the wax candle. He further told me that he had made arrangements for the action in a room in the Serai and that they had given Ram Singh and Lachhman Singh as their names to the Munshi of the Serai.

This incident was altogether omitted in the statement given by Indar Pal before the tribunal. The only witness produced by the prosecution in regard to this incident is one Lakhmi Das, who is the keeper of the inn in which the explosion occurred. He stated that a room had been taken on 17th June 1930 by two Sikh brothers who gave their names as Ram Singh and Lachhman Singh and that the explosion occurred in the same room on 19th June 1930. This statement is supported by entries in his register which is regularly kept and, therefore, affords strong corroboration of Indar Pal's statement. It is not very material that Lakhmi Das failed to identify Gulab Singh and Amrik Singh during the investigation. It is not alleged that there were any other Sikh

brothers who were members of the party and who could have gone to Gujranwala to arrange for the explosion. We are also of opinion that in view of Indar Pal's position in the party and the intimate connexion between him and Gulab Singh it is most improbable that Gulab Singh and Amrik Singh went to Gujranwala to arrange for the explosion without the knowledge of Indar Pal. The evidence bearing on these points will be referred to hereafter.

In connexion with this incident we have to note with regret that the police did not produce before the Court the statement of Lakhmi Das as originally recorded. It is not easy to accept the explanation given by the police officer concerned that the original statement was destroyed because some ink was spilt on it. The allegation of the defence is that the original statement was destroyed because an addition had to be made therein to the effect that Lakhmi Das had seen Amrik Singh shortly before the explosion occurred and was, therefore, in a position to identify him clearly. This allegation may or may not be true, but the destruction of the original statement certainly creates suspicion against the proceedings of the Police. We, however, consider that the statement of Lakhmi Das, in so far as it is supported by the entries in his register, together with the other circumstances mentioned above, is a guarantee of the truth of Indar Pal's statement in Ex. D. A. (Their Lordships after discussing the evidence in connexion with the explosion at Lyallpur, Lahore, Sheikhpura, Amritsar, Rawalpindi, proceeded) For the reasons stated above, we have unhesitatingly come to the conclusion that Indar Pal has forfeited his pardon. This being so, his conviction on all the charges framed against him is correct and was not challenged before us. The only question that remains for consideration is, whether the death sentence passed on him under Sections 302/109, Penal Code, for abetting the murder committed at Gujranwala should be confirmed or not.

According to the learned counsel for the accused the mitigating circumstances in the case are as follows : (1) Indar Pal made a full and free disclosure before the police at the very earliest stage and thereby secured the conviction of a great many members of his party in spite

of his subsequent retraction. (2) It was only human for Indar Pal to be afraid of his life at the hands of the revolutionaries outside as a result of the disclosures made by him. (3) The investigation was not carried on in a straightforward manner and the investigating officers freely told lies in Court. The Magistrate concerned was also more or less under the thumb of the police and did not hesitate to commit irregularities at their instance, and then to come and tell lies in Court. (4) The atmosphere prevailing round the accused encouraged him to try and see if he could retain his pardon and also avert the danger from the revolutionaries outside by making out that he had tried to shield his comrades as far as possible. (5) He has been in jail since 26th August 1930, and he was made aware as soon as he began to resile from his magisterial statement, viz., in January 1931 that he would be tried for the offences committed by him. (6) In the previous case Gulab Singh and Roop Chand, who were prominent members of the party and were held to be aware of the whole scheme of 19th June 1930, were not sentenced to death, but only to transportation for life.

On the other hand the learned Public Prosecutor has urged that Indar Pal was the leader of the party which planned such diabolical crimes and, therefore, deserved the extreme penalty of the law. We may not be inclined to agree with the learned defence counsel that each point mentioned by him is a mitigating circumstance in the case, but we certainly think that taken together they affect the question of sentence. We are particularly impressed by the point mentioned by the counsel in the forefront of his argument, namely, that the accused not only disclosed all the information in his possession about the activities of his party, but indicated all the evidence which could be obtained in support of his statement. It does not appear that the police discovered anything which was not contained in the statement of Indar Pal. If the irregularities mentioned above had not been committed during the investigation, the trial would have been a short and a simple one and Indar Pal might not have found it possible to resile from his statement. It is true that Indar Pal held a very important position in his party, but the brain

that contrived the explosions of 19th June 1930 was that of Hans Raj, and the latter also took an active part in the preparation of the materials required for that purpose. It was he who was the chief actor in connexion with the outrage on the Viceregal train on 23rd December 1929. We are, therefore, not inclined to agree with the learned Public Prosecutor that Indar Pal must be chosen for the severest sentence possible. After carefully weighing all the circumstances we consider that a sentence of transportation for life would meet the ends of justice in this case. We, therefore, accept the appeal and alter the sentence under S. 302/109, Penal Code, accordingly. The remaining sentences will stand unaltered, but they will all run concurrently.

In the end we desire to emphasize that the original trial and this trial have become so complicated and have been prolonged so inordinately merely because the police did not wish to place a true picture of the investigation as it proceeded, before the Court. But in fairness to the police and the Magistrates concerned we feel bound to record that it has not been shown that there was any deliberate attempt to introduce any falsehood into the case or to implicate any innocent person. The desire to suppress all discrepancies and inaccuracies apparently sprang from over-zeal, but it has led to disastrous consequences. It has been most painful for us to record that responsible officers have committed perjury in Court in order to maintain the untenable positions they had taken up. We trust that the lessons to be learnt from this trial will be taken to heart and Police Officers who have at all times to perform a difficult task will never again disgrace their force and cause such a waste of public time and money as in this case.

We cannot close this judgment without expressing our gratitude to the learned counsel on both sides for the great assistance they have given us in this complicated case. They have shown complete mastery of details and the case has been presented on both sides with fairness and accuracy. Their ability and industry have shortened the hearing and have helped us greatly in arriving at our conclusions.

B.D./R.K.

Order accordingly.

A. I. R. 1936 Lahore 418

ADDISON, J.

on difference between

COLDSTREAM AND JAI LAL, JJ.

Balanda and another—Plaintiffs—Appellants.

v.

Mt. Suban—Defendant—Respondent.

Second Appeal No. 527 of 1934, Decided on 11th December 1935, from decree of Addl. Dt. Judge, Lahore, D/- 21st December 1933.

(a) Custom (Punjab)—Succession — Arains — Self-acquired property — Chunian Tahsil, Lahore District—Collaterals exclude daughters of last maleholder — Per Addison and Coldstream, JJ.; Jai Lal, J., *contra*.

(Per Addison and Coldstream, JJ.; Jai Lal, J., *contra*.)—A daughter of an Arain does not succeed to the self-acquired property of her father after the death of her mother in the Chunian Tahsil of the Lahore District in preference to the nephews and grand-nephews of the last male owner. [P 427 C 1]

(b) Custom (Punjab) — No such thing as general custom in Punjab—Custom and that parties are governed by such custom should be proved in every case.

There is no such thing as a general custom in the Punjab, and it is necessary in every case to prove that the parties are governed by custom and what the custom is. To hold otherwise would amount to manifest injustice as custom in the Punjab is more local than tribal, though it may be both, and if there is a custom prevalent in a small area or in a small tribe, that custom will always be held not proved because in most areas or amongst other tribes the custom is otherwise. [P 427 C 2]

(c) Custom (Punjab) — Weight of judicial decisions to prove custom—Decision is not judgment in rem — It is merely instance relevant under S. 13, Evidence Act.

Courts should not place greater value on judicial decisions than on the statement of a custom in the Customary law. A judicial decision depends on the evidence produced in the case which may be a badly conducted one. A decision on a question of custom is not a judgment in rem; it is merely an instance, relevant under S. 13, Evidence Act, of a particular custom being asserted or denied, or possibly recognized though the word 'recognized,' may mean recognized by the parties to a particular transaction rather than by the Courts. [P 427 C 2, P 428 C 1]

Badri Das—for Appellants.

Khurshaid Zaman—for Respondent.

Coldstream, J.—One Umra, an Arain of Chak No 2 in the Chunian tahsil of the Lahore District, died leaving self-acquired landed property, of which his widow Mt. Rakho took possession in accordance with custom. Mt. Rakho died on 20th October 1931 and mutation of the land was effected in favour of her daughter Suban. Bulanda, the son of

Umra's brother, and Allah Ditta, the grandson of another brother Amir, appealed against this mutation unsuccessfully. They then instituted the suit out of which this appeal arises for possession of Umra's property, alleging that under the Customary law by which they were governed they were entitled to succeed in preference to Umra's daughter Suban. The Subordinate Judge found that they were entitled to succeed in accordance with the rule of custom stated in the *riwaj-i-am* and held that they had also established their claim by the evidence produced in the case which supported the rule. Against this decision Mt. Suban appealed to the Additional District Judge who reversed this decision and the collaterals have come to this Court on second appeal, having obtained the necessary certificate under S. 41, Punjab Courts Act. The appeal is not opposed.

It is contended before us on behalf of the collaterals that the evidence in the case justified the decision of the trial Court which the Additional District Judge erred in upsetting. The learned Additional District Judge has remarked in his judgment that in view of the clear pronouncements of the Lahore High Court in regard to the right of daughters to succeed under the Customary law in preference to collaterals it is scarcely necessary to examine the instances which have been cited by the respondents, and he has proceeded on the assumption that the onus was upon the plaintiffs to prove that they did not follow the "general custom" governing agricultural tribes in the Punjab. He has found that they had not discharged this onus. In support of his view of the law he has cited 25 P R 1882 (1), 174 P R 1889 (2), 180 P R 1888 (3), 89 I C 351 (4), 10 Lah 422 (5), 14 Lah 651 (6) and a judgment of my learned brother Jai Lal, J., in Civil Appeal No. 909 of 1932 (7). The principle, on which disputes regarding the validity of a cus-

1. *Miran Bakhsh v. Mt. Allajawai*, (1882) 25 P R 1882.
2. *Mt. Zainab v. Amir*, (1889) 174 P R 1889.
3. *Mt. Imam Bibi v. Fazul Bibi*, (1888) 180 P R 1888.
4. *Mehtab Bibi v. Din Mahommad*, 1926 Lah 118=89 I C 351.
5. *Jhandi v. Chiragh Din*, 1928 Lah 870=112 I C 840=10 Lah 422.
6. *Ghulam Muhammad v. Zainab Bibi*, 1933 Lah 640=145 I C 291=14 Lah 651.
7. *Mt. Fatima v. Dulla*, Civil Appeal No. 909 of 1932.

tom are to be decided, has been laid down clearly in 45 Cal 450 (8), where their Lordships of the Privy Council approved of the observations made by Robertson, J., in 41 P R 1906 (9), namely that in all cases of this kind it lay upon the person asserting that he was ruled in regard to a particular matter by custom, to prove that he was so governed, and further to prove what the particular custom was :

It is not the spirit of Customary law, nor any theory of custom or deductions from other customs, which is to be a rule of decision.

It is, I think, open to doubt, in view of the remarks made at p. 460 of their Lordships' judgment in 45 Cal 450 (8) whether the facts that a particular custom is widely prevalent or not prevalent in other parts of the Province, or is followed or not followed by the majority of tribes in the Province, are relevant considerations in such a case, since, to quote their Lordships' words, the custom might be independent in each case, and the evidence would not establish that the custom failed by reason of the inability to define the exact limits within which it was to be found when once it was established that within certain and definite limits it undoubtedly existed. There can however be no doubt that these facts would not by themselves be sufficient to relieve a party setting up any particular custom from the onus of proving that his family was governed by the particular custom he alleged.

It is now well-established law that an entry stating a custom in a manual of Customary law compiled under authority for a district in the Punjab is *prima facie* proof of that custom and places the onus of rebuttal on the party disputing the correctness of that entry : see 8 Lah 281 (10), 45 P R 1917 (11) and 10 Lah 86 (12). These manuals are based on the *riwaj-i-am* drawn up for inclusion in the land revenue records when these were revised from time to time for the purposes of land revenue assessment. It

has first to be seen therefore what is stated to be the custom in the Customary law of the Lahore District. The rights of a daughter are dealt with in Question 61 of Mr. Bolster's Manual compiled in 1916. The rule stated is as follows :

Answer 61.—Sons and widows exclude daughters. Among Jats daughters are also excluded by male lineal descendants through males however distant. All other tribes follow the same custom except that (1) among Arains in the proximity of Lahore (here follows a list of 18 villages), daughters of a sonless proprietor exclude agnates.

In answer to Question 62 it is stated that no distinction is made, as to the rights of daughters to inherit, between immoveable and ancestral property. The village Chak No. 2, where the land in dispute is situated is not in the proximity of Lahore. There is therefore a presumption in favour of the collaterals in this case which it was for the daughter to rebut, and it has to be decided whether in this case the presumption has been rebutted.

The evidence produced by the parties has been described at length in the judgment of the Subordinate Judge. On behalf of Mt. Suban six documents were produced. The first proves the mutation in dispute which has no evidentiary value. Ex. D-3 is a copy of a mutation showing that when one Mohammad Din, an Arain of this village, died, his land was mutated in favour of his daughter Mt. Jiwai, although Mohammad Din's brother was alive. But this mutation was made at the instance of Mohammad Din's brother Chiragh himself. There was no dispute and this instance is not therefore of much value. Next it is proved by Ex. D-4 that when Chiragh, another Arain of this village, died, his land was taken by his daughter Bhagan in preference to collaterals; but the evidence does not explain the circumstances. It appears that Chiragh left three daughters, Mt. Karam Bhari, Mt. Bakhtawar and Mt. Bhagan. Only two of the daughters, Mt. Karam Bhari and Mt. Bhagan, took the land, Mt. Bakhtawar not being given a share. The property was an occupancy tenancy, which would devolve in accordance with the special rules governing succession to such rights in the Colony. The daughters were themselves tenants. The third instance is proved by Ex. D-5 which shows that when one Bulagi, an Arain of Chak No. 8, died, his daughters succeeded to

8. Abdul Hussein Khan v. Sona Dero, 1917 P C 181=48 I O 306=45 I A 10=45 Cal 450=12 S L R 104 (P C).

9. Mahomed Khan v. Sis Banu, (1906) 41 P R 1906=95 P L R 1906.

10. Lakh Singh v. Mango, 1927 Lah 241 = 100 I O 924=8 Lah 281.

11. Beg v. Allah Ditta, 1916 P C 129=38 I O 354=44 I A 89=44 Cal 749=45 P R 1917 (P O).

12. Vaishno Ditti v. Rameshri, 1928 P C 294 = 113 I C 1=55 I A 407=10 Lah 86 (P O).

his land. His property was claimed by his wife Fatima, his four daughters and his collaterals. The daughters based their claim on a registered will in their favour. As pointed out by the Subordinate Judge, this instance is of no value, for the land was self-acquired and Bulaqi was entitled to dispose of it as he wished. The next instance is proved by Ex. D-6. This also was a case of a gift to daughters by a proprietor of self-acquired property and it is significant that all the daughters did not take the land, but only two, in accordance with the will. These are the only instances relied on by Mt. Suban of which the proof is documentary.

Several witnesses have been produced who give evidence relating to the instances already mentioned. Other witnesses give evidence of four more instances relied upon by Mt. Suban. The first relates to the self-acquired property of one Kandu, an Arain of this Chak, to which his daughters succeeded; but none of the four witnesses who gave evidence was concerned in this matter; neither Kandu's collaterals, nor his daughters, have come forward; it is manifest that succession may have been in accordance with a will or a gift. It is possible that the proprietary rights in the land may have been acquired by Kandu's widow and gifted by her, for the land in that case would be her own. Then there is the case of one Mohi about which four witnesses have given oral evidence. Mohi died 30 years ago before acquiring proprietary rights in his holding. The presumption is that his widow paid the nazrana and acquired the proprietary rights. The same remarks apply to the next instance, that of Nizam. Here too the nazrana was paid by Nizam's widow who acquired proprietary rights. There is oral evidence that there was a suit relating to this succession, but no document had been produced to show what the nature of the dispute was. In any case, the instance has no evidentiary value. Then there is an instance of a succession to the property of one Nawab; but Nawab was not an Arain. There is also an instance of land which was owned by one Mian Kamal Din, but his land was in Sanda near Lahore and not in Chunian tahsil. Lastly there is the instance of the land of one Kamal Arain to which his daughters are said to have succeeded in spite of a claim put forward by Kamala's collaterals.

It is said that there was litigation in this case which went so far as the High Court, but no documentary evidence has been produced to prove what the circumstances were. It appears from the oral evidence that Kamala died leaving a widow and a daughter Fatima. The land was mutated in favour of the widow who gifted it to her daughter; but here too it appears that the proprietary rights had been acquired by Kamala's widow. The case, therefore, was not one of the exclusion of collaterals by a daughter. Among all these instances, therefore, there is only one in which a daughter took possession of her father's land in preference to a collateral, namely the case of Mohammad Din. That case does not help Mt. Suban, for, as already stated, the mutation in her favour was effected at the instance of her father's brother. This evidence, in my opinion, is manifestly insufficient to discharge the onus placed upon Mt. Suban of proving that, in spite of the entry in the *riwaj-i-am*, which is clearly against her, she is entitled by the custom governing Arains in the Chunian tahsil to succeed to her father's property in preference to her father's near collaterals.

The evidence on the other side has much more weight. The collaterals rely chiefly upon un rebutted evidence in the form of judicial instances which have enforced the custom stated in the Customary law. The first instance is a judgment by a Subordinate Judge of Lahore, dated 27th February 1931 (Ex. P-2). The parties were Arains of Chak No. 11 in Chunian tahsil, two and a half miles from Chak No. 2. In this case collaterals succeeded against daughters. The learned Subordinate Judge examined a large number of instances and on the evidence decided in favour of the collaterals. Ex. P-3 is a copy of a mutation order passed by the Commissioner of Lahore Division on 29th January 1930. The land in dispute was self-acquired of one Bugga. The Collector had taken the view that Bugga's daughters had a right to succeed to it in preference to his collaterals. Upon the question of the right to succeed, the Commissioner remarked that while it might be the general custom in the Punjab as a whole that daughters were the direct heirs to the self-acquired property of their father, this does not appear to be the custom in the Lahore

district where among Jats and all other tribes, with a few exceptions, daughters are excluded by male lineal descendants, however distant, no distinction being made in this respect between ancestral and acquired property. The order of the Collector was accordingly set aside.

Then there is the judgment of the Subordinate Judge, 1st Class, Lahore, dated 20th December 1928 (Ex. P-4). The parties in that case were Arains of Chak No. 8 in Chunian tahsil and the dispute was between the collaterals of one Khuda Bakhsh and his widow who had gifted the property to his daughters. There is oral evidence that the land was self-acquired; the daughters and the widow at first contested the suit, but ultimately withdrew their claim. Next there is a judgment (Ex. P-5) by the Additional District Judge of Lahore (now Currie, J.), Appeal No. 39 of 1931 (13). The land in dispute in this case was in Chak No. 2. It had belonged to one Ilam Din who was succeeded by his mother Natho. Mt. Natho gifted the property by a registered deed to her daughter Fatima. Ilam Din's cousins sued for a declaration that the gift would not affect their reversionary rights, and one of the issues struck was whether Mt. Fatima was entitled by the custom prevalent amongst Arains of the Lahore district to succeed to the property left by Ilam Din in preference to the collaterals of her husband, the position of the parties being that of a sister claiming to succeed to the estate of her brother as against his first cousin. The learned Additional District Judge delivered an exhaustive judgment deciding in favour of the collaterals largely upon the evidence of the entries in the *riwaj-i-am* to which reference has already been made. This judgment was, however, reversed on appeal by my learned brother Jai Lal, J. in Civil Appeal No. 909 of 1932 (7); and a L. P. A. No. 15 of 1934 (14) against his judgment was dismissed by this Court on 8th January 1935. Another judgment relied upon by the collaterals is that of the Munsif, 1st Class, Chunian, in suit No. 638 of 1918, decided on 10th December 1918. (P. W. 6-1).

The dispute here was between a sister and collaterals. The parties were Arains

13. Dulla v. Mt. Natho, Appeal No. 39 of 1931 decided on 9th April 1932.

14. Waras v. Fatma 1935 Lah 592=155 I C 841.

of Chak No. 9 in Chunian Tahsil, two and a half miles from Chak No. 2. The property was self-acquired. The decision was that collaterals excluded a sister. But here the right of a daughter to succeed in preference to collaterals was not in dispute. In Civil Appeal No. 29 of 1928, decided by the District Judge of Lahore (now Blacker, J.), on 15th October 1928, the parties were Arains of Chak No. 10 in Chunian Tahsil. The District Judge in this case affirmed the judgment of the Subordinate Judge, Lahore, on the question whether a daughter excluded collaterals. The collaterals also relied upon a mutation order (Ex. P-7) relating to land in Chak No. 13 of Chunian Tahsil. The land belonged to one Imam Din, an Arain. When he died he was succeeded by his widow Mt. Janat Bibi, and on her death the property which had been acquired by Imam Din was inherited by Imam Din's brother and nephews, Imam Din's daughters being given no share: Ex. P-7 and statement of P. W. 5. Lastly there is an instance about which the evidence is merely the oral statement of the witness Ismail, P. W. 4. His statement is that one Ahmad Arain of Nizampur, four miles from the parties' village, died and was succeeded by his collaterals although his daughter Mt. Aishan was alive.

Of the judgments cited by the learned Additional District Judge in support of his finding in favour of the present respondent, the first one, 25 P R 1882 (1), has no applicability. It related to Bhatti Arains of Lahore city and the decision was that it was not proved that the parties followed a customary rule of succession opposed to Mahomedan law. 174 P R 1889 (2) dealt with a dispute between a sister and the collaterals of the last male proprietor. The parties were Gehlon Arains of Lahore Tahsil. The decision in 180 P R 1888 (3) was upon a dispute between a sister of the last male owner and his niece and the parties were not of Chunian Tahsil but of Shahdara, close to Lahore. In 89 I C 351 (4) Martineau, J., decided in favour of a half sister against her mother's father's brother. It is not shown by the judgment or the report to which part of Lahore District the parties belonged, but the learned Judge appears to have based his decision on the statement in the answer to question 71 of the Customary law that among Arains,

sisters of a childless proprietor exclude a collateral in the inheritance of ancestral property. The dispute decided by 10 Lah 422 (5) concerned the rights not of a daughter but of a sister of the last male owner and the parties were Arains of Mauza Sanda Kalan, a village close to Lahore and therefore presumably within the exception noted in question 61 in the Customary law. In 14 Lah 651 (6), Harrison and Addison, JJ. applied this exception to Arains of Karol village in the proximity of Lahore. The last judgment relied on by the Additional District Judge had not been delivered when the Subordinate Judge decided the appeal. That judgment is of course a judicial instance in favour of the collaterals.

The judgment relating to the rights of sisters have no bearing on the question now in issue for, as was emphatically laid down in a Full Bench of the Punjab Chief Court in 134 P R 1907 (15), the position of a sister of a male proprietor without issue cannot be assimilated for purposes of inheritance to that of a daughter even as regards self-acquired property. We are here dealing with Arains of Chunian Tahsil. The Manual of Customary law drawn up by Mr. Bolster has frequently been accepted as an authority by this Court, see e. g., 14 Lah 651 (6) and 10 Lah 422 (5), and so far as I am aware its accuracy has never been questioned. The answers to questions 61 and 62 by themselves show that so far as the rights of daughters are concerned the Arains in Lahore district follow a custom which is both local and tribal and they state the rule to be that, except in villages in the proximity of Lahore (the list, which does not appear in the *riwaj-i-am* is not to be regarded as exhaustive), daughters of childless male proprietors are excluded by collaterals howsoever distant in succession to ancestral and self-acquired property. The instances of succession by daughters given in the appendix to the Customary Law under question 61 all relate to residents of Lahore Tahsil. As was noticed in the case *Dulla v. Nathoo* (13), to which I have referred above not a single instance of such succession among Arains of Chunian Tahsil is there cited.

In the circumstances I am unable to see how the fact that in other districts

Arains or other agriculturists follow a definite custom is relevant. Numerous exceptions have been found in Amritsar and Jullundur districts to the rule most commonly followed by the tribes of the Punjab that daughters of sonless proprietors exclude collaterals, but even if there were no such exceptions proved in any other district, the onus would still lie on the daughter in the present case, in view of the entry in the Customary Law, to prove by evidence produced in the trial that she had a right superior to her father's collaterals. I can see no reason why the onus should be regarded as one more easily discharged in a case like the present one than in any other. There is no legal sanctity attached to a custom which favours females nor any abhorrence to one which excludes them from inheritance. Nor do I at present see any reason why the correctness of a *riwaj-i-am* should be doubted because it does not show that women were consulted when the statements of the land owners were recorded. The proprietary body as a whole is male. It knows and applies its customary rules. In the introduction to the Customary Law of the Lahore district Mr. Bolster has drawn particular attention to the question of the rights of daughters to succeed in the following passage.

In 1856 daughters were completely excluded from inheritance by collaterals: 12 years later, in the 1868 settlement, there appears among the Arains of the Lahore and Kasur Tahsils and the Awans and Rajputs of the Lahore Tahsil a relaxation in their favour allowing parents to make them gifts of small areas; finally in the 1892 settlement and now among Rajputs Dogras and Arains daughters are held entitled to exclude collaterals five degrees remote, while in the neighbourhood of Lahore, where disturbing causes naturally have largest play and customs change much more rapidly than among the Arains of the Sutlej bank, Arain daughters exclude their cousins in the first degree.

Mr. Bolster's Manual has widened this exception. It is possible that if his Manual is revised at a future settlement the entry about Arains' daughters will be still more favourable to them. It is in any case obvious that the compiler of the Manual of 1916 was not deliberately closing his eyes to the rights of females. Nevertheless Mr. Bolster noted (note to answer No. 61)

the feeling of the custom excluding daughters is so strict that it gives even members of the village community a prior right of succession, while in the case of the agnatic line becoming extinct escheat to Government is recognized.

15. *Hamira v. Ram Singh*, (1907) 134 P R 1907 = 74 P L R 1903 = 85 P W R 1907 (F B).

In the present case it is to me very clear that the evidence produced by Mt. Suban in this case did not discharge the onus that lay upon her and I would therefore accept this appeal, set aside the judgment of the learned Additional Judge and restore that of the trial Court with costs throughout.

Jai Lal, J.—I regret I am unable to agree with the conclusion of my learned brother. The question is whether according to custom among the Arains of village Abbotabad in the Chunian Tahsil of the Lahore District a daughter succeeds to the self acquired property of her sonless father in preference to the near collaterals. The mutation was made in favour of the daughter and an appeal by the collaterals was dismissed. Consequently they instituted the suit out of which this appeal has arisen for possession of the land in suit. The burden was placed on the daughter. The trial Court held that it had not been discharged, but the District Judge on appeal decided in favour of the daughter and granted a certificate to the plaintiffs who have appealed to this Court. The question of burden of proof and the quantum of evidence that is necessary to discharge that burden has an important bearing on the decision of this case. Ordinarily the initial burden must be on the plaintiff. Moreover, according to the personal law of the parties, the daughter would be entitled to inherit the property in preference to the plaintiffs, the collaterals. But it is claimed on behalf of the appellants that a presumption arises against the daughter in view of the statement of the custom in the Customary Law of the Lahore District prepared in 1912-16 by the Settlement Officer, Mr. Bolster. There is no doubt that a statement of custom made in the Customary Law carries with it the presumption of correctness, and therefore the appellants are justified in claiming that under the circumstances the Court should start with a presumption in their favour. In the Customary law relied upon by the appellants the statement of the custom is to be found in answer to question No. 61 which relates to succession of daughters. The answer is :

Among Jats daughters are excluded by male lineal descendants through males however distant. All other tribes follow the same custom except that among Arains in the proximity of

Lahore (villages of Harbanspura . . .) daughters of sonless proprietors exclude agnates.

The statement of the customs, therefore, is that among the Arains, except those in the proximity of Lahore, the male lineal descendants through males, however distant, exclude daughters. At p. 4 of the introduction however, Mr. Bolster makes the following significant remark :

In 1856 daughters were absolutely excluded from inheritance by collaterals; 12 years later in the 1868 settlement there appears among the Arains of the Lahore and Kasur Tahsils and the Awans and Rajputs of the Lahore Tahsil a relaxation in their favour allowing parents to make them gifts of small areas; finally in the 1892 settlement and now among Rajputs, Dogras and Arains daughters are held entitled to exclude collaterals five degrees remote, while in the neighbourhood of Lahore, where disturbing causes naturally have largest play and customs change much more rapidly than among the Arains of the Sutlej bank, Arain daughters exclude their cousins in the first degree.

Now, this remark shows that the statement of custom made in reply to question No. 61, has not been accepted to be correct by Mr. Bolster because the statement in the answer is that the daughters are excluded by male lineal descendants through males, however distant, while according to Mr. Bolster the custom is that collaterals five degree remote are excluded by daughters. This necessarily materially affects the value to be placed on the answer to question No. 61. Moreover we are concerned in this case with the self-acquired property of the deceased male proprietor and with regard to such property even in the tribes governed by custom a daughter is generally preferred to the collaterals (see para. 23 of Rattigan's Digest of Customary Law). In making this remark I am not unmindful of the observations of Robertson, J., in 41 P R 1906 (9) and also of their Lordships of the Privy Council in 45 Cal 450 (8), referred to by my learned brother. But I am of opinion that this aspect of the case has material bearing on the quantum of evidence that is required to rebut the presumption that arises from the statement of the custom in the Customary law, and this in spite of the fact that in the Customary Law concerned it is stated that there is no difference in this respect between the self-acquired and ancestral property.

The principle underlying the restrictions on alienation by sonless proprietors

of ancestral property is that such property should ordinarily revert to the descendants of the common ancestor. But the same considerations do not apply to self acquired property as no question of reversion arises in respect of it. This, I believe, is the reason for the rule propounded in para 23 of Rattigan's Customary Law. In 1935 Lah 434 (16), a Division Bench of this Court held that the opinion of the Settlement Officer who has compiled the Customary law is relevant in estimating the value of the statement of a particular custom. Sale, J., with whom I concurred has recently expressed the same opinion in another case.

In 174 P R 1889 (2), a question arose before a Division Bench of the Chief Court of the Punjab, whether a married sister of an Arain of Ghelan section residing in Babo Sabu in the Lahore Tahsil inherits the ancestral property of her brother in preference to his first cousins. The learned Judges were not satisfied as to the sufficiency of the enquiry made in the trial Court and remanded the case for "a fuller enquiry into the custom whether among Arains of the Lahore district collaterals of an Arain who dies childless exclude his sister or not." Such an enquiry was made by Mr. Harris, District Judge, and his report was in favour of the sister. His conclusions were accepted by the Chief Court and the appeal was decided in favour of the sister. The fact that the enquiry was made by Mr. Harris and the nature of the report has been mentioned at p. 426 by a Division Bench of this Court in 10 Lah 422 (5), to which reference will again be made hereafter. There are other cases relating to the Arains of Lahore decided by the Chief Court of the Punjab which support the claims of daughters and sisters against the collaterals. They are, in my opinion, sufficient to shift the burden to the collaterals if it be held that the initial burden was on the daughter in this case on account of a statement of the custom in the Customary law. In my opinion the Courts should place greater value on judicial decisions than the statement of a custom in the Customary law unless there is reason to hold that the custom has in the meantime changed. In any

case the burden on the daughter under the circumstances is light. Now, assuming that the burden is still on the daughter I consider that it has been amply discharged in this case. I have already referred to 174 P R 1889 (2), in which a Division Bench of the Chief Court held after a full enquiry into the matter that among the Arains of the Lahore district sisters exclude first cousins. In the present case the contest is between the daughters and the first cousins and the sons of a first cousin, but my learned brother has cited 134 P R 1907 (15) in support of his remark that the position of a sister of a male proprietor without issue cannot be assimilated for the purpose of inheritance to that of a daughter even as regards self-acquired property and that, therefore, the judgments relating to the rights of sisters have no bearing on the question now in issue. But, in the matter of inheritance, a daughter is a more favoured person than a sister, and if instances of exclusion of cousins of the deceased by sisters can be established then there are greater reasons for holding that daughters exclude the collaterals; moreover it is provided in the Customary law of the Lahore district that sisters have the same rights as daughters in this respect. Therefore instances in favour of sisters must be deemed to be equally in favour of daughters and vice versa.

In Civil Appeal No. 909 of 1932 (7) I had to deal with a dispute between a sister of the deceased sonless proprietor, an Arain, and his cousin with regard to ancestral property. The parties belonged to village Abbotabad, i.e., the same village to which the parties in this case belong, and after considering the previous case law on the subject and the instances proved by the parties, I came to the conclusion that the sister had discharged the burden placed on her to prove that she was entitled to exclude the first cousins of her brother in respect of ancestral property. It is interesting to remark that that case was decided originally by the same trial Judge who has decided this case and his decision was in favour of the sister, but it was set aside on appeal by the Additional District Judge, Mr. Currie, and this fact must necessarily have heavily weighed with him in deciding the present case against the daughters. The Additional District Judge has fol-

16. Mt. Sukh Devi v. Fakir Singh, 1935 Lah 434.

lowed my decision in the present case and has set aside the decree of the trial Judge. Now, in view of the importance of the question involved, I certified the case to be a fit one for a Letters Patent appeal, and a Letters Patent Bench has affirmed my decision. Therefore it has been now held by this Court that there is a custom in the Abbotabad village whereby a sister excludes first cousins in respect of the ancestral property of her sonless brother. The same rule should necessarily govern the case of a daughter specially in respect of self-acquired property of her father. A perusal of the judgment of the Letters Patent Bench shows that the learned Judges considered the case on its merits and came to the same conclusion that I had reached. In support of my conclusion, in addition to some considerations of a general nature, I had quoted instances of succession of sisters and daughters in the village of Abbotabad.

Now, in the present case, two instances of succession by sisters and daughters in preference to near collaterals were proved in this village in addition to some from other villages and in stating this I take no account of instances which were proved by oral evidence only but only of those which were supported by mutations. Ex. D-3 relates to mutation of land of one Muhammad Din, an Arain of this village; it was in favour of his daughter on his death in the presence of Muhammad Din's brother. My learned brother would not consider this as a good instance because Muhammad Din's brother Chiragh himself had the mutation made. I venture to think that this fact is no ground for rejecting this instance; on the other hand, it shows that Chiragh recognized that he had no right to inherit the land in the presence of the daughter.

The second instance is Ex. D-4 which relates to the land of another Arain of this village named Chiragh, and his land was mutated in favour of his daughter Bhagan in preference to his collaterals, but my learned brother does not consider this to be a good instance as the circumstances of the case have not been disclosed. In my opinion if there were any other circumstances which needed explanation, it was for the plaintiffs in this case to prove them and in the absence of any such proof the mutation

must be considered to be a good instance in favour of the daughter. Also the fact that out of three daughters only two got the land is no ground for holding that the instance is not applicable to this case. The fact remains that the collaterals were excluded by daughters. Nor does the fact that the property was an occupancy tenancy affect the question, because no different rule of succession to a holding of this description has been established. There are other instances which are not cases of pure succession but of alienations and some of them relate to different villages. I do not propose to discuss them.

Against these two instances not a single instance from this village to the contrary has been proved by the plaintiffs. They have, on the other hand, relied upon instances from other villages, which, in my opinion, under the circumstances, are of no value. The case of *Mt. Natha v. Dulla* (17), decided by the Letters Patent Bench is another instance in support of the daughter. The original decision in that case was based on other instances from this village. I am further of opinion that a decision given by this Court or the Chief Court of the Punjab as to the existence or non-existence of a custom, after detailed enquiry held on a contest between the parties, ought ordinarily to be almost conclusive evidence of the existence or non-existence of the custom concerned, and must override the statement to the contrary of the custom in the Customary law and it is only in exceptional circumstances that such decisions should not be accepted as decisive of the question.

There is no good reason to ignore the large number of instances in favour of daughters which are cited in the Customary Law and which relate to the Lahore Tahsil on the ground that they do not relate to the Chunian Tahsil. It must be remembered that custom is primarily tribal and not local, and the division of a district into tahsils is an artificial division made mainly for revenue and administrative purposes. These instances are an important indication of the prevailing tendency in favour of daughters. This tendency to favour daughters and sisters is specially to be found among the

17. L. P. A. from Appeal No. 39 of 1931, Decided on 9th April 1932.

Arains [see as to this 10 Lah 422 (5)] and is noticed in the Introduction to the Customary Law prepared by Mr. Bolster. "In the neighbourhood of Lahore", he says,

disturbing causes naturally have largest play and customs change much more rapidly than among the Arains of the Sutlej bank.

It may be, as observed by my learned brother, that when enquiry is made at the next settlement, probably the custom will be more favourable to the daughters. But, it is not necessary to wait till the next settlement, as it is our duty to make a judicial enquiry to ascertain the custom and if proved to give effect to it. The Customary Law does not create the custom; it merely records the fact of its existence. Moreover, an inquiry made by the Court is more scientific than the inquiry of the Settlement Officer before whom the females are not represented at all and instances are found where the statement of the custom reflects rather the wish of the males—specially the more influential of them—rather than the existing facts.

The rapid growth of facility of communications, spread of education, and breaking of tribal bonds have all materially affected the position of the daughters favourably, and it is not, therefore, surprising that, whereas in 1912 in villages which were in the proximity of Lahore, daughters of sonless proprietors excluded agnates, the same has happened in villages which are in the neighbourhood of the villages mentioned in the answer to Question No. 61, as appears from the reported cases. In 10 Lah 422 (5) the custom of exclusion of collaterals by daughters was found to exist in the case of a village which is not one of those villages specified in the answer. In 14 Lah 651 (6), Addison, J., delivering the judgment of the Division Bench, held that a daughter of a sonless proprietor in village Karol in the District of Sheikhpura excluded collaterals. The case related to Arains and the village in question was originally in the Lahore District, but has since been transferred to Sheikhpura. It is in the neighbourhood of Lahore.

My learned brother has referred to some decisions of subordinate Courts including two of District Judges. One of these two was set aside by me on appeal

and it is not necessary to criticise it now. The other is by Mr. Blacker in Civil Appeal No. 29 of 1928. That case related to Arains of Chak No. 10 in Chunian Tahsil, but it appears from the judgment that the contest in that case was between the widow and a daughter of a predeceased son of one Karam Din on the one hand and the sons and the great-grandsons of Karam Din on the other. It is obvious that that case can be of no help in the decision of the present case. It may also be mentioned that one ground of Mr. Blacker's decision, that the list of the villages mentioned in answer to Question No. 61 is exhaustive, is contrary both to 10 Lah 422 (5) and 14 Lah 651 (6), and I believe my learned brother also does not support it. The remaining cases were decided by Subordinate Judges, and one of them was decided on confession of judgment by the defendant (see judgment in Suit No. 33 of 1928 by Lala Dewan Chand, Subordinate Judge, First Class, Lahore, Ex. P-4).

The judgment of the Commissioner of Lahore, Mr. Craik, referred to by my learned brother also is not of much value because the Commissioner was bound to give effect to the statement in the Customary Law. Against that we have the fact that the Revenue Officers including the appellate Court in the present case decided in favour of the daughter. All these cases decided in favour of the collaterals relate to other villages and not to this village. I do not wish to repeat here the reasons on which I based my conclusion in Civil Appeal No. 909 of 1932 (7) or what has already been stated in the previous decisions of this Court to which reference has already been made. In my opinion, if the case be considered on the evidence as to custom in this village alone, it must be decided in favour of the daughter. Even if it be considered on the basis of the tendency among the Arains of the Lahore District or of those who reside in the villages in the neighbourhood of Lahore, still it must be decided in favour of the daughter and in this respect there is no reason to differentiate between one Tahsil and the other, because the custom is generally tribal, and if it is local it generally relates to the village, but seldom, if ever, to the more recent and artificial divisions of the Tahsil. I would dismiss the appeal with costs.

Addison, J.—This appeal has come before me on a difference of opinion between Coldstream and Jai Lal, JJ. The question involved is whether a daughter of an Arain succeeds to the self-acquired property of her father after the death of her mother in Chak No. 2 (Abbotabad) in the Chunian Tahsil of the Lahore District, or whether the nephews and grand-nephews of the last male owner succeed. Coldstream, J., decided in favour of the collaterals and Jai Lal J., in favour of the daughter. I may say at once that I am in full agreement with the judgment of Coldstream J. According to Jai Lal J., there are two proved instances in favour of the daughter, apart from certain judicial cases which he has also relied on. The first instance relates to the succession of a daughter of one Muhammad Din, an Arain of this village, to her father's land in the presence of her uncle Chiragh Din. Coldstream, J., did not consider this instance of much value and I am in agreement with him. The mutation, as first entered up, showed Chiragh Din as the natural heir, but at the time of sanction . . . Chiragh appeared before the Revenue Officer and said that he wanted the land mutated in favour of his niece. This practically amounted to a gift by Chiragh, in which case it obviously is not of much value.

The second instance relied upon by Jai Lal J., is Ex. D-4., a mutation of the land of another Arain of this village named Chiragh in favour of some of his daughters, a married daughter Mt. Bakhtawari being excluded. Another daughter, Mt. Karam Bhari, married subsequently and her share went to the other daughters on appeal. This, however, was not a case of succession to ordinary land as Chiragh was merely an occupancy tenant under the Government in the Colony and to this succession the provisions of the Colonisation Act applied. For this reason, and also because married daughters were excluded it is obvious that this is not an instance in favour of absolute succession of daughters but rather the opposite. This means that there is only one doubtful instance in favour of daughters established by documentary evidence on this record apart from judicial instances. Jai Lal, J., also relied upon the assumption that daughters are generally preferred to collaterals in the province and in this

connection he quoted para. 23 of Rattigan's Digest of Customary Law. It has frequently however been laid down that there is no such thing as a general custom in the Punjab, and it is necessary in every case to prove that the parties are governed by custom and what the custom is. To hold otherwise would amount to manifest injustice as custom in the Punjab is more local than tribal, though it may be both, and if there is a custom prevalent in a small area or in a small tribe, that custom will always be held not proved because in most other areas or amongst other tribes the custom is otherwise.

There is no doubt that in the present case, as is shown in the preceding judgments, the Customary Law of this district is against daughters of Arains except in a small tract near the city of Lahore. The tahsil of Chunian is the most distant tahsil in the Lahore district from Lahore city. Jai Lal, J., relied upon the decision in 174 P R 1889 (2), where a married sister of an Arain residing in Babu Sabu in the Lahore Tahsil was held entitled to inherit the ancestral property of her brother in preference to his first cousins. As pointed out in the judgment of Coldstream, J., the case of a sister differs from that of a daughter and custom cannot be decided by analogy. He also relied upon a case decided by himself, C. A. 909 of 1932 (7), where it was held that a sister in the village Abbotabad excluded her cousin with regard to succession to ancestral property of her brother, the parties being Arains. There was a Letters Patent appeal from this judgment which was dismissed on the ground that custom was tribal rather than local and that therefore the exception given in the answer to question 61 about Arains in the proximity of Lahore having a different custom to the other Arains in the district had not much importance, although Tahsil Chunian is very distant from Lahore city.

This case is not strictly in point being the case of a sister. But even if it be held to be in point, it is the one judicial instance which is in favour of a sister or daughter in Tahsil Chunian. I am not in agreement, with all respect, with the opinion of Jai Lal, J., that Courts should place greater value on judicial decisions than on the statement of a custom in the

Customary Law. A judicial decision depends on the evidence produced in the case which may be a badly conducted one. A decision on a question of custom is not a judgment in rem; it is merely an instance, relevant under S. 13, Evidence Act, of a particular custom being asserted or denied, or possibly recognised, though the word 'recognised' may mean recognised by the parties to a particular transaction rather than by the Courts. In fact, Jai Lal, J., has gone further in a later portion of his judgment and stated that a decision given by this Court or the Chief Court of the Punjab as to the existence or non-existence of a custom ought ordinarily to be almost conclusive evidence of the existence or non-existence of the custom concerned, and must overrule the statement to the contrary of the custom in the Customary law and it is only in exceptional circumstances that such decisions should not be accepted as decisive of the question. This, with all respect, appears to me to overrule such decisions as 45 P R 1917 (11), and many other decisions of this Court, as well as to go against the provisions of the Evidence Act.

Against the daughter there are not only all the Customary Laws of the Lahore district, but there is other evidence as well. Ex. P-3 is a copy of a mutation order passed by the Commissioner of Lahore on 29th January 1930. The land in dispute was self acquired property of one Bagga. The Collector took the view, against the Customary Law of the district, that Bagga's daughters were entitled to succeed in preference to his collaterals. The Commissioner accepted the appeal and reversed this decision, remarking that while it might be general by the custom in the Punjab as a whole, this did not appear to be so in the Lahore district, no distinction being made in this respect between ancestral and acquired property. The second instance in Ex. P-7, related to land in Chak No. 13 of Chunian Tahsil. The land belonged to Iman Din, an Arain, who was succeeded by his widow Mt. Jannat Bibi. On her death the property passed to Iman Din's brother and nephews, his daughters being excluded. These are two weighty instances. The instances as to which there is no documentary evidence, I do not propose to discuss.

I come now to the judicial instances against the daughters. Ex. P-2 is a judgment of the Subordinate Judge of Lahore dated 27th February 1931, the parties being Arains of Chak No. 11 in Chunian Tahsil, two and a half miles from Chak No. 2, the village concerned in the present suit. In this case the collaterals succeeded against daughters. Another judicial instance is Ex. P. 4, the decision of a Subordinate Judge First Class, Lahore, dated 20th December 1928. The parties in that case were Arains of a neighbouring Chak No. 8 in the Chunian Tahsil. The dispute was between the collaterals of Khuda Bakhsh and his widow who had gifted the property to her daughters on the ground that she was merely accelerating succession. The land in that case was self-acquired. The collaterals brought the suit which was first contested by the daughters and the widow, but they ultimately withdrew their defence and a decree was passed in favour of the collaterals. These are two good judicial instances. Next comes a judgment (Ex. P-5) of the Additional District Judge of Lahore, Appeal No. 39 of 1931 (13). He decided against the sister. This is the case which came before Jai Lal, J., in Civil Appeal No. 909 of 1932 (7), and which ultimately went to a Letters Patent Bench. I have already sufficiently dealt with this case.

I might here mention another judgment in suit No. 638 of 1918, decided on 10th December 1918, by a Munsif, First Class of Tahsil Chunian. This is a case where it was held that collaterals excluded the sister so that it was decided in the opposite sense to the one immediately referred to above. The parties were Arains of Chak No. 9 in the Chunian Tahsil, two and a half miles from Chak No. 2. Next comes another case of daughters (Civil Appeal No. 29 of 1928) decided by the District Judge of Lahore on 15th October 1928, the parties being Arains of Chak No. 10 in Chunian Tahsil. The District Judge agreed with the Subordinate Judge that daughters did not exclude collaterals. Admittedly 10 Lab 422 (5) does not help the case for the daughters as all that was held in it was that the list of eighteen villages in the proximity of Lahore referred to in sub-cl. (1) of the answer to question 61 of the Customary law of 1916 was not

exhaustive and that it had been established that the same rule applied to village Sande Kalan, which was also like the eighteen villages mentioned in the proximity of Lahore. Similarly 14 Lah 651 (6) took the same view. These two cases were decided in accordance with the statement of custom in the Customary Law and they only applied the exception given in sub-cl. (1) to answer 61, to two other villages near Lahore City and not to villages in the Chunian Tahsil, the most distant part of the district from the city. The evidence is thus overwhelmingly against the daughters and I therefore, agreeing with Coldstream, J., accept this appeal, set aside the judgment of the learned Additional District Judge and restore that of the trial Court with costs throughout.

B.D./R.K.

Appeal accepted.

* A. I. R. 1936 Lahore 429

COLDSTREAM, J.

Emperor.

v.

Atta Ullah Shah Bukhari — Respondent.

Criminal Misc. No. 182 of 1935, Decided on 11th November 1935, from judgment of Sess. Judge, Gurdaspur, D/- 6th June 1935.

(a) Criminal Trial—Judgment—Expunging remarks in judgment—Extraordinary character of jurisdiction to be exercised with caution—Lower Courts should generally be allowed to exercise their jurisdiction freely and fearlessly.

A High Court has an inherent power to expunge a portion of a judgment by an inferior Court. The power is unbounded by the law, which expressly gives the Court authority to make "such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice." On the other hand, this jurisdiction has always been regarded by the High Courts as one of an extraordinary character to be exercised with care and caution in exceptional cases, because it is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by High Court and because, in weighing evidence and in arriving at conclusions on questions of fact, lower Courts have often to make remarks which reflect adversely on the character of witnesses: 1928 Lah 740, *Ref.* [P 481 C 2]

* (b) Criminal Trial—Judgment—Expunging remarks from judgment—Jurisdiction how should be exercised—Passages based on no or little evidence, remarks against persons who are not party or who are not heard should be deleted—Jurisdiction is not limited

to such cases only — Remarks damaging character and wholly irrelevant to point in issue, so also judgments couched in unjudicious language should also be deleted.

It is the duty of the High Court, in order to prevent abuse of the process of the Courts, and secure the ends of justice, to delete passages commenting adversely upon a person who is not a party to the proceedings and has not had a fair opportunity of being heard and also to delete such passages when they are based upon no evidence, or evidence not properly upon the record. But the power to expunge is not limited to such cases only. It is also desirable that a judgment once delivered should remain in the shape in which it was originally published, and although the practice should not be extended to exercise this peculiar power beyond limits there appears to be no good reason why it should not be used to delete passages which, though based on evidence, damage the character of a person, and are wholly irrelevant to any point in issue and which a Court has unnecessarily gone out of its way to include in a judgment. Further where High Court's notice has been drawn to a judgment which appears to it to be couched in language injudicious and uncalled for, High Court can and ought to express its opinion in the matter whether any passage is or is not ultimately to be expunged: 1933 Sind 91, *Foll.*; 1929 Sind 248; 1927 All 193; 1925 Lah 187 and 392, *Criticised.* [P 483 C 1]

* (c) Criminal Trial—Judgment—Proceedings assuming communal aspect—Language should not promote communal enmity—Proceedings and judgment should be careful.

In cases which have assumed a communal aspect, the proceedings in Courts and the language of their judgments necessitate special care and should not themselves promote the feelings of enmity, the promotion of which by others it is their duty to punish under the law. [P 483 C 1, 2]

(d) Criminal Trial—Evidence—No prosecution in Court is not evidence that action was not taken by police.

The fact that there is no prosecution in Court is not evidence that no action whatever is taken by the police regarding an offence. [P 483 C 2]

Ram Lal—for the Crown.

Mazhar Ali Azhar and Muhammad Sharif—for Respondent.

Judgment.—This judgment will dispose of the two petitions for revision Nos. 182 and No. 225 of 1935. In 1891 (I take the date and the following historical facts here stated from 'Chiefs and Families of note in the Punjab,' published under the order of the Punjab Government) Mirza Ghulam Ahmad of Qadian in Gurdaspur District, a grandson of Ghulam Murtaza, (a General of the Sikh Darbar) founded a religious movement and proclaimed himself to be the promised Messiah of the Muslim Faith. He won over a large number of people to his tenets and his followers, who were

known as Qadianis, Mirzais or Ahmadis, numbered some hundreds of thousands in the Punjab and elsewhere. The Mirza was the author of many works in Arabic, Persian and Urdu in which he combated the doctrines of Jihad. 'His life,' to quote the book mentioned:

was for many years a stormy one as he was constantly involved in disputes and litigation with his religious opponents. By the date of his death, which took place in 1908, he had attained a position in which he commanded the respect even of those who disagreed with his views.

He was succeeded as head of the sect by Maulvi Nur-ud-Din, on whose death, in 1914, Mirza Ghulam Ahmad's son Mirza Bashir-ud-Din Mahmud Ahmad was elected as his spiritual successor or Khalifa. The number of people professing the Qadiani creed has increased considerably. Their headquarters remain in Qadian, the whole of which according to the defence evidence, belongs to the Mirza Sahib's family in proprietary rights. Of the population of Qadian, about 9,000, some 8,000 are said to be Qadianis by religion, the other Muhammadans numbering 400 or 500. The Khalifa and his disciples naturally exercise great influence in Qadian and are in a position to bring strong social pressure to bear upon individual residents of the town. It is not disputed that from the time when the new religion was founded the claim of the Mirza Sahib to be the promised Messiah has offended and been resented by the orthodox Muhammadans, between whom and the Qadianis there has been constant friction evidenced by published writings, often of an abusive character, on both sides. In 1923 there was a conference of orthodox Muhammadans at Qadian, which was brought to an end by rowdyism. In 1934 the Ahrars, a body of Muhammadans, who take an active interest in the spread of their religion and some of whom had recently settled in Qadian, decided to hold another conference in Qadian. At that time dissension between them and the Qadianis had reached an acute stage. The Ahrars obtained permission from one Ishar Singh, a resident of Qadian, to hold it on land in his possession, but the Qadianis prevented this by building a wall on the one side and round the site. Unable to get a site in Qadian, the Ahrars held the conference to be held on the land of the Dayanand Anglo-

Vedic High School premises in Rajada, a village a mile from Qadian. Here the conference began on 21st October 1934, on the evening of which day Sayyed Atta Ullah Shah Bukhari, the president, addressed an audience of many thousands for five hours. For making this speech, which was a bitter attack in scurrilous language upon the Qadianis, their leaders and their religion, Sayyed Atta Ullah Shah was prosecuted under S. 153-A, I.P.C. At his trial he pleaded that his speech had been wrongly reported and that his intention had been to spread the true religion of Islam.

It was pleaded by his counsel that his object was to put an end to a reign of terror prevailing in Qadian, where all sorts of crimes were being committed and where an independent administration had been set up by the Mirzais, who had their own Courts of justice. Much evidence was produced to prove the truth of this assertion as well as evidence to show that Mirza Ghulam Ahmad had used abusive language towards those who combated his doctrines, Mirza Bashir-ud-Din Mahmud was called as a defence witness and subjected to a lengthy examination. A mass of wholly irrelevant evidence relating to the tenets of the two religions was brought on to the record, and in the pretence of a plea of justification, the attack upon the Qadianis and their religion was continued in Court. S. Atta Ullah Shah was convicted and sentenced to six months' rigorous imprisonment. He appealed. The learned Sessions Judge, Gurdaspur, found it proved that S. Atta Ullah Shah's intention had been to criticise the Mirza Sahib and his followers and also to rouse his hearers to take action against the Qadianis and redress their own wrongs, but that he had "said things which could have no other effect but to rouse hatred of the Ahmadis in the minds of his hearers," that "the professions of peace in his speech alternated with abuse and wit of a very low order, which could only induce the audience to hate the Ahmadis," and that he had gone beyond the bounds of legitimate criticism and was therefore liable under the law. It is to be presumed that he found that the explanation to S. 153-A, had no application. At the same time, he found that the speech contained passages "which might be called very just criticism of the doings of the

Mirza." He maintained the conviction but, to quote his judgment, taking into account the conditions obtaining in Qadian and the extreme resentment which the millions of Muhammadans of India experienced on being called unbelievers and swines and their women being compared to bitches, he considered that the offence committed was merely technical and reduced the sentence to imprisonment for the day. In the course of his judgment the learned Judge referred to a number of incidents in Qadian about which evidence had been produced in defence to prove the truth of the allegations in the speech about the state of affairs in that place and made observations derogatory to the Khalifa and his followers and condemning the behaviour of the Government authorities. He delivered judgment on 6th June 1935. The Crown did not apply for an enhancement of the sentence, a course which would have laid the Sessions Judge's judgment open to revision from all points of view, but, on 9th August, the Government Advocate presented the petition No. 182 asking this Court, in exercise of its powers under S. 561-A, Criminal P. C., to expunge certain of these observations from the judgment on the ground that they were not based on evidence, were without foundation and were untrue in fact, and cast a serious reflection upon Government. The petition also prayed that:

in any case, if necessary, the case be remitted for further enquiry so as to afford an opportunity to Government to show that the remarks of the learned Sessions Judge were without foundation and substance.

A month later, Captain Mirza Sharif Ahmad, brother of Mirza Bashir-ud-Din Mahmud, submitted the petition No. 225 asking for a large portion of the judgment to be expunged on the ground that the retention of it would be an abuse of the process of the law, and a denial of justice to the petitioner, who was not a party to the case and was not in a position to produce evidence to rebut that put forward by Sayyed Atta Ullah Shah in defence. The petition No. 182 was accompanied by an affidavit by the Chief Secretary to Government denying the truth of the observations of the Sessions Judge and stating the true facts. The petition No. 225 was also accompanied by an affidavit by the petitioner disputing the correctness of the observations objected to and describing the judgment as more offensive than the speech for which

Sayyed Atta Ullah Shah was prosecuted. The Crown had given notice to Sayyed Atta Ullah Shah of its petition and as some of the passages sought to be expunged put forward grounds for the leniency with which he had been treated, his counsel was permitted to reply to the arguments addressed to me in support of both petitions. That a High Court has an inherent power to expunge a portion of a judgment by an inferior Court is now beyond dispute and this power has been frequently exercised by this Court, since S. 561-A was inserted in the Criminal Procedure Code in 1923. The power is unbounded by the law, which expressly gives the Court authority to make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

On the other hand, this jurisdiction has always been regarded by the High Courts as one of an extraordinary character to be exercised with care and caution in exceptional cases, because, as was observed by Tek Chand, J., in 9 Lah 269 (1), it is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by this Court, and because, in weighing evidence and in arriving at conclusions on questions of fact, lower Courts have often to make remarks which reflect adversely on the character of witnesses. The judgments in 5 Lah 476 (2) and 6 Lah 166 (3) and *In the matter of Daly* (1), to which reference has been made above, indicate the principles upon which this Court has acted in expunging objectionable passages. In 5 Lah 476 (2) a Sessions Judge had observed in his judgment that a witness, a police officer, had been guilty of perjury.

The remark was based upon a police diary which was not properly upon the record and in ordering the passage containing it to be expunged Eforde, J., observed that a Judge had no right to test evidence in Court by material which has not been properly made legal evidence, and that if the Judge considered that the witness had lied, he should have asked him for an explanation before charging

1. In the matter of Daly, 1928 Lah 740=109 I O 812=29 Cr L J 620=9 Lah 269.
2. Amar Nath v. Emperor, 1925 Lah 187=85 I O 148=5 Lah 476.
3. Banarsi Das v. Emperor, 1925 Lah 392=89 I O 270=26 Cr L J 1326=6 Lah 166.

him with the crime of perjury. In 6 Lah 166 (3), which was also decided by Eforde, J., a passage in the judgment of a Magistrate was expunged on the grounds that it would be a denial of justice to allow the reflections made upon the character of a person to stand where the person is neither a witness nor a party to the proceedings, and has had no opportunity of being heard, and where the reflections are based upon no legal evidence. In 9 Lah 269 (1), a Magistrate had remarked in his judgment that he was convinced that Daly and other clerks employed with him had been sharing misappropriated money and that Daly had been neglecting his duties in a reckless manner. Daly had been in the witness box and cross-examined at great length and no questions had been put to him by either counsel or by the Court from which it could be inferred that he was privy to the offence for which the accused was being tried. The learned Judge found that there was no justification for holding that Daly had shared the money with the accused and other clerks, and he expunged the remarks to this effect. He found on the other hand that there was evidence from which the inference that Daly was grossly negligent in the discharge of his duties could have been drawn, and he declined to expunge the Magistrate's remark about his carelessness, observing that he could only order its expunction if he came to the conclusion that it was wholly unwarranted by the record, which he was unable to do.

A similar view was expressed by Sulaiman, J., in 49 All 254 (4), in ordering certain objectionable words to be expunged from the judgment of a Sessions Judge. While observing that he saw no reason why the inherent power possessed by the High Court, emphasized by S. 561-A, should not comprise a power to order a deletion of passages which are either irrelevant or inadmissible, and which adversely affect the character of persons before the Court, the learned Judge went on to add that such jurisdiction can be exercised only when there is no foundation whatsoever for the remark objected to, and not where it is a matter of inference from evidence. The ques-

tion what principles should be applied in dealing with an application by a witness to have certain remarks against his character made by a Sessions Judge expunged from the judgment was discussed by a Division Bench of the Sind Judicial Commissioner's Court in 118 I C 747 (5). The application had been made by a Deputy Superintendent of Police. The conclusions arrived at by the Bench were expressed as follows:

Obviously if an unjustifiable attack be made on a person who has had no opportunity of being heard in his own defence, and the remark is irrelevant and separable, it can and should be expunged, especially if he is neither a party nor a witness. But it is not so easy to expunge remarks which though unjustified are relevant, and we do not think that it is possible to delete them unless they are separable, that is to say if they form an integral part of the argument. A Judge or Magistrate is bound to record reasons for his decision, and even in the interests of justice we cannot delete those reasons and leave the decisions without its reasoned basis. We must operate, but we must not kill the patient... The prosecution sought to prove a confession and the production of property, and if that evidence had been accepted the Court was bound to convict. The learned Sessions Judge refused to believe the Zamindar who swore to the confession, and gave his reasons. But the Zamindar's word was confirmed by that of the Deputy Superintendent of Police who had heard the confession and seen the production. Logically then the Sessions Judge was bound to express his opinion of the Deputy Superintendent of Police, and he did so. We do not agree with his view, but since we cannot say that the remarks were irrelevant or expunge the passage without ruining the argument, we cannot legitimately interfere... We think we are justified in taking the view which we have indicated above that passages must only be deleted if they are irrelevant and do not form an integral part of the judgment.

In dismissing the application the learned Judges expressed the opinion that the remarks made against the applicant were wholly unjustified. In 1923 another Division Bench of the Sind Court, in dismissing a similar application, allowed the judgment to stand subject to the comment that, in its opinion, the strictures made in the passage objected to exceeded anything which had been justified by the record and ought not to have been made until an explanation of the person adversely affected had first been heard. The learned Judges also observed that the learned Additional Sessions Judge had permitted himself to use language which was injudicious and uncalled for:

4. Panchanan v. Upendra Nath, 1927 All 193=98 I C 719=49 All 254=27 Cr L J 1407=25 A L J 100.

5. Muhammad Hussain v. Emperor, 1929 Sind 243=1929 Cr C 537=118 I C 747=30 Cr L J 970=23 S L R 432.

1933 Sind 91 (6). These judgments are ample authority for holding that it is the duty of the High Court, in order to prevent abuse of the process of the Courts and secure the ends of justice, to delete passages commenting adversely upon a person who is not a party to the proceedings and has not had a fair opportunity of being heard, and also to delete such passages when they are based upon no evidence or evidence not properly upon the record. But with due respect to the learned Judges whose judgments indicate that the power to expunge is limited to such cases, and while agreeing again with due respect, with the view expressed by Ferrers, J. C., in the case last cited, that it is desirable that a judgment once delivered should remain in the shape in which it was originally published, and averse as I am from extending in practice the exercise of our peculiar power beyond the limits adopted hitherto, I must say that there appears to me no good reason why it should not be used to delete passages which, though based on evidence, damage the character of a person, are wholly irrelevant to any point in issue and which, a Court has unnecessarily gone out of its way to include in a judgment. Further, I have no doubt at all that where its notice has been drawn to a judgment which appears to it to be couched in language injudicious and uncalled for, this Court can and ought to express its opinion in the matter whether any passage is or is not ultimately expunged.

The language of the judgment in the present case is in some places such as must tend to raise a doubt whether the learned Judge approached the case from a perfectly fair point of view. Much of it is exaggerated. This is clear from some of the passages to which objection has been taken. As an instance, he describes the Qadiani creed in the beginning of the judgment, where it sets forth some facts which in the opinion of the Judge have a bearing on the points at issue as 'new fangled'. The merits or demerits of the Qadiani beliefs were not and could not in this case be a matter for the Court's consideration. This is unfortunate, and the more to be regretted because the circumstances of the time (and this is a matter of common knowledge) are such as to necessitate especial care that, in cases which have assumed a communal aspect,

6. *Tejmal v. Emperor*, 1933 Sind 91=27 SLR 30.
1936 L/55 & 56

the proceedings in Courts and the language of their judgments should not themselves promote the feelings of enmity, the promotion of which by others it is their duty to punish under the law. I come now to deal with the passages which the Court has been asked to expunge. I take first the petition submitted by the learned Govt. Advocate. After referring to the death of one Md. Amin, who was killed in an affray in Qadian, the judgment proceeds:

A report was made to the police but no action whatever was taken. It is idle to argue that the murderer was acting in self-defence for this is a matter which can only be determined by the trial Court. Chaudhri Fateh Muhammad has, curiously enough, admitted in Court on solemn affirmation that he killed Muhammad Amin. The police, however, could not take any action in the matter and it is suggested that so great is the power of the Mirza that no witnesses dared come forward and state the truth.

That Muhammad Amin died in a fight with Fateh Muhammad (D. W. 21) the President of the Sadar Anjuman Ahmadia in Qadian is in evidence. According to Fateh Muhammad, Muhammad Amin had made a murderous attack upon him, that is to say, he was killed while Fateh Muhammad was defending himself. It appears that the learned Sessions Judge has based his observation that no action whatever was taken solely on the fact that Fateh Muhammad was not sent for trial. Now, there is no evidence that no action was taken. It is possible, as the learned Judge has himself suggested, that this was because witnesses were afraid of the power of the Mirza. In any case the fact that there was no prosecution in Court is not evidence that no action whatever was taken. The police officer whose duty it was to investigate the case was not, it seems, examined. The executive authorities were not on trial and there was no reason why they should in this case call evidence to show that investigation was made, unaware as they were of the inference which the appellate Court was going to draw from Fateh Muhammad's evidence. The Chief Secretary's affidavit shows that it is untrue that no action was taken by the local authorities at Gurdaspur in connexion with Muhammad Amin's death. There being no evidence to support it, the remark that no action whatever was taken might properly be deleted. The removal of these words will however mutilate the judgment so as to render meaningless the rest of the passage which I am asked to expunge but

for the expunging of which there is no good reason apparent. I therefore leave the passage in the judgment with these comments which I have no doubt will satisfy the learned Government Advocate. The next passage to which the petition relates runs as follows (the learned Sessions Judge is referring to the state of affairs in Qadian) :

The authorities appear to have been affected by an extraordinary degree of paralysis and the supreme authority of the Mirza in matters secular as well as religious was never questioned. Complaints were on different occasions made to the local officials but no redress was forthcoming. There are on record one or two such complaints, but it is needless to refer to their contents and it is sufficient for the purposes of this case to state that definite allegations of tyranny prevailing in Qadian were made and no notice appears to have been taken of them.

These remarks the learned Sessions Judge based upon evidence that criminal and civil cases were tried by Courts constituted by the Qadiani community in Qadian, the procedure of which Courts was based on that followed by British Indian Courts, that Qadiani volunteer corps had been organised, and upon the absence of evidence that notice of complaints against the Qadianis was taken by the authorities. Here again it is contended by the learned Government Advocate that the remarks throwing discredit on the executive authorities are not only baseless, but that such evidence as is on the record relating to their behaviour proves that action was taken when cognizable cases were reported. The Chief Secretary's affidavit is to the effect that complaints and allegations have always been made the subject of enquiry, and Government have constantly endeavoured to enforce the law without fear or favour, that on receipt of information that so called Courts had been set up in Qadian by the Ahmadi community, they had the legal position examined, that they were advised that the proceedings in criminal cases were not open to legal objection so long as they related to the settlement of cognizable and compoundable cases by consent of the parties, and that, so far as civil cases were concerned, they were not open to legal objection so long as the reference to the Court was by consent of the parties and of the nature of arbitration. Government caused the Ahmadiya community to be informed that the proceedings would be open to legal objection

if they referred to cognizable criminal cases, or if the so-called criminal Courts assumed powers of inflicting punishment which would bring them within the mischief of the law, and it was also made clear to them that any complaint that any of the so-called Courts had come within the mischief of the law would be fully investigated. The community was also advised that these so called Courts should not use summonses or other forms which closely resembled those in use in Government Courts. The affidavit also states that the Government had examined the legal position in respect of the volunteer corps. They had informed the Ahmadi community that so long as the volunteers did not transgress the law, Government did not propose to take any action, but that action under the Criminal Law Amendment Act, 1908, would be taken if the activities of the volunteers brought them within the scope of the Act. After an enquiry which resulted in satisfying Government that musketry practice did not take place, Government saw no reason to take action either under the Criminal Law Amendment Act, in regard to the volunteers or under the Arms Act in regard to musketry practice.

There is evidence to show that the Qadiani community is organised in various departments, or Nazarats, with establishments of their own, record-keepers, copyists, etc. These departments are all controlled by the Sadar Anjuman of which Fateh Muhammed (D. W. 21) is the President. It is also proved by the evidence that there were Courts, criminal and civil, functioning in Qadian, which dealt with non-cognizable criminal cases and civil disputes between members of the Qadiani community, and that these Courts inflicted punishment and passed and executed decrees. But there is no evidence that any non-Qadiani was forced to submit to their jurisdiction, no evidence that the supreme authority of the Mirza, secular as well as religious, was never questioned and no evidence that any illegal act was done by any of them which was brought to the notice of the Government, or that Government had shut its eyes to this state of affairs in Qadian, and had abstained from taking proper action when this was necessary. It is proved that there was in Qadian a volunteer corps, organised on

the lines of the Boy Scout Movement, armed with lathis and numbering, according to a defence witness, thirty or thirty-five boys and men, that there were congregations of this body in 1932 and 1933 and that they were drilled as if they were armed with bayonets. One defence witness said he had seen them armed with spears. But there is no evidence that this force was used in any criminal activity or was such as to lay open to doubt the power of the authorities to enforce the law of British India in Qadian. The evidence is that the main object of the corps was to help in the arrangements in connection with meetings, etc.

As regards the categorical statement that definite allegations of tyranny prevailing in Qadian were made and no notice was taken of them, learned counsel for the respondent has contended that there is evidence of four instances (and he confesses that he can point to no other instances) in which complaints made to the authorities passed unheeded. These are (1) the case of Ishar Singh (D. W. 4), (2) the case of Mehar Din (D. W. 52), (3) a report of 31st March 1930 (D. W. 55/3) by Abdul Karim and (4) a complaint sent to the Deputy Commissioner by Abdul Karim (D. Z. /32). (1) This Ishar Singh is the man who had offered his land for the purpose of the conference. There is reliable evidence that the wall built round it was upon gorah deh land, which belongs to the Mirza Sahib's family. Ishar Singh says he was threatened with expulsion and death by the Qadianis. He did not himself report the matter at the thana but sent his nephew and another man to do this. It is not proved that a report was made or that any cognizable offence was reported or that any accused was named or that the police took no action. Ishar Singh's evidence does not show therefore that tyranny was reported and overlooked. (2) Mehar Din's evidence shows that he was able to obtain a decree in the Government Civil Court (Senior Subordinate Judge) against the present Khalifa in 1923. He says he was attacked by some of the Ahmadiyas in 1925. His assailants were challaned and convicted. In 1930 he was turned out of Qadian by the Qadianis and his wife and children were beaten. He reported the matter to the Superintendent of Police but no action was taken. He went to Batala. Four months later he

learnt that his shop had been burnt but he does not know who burnt it. He returned to Qadian, where he still resides. He lodged no complaint in Court and apparently none at the thana. It is not in evidence that any cognizable offence had been committed or that any offender was named.

On the other hand his evidence itself shows that the police gave him protection and actually accompanied him from Qadian to Batala. All this evidence affords no ground for the learned Judge's strictures. (3) The report of 31st March 1930 was made by Abdul Karim who figures prominently in the defence story. His evidence shows that he had instituted a complaint against Mohammad Amin and the present Khalifa and the former was convicted by the Government Court. Another complaint was dismissed. In March 1930 he learnt that the Qadianis were about to burn his house and he and the other inmates would be killed. He left the house and took refuge in a Sikh boarding house. Next morning the police escorted him to Gurdaspur where he saw the Superintendent of Police. He then made the report of 31st March 1930. A few days later he heard that the house had been set on fire. On 23rd April he was returning to Batala from Gurdaspur (where he was being tried for an offence under S. 153-A, I. P. C.) when a murderous attack was made on him by one Mohammad Ali. Mohammad Ali wounded him, but killed another man, was tried for murder, sentenced to death and hanged. It is not obvious what action ought to have been taken by the authorities on the complaint of 31st March 1930. The complaint indicates no cognizable offence, no particular action was asked for nor protection. But there is evidence that the police gave Abdul Karim protection, and evidence that when the house caught fire the police extinguished the fire and started an investigation. Abdul Karim's petition which I deal with below, mentions that when he left Qadian the police posted a guard at his house. No paralysis of the authorities is disclosed here.

4. The last complaint mentioned was also made by Abdul Karim. It was sent from Batala after he had left Qadian and before he was injured by Mohammad Ali. In it he complained that two of his servants had been beaten, that obscene

pictures had been posted in the office of the Mubahala (a paper started by Abdul Karim in 1928, which published articles abusing the Mirza Sahib, the Qadianis, and their religion), that filthy writings had been made on the walls of his house, that armed Qadianis had started hovering round his house, threatening him with murder and that the Inspector of Police had proved by his conduct that he was not prepared to take action against the Qadian Caliph who, on 28th March, had delivered a provocative address and tried his utmost to incite his followers to kill him. The petition goes on to mention that the police were investigating a case in which Qadianis had beaten the Editor of the Mubahala. Then it states that the police constable posted at Abdul Karim's house had been withdrawn. On complaining at the thana, the petition proceeds to say, Abdul Karim was ordered to stop publication of the 'Mubahala.' That night Abdul Karim heard of the danger to his life and left his house. He gave information at the thana and the officer in charge put a guard upon his house. The petition next states that the interview with the Superintendent of Police at Gurdaspur showed that he was inclined to help and favour the Qadianis. The Superintendent of Police told Abdul Karim to stop the publication of the Mubahala, adding that if he did not do so he was likely to be killed and that he himself was powerless. After that the house had been set on fire and the Qadianis were daily passing resolutions that he should be killed.

This petition, it is to be noted, was submitted when action to launch a prosecution against Abdul Karim himself under S. 153-A, I. P. C., had been taken and warrants had been issued against him and his father, his brother and the Editor of the Mubahala. It is in evidence that Abdul Karim's house was upon a site claimed as their own property by the Qadiani family. Assuming that the local police were not doing their duty properly the evidence of the facts alleged is not evidence from which the inferences made by the learned Judge that the authorities appear to have been paralysed, that no redress for injury could be had, and that no notice appears to have been taken of definite allegations of tyranny prevailing in Qadian, could be drawn. There is no evidence that no action was

taken by the Deputy Commissioner to whom D. Z/32 was addressed. This being so the Sessions Judge ought not to have denounced the authorities (who were not on their trial), as he has done, without giving them an opportunity of rebutting the evidence given by witnesses called in defence. Such procedure is not fair. Having said this much, I do not think it necessary to delete this passage. It is true that the learned Judge has gone out of his way to comment adversely upon a party not before the Court and that when the evidence is examined it is found wholly insufficient to warrant these comments. But the facts inferred by the Judge are the grounds for his conclusion that the accused should be leniently treated and are important portions of his judgment.

Although I am unable to see how the setting up of tribunals by the Qadianis to decide their own disputes, or the organisation of a volunteer corps for their own legal purposes could possibly be regarded as mitigating the offence in this case, it cannot I think be said that evidence to prove that the authorities were lax and allowed the Qadianis to persecute the people of their town in various ways would not in such a case be irrelevant. The passage illustrates the attitude in which the learned Sessions Judge appears to have approached the case, and an examination of the record does not diminish the doubt which the language of many other parts of the judgment also must tend to raise whether the evidence has been properly weighed. No individual however, has been singled out for censure and it is difficult to believe that such a judgment could in fact injure the authorities to any appreciable extent. For these reasons I do not think it necessary to expunge this passage. The third and last passage which the Government Advocate wishes to have expunged are the words at the end of the judgment: "The offence is a technical one." The correctness of the opinion of the Sessions Judge as to the degree of Sayed Ata Ullah Shah's culpability is not open to reconsideration.

It is true that the passage is not consistent with other parts of the judgment but this fact is no good reason for ordering it to be expunged. I do not think it necessary to remit the case for further enquiry as asked for in the petition. The

Chief Secretary's affidavit rebuts the unfounded inference drawn in the judgment and further proceedings are not likely to prevent mere abuse of the process of the Courts. I pass now to the petition presented by Captain Mirza Sharif Ahmad. The petitioner asks for the removal on various grounds of no less than eighteen passages. I see no justification for the deletion of the first three passages, referred to as A, B and C in the petition, which appear to be simple statements of facts historical and proved. The fourth passage (D) runs as follows:

There was naturally some opposition and the majority of Mahomedans resented the arrogation of religious supremacy by the Ahmadi founder. Non-believers in the new-fangled religion vehemently repelled the accusation of kafar which was bestowed on them by the Mirza. The Qadianis, however remained heedless to these foreign criticisms and secure in the local safety of their home town, flourished as well as they could in the circumstance. This comparative security of their position gave birth to pride amounting almost to arrogance on the part of the Qadianis.

In order to enforce their argument and further their cause they called into play weapons which would ordinarily be termed highly undesirable. They not only intimidated the persons who refused to come within their fold with boycott and excommunication and occasionally threats of something worse, but they frequently fortified the process of proselytizing by actually carrying out these threats. A volunteer corps was established in Qadian with the object probably of giving sanction to their decrees.

The use of the word "arrogation" in the first sentence is consonant with the language throughout the judgment, but there is no strong ground for removing it. In the second sentence the word 'new-fangled' is objectionable. It is calculated to offend the followers of the Qadiani religion although possibly the learned Judge did not intend to be derisive when he used it. As already noticed the merits of the Qadiani or any other religion were not before the Court and were wholly irrelevant matters for the purpose of the trial. All revealed religions must be at one time new. I cut out the word 'new-fangled'. The next words objected to before me are:

This comparative security of their position gave birth to pride amounting almost to arrogance on the part of "the Qadianis".

This statement is based on the evidence generally oral and documentary, and though the language might well have been more moderate and the whole sentence is unnecessary I cannot see proper

grounds for deleting these words. In the behaviour of the Qadianis about which evidence has been given the learned Sessions Judge has found reasons for mitigating the sentence he has imposed. Whether he was right or wrong in this decision is a question which cannot be raised in a petition of this kind. The learned Judge had authority in at least one judgment of this Court, 7 Lah 15 (7), for the proposition that it is open to a person accused of an offence under S. 153-A, I. P. C., to plead the truth of the statements, for making which he is prosecuted, for the purpose of showing his real intention in making them, and in support of a plea for mitigation of sentence. The explanation to S. 153-A itself appears to predicate this, and no authority has been cited for the view that evidence of the truth of the offending words is not a relevant matter for the purpose of a trial under that section. I am not, therefore, prepared to say here that the trial Magistrate was wrong in allowing the production of evidence to prove the truth of the assertions made by the respondent in his speech, and that therefore any inference by the learned Sessions Judge drawn from this evidence must be regarded as irrelevant. On the other hand there can be no doubt that to make such evidence relevant there must be some proximate relationship between the fact urged in support of the plea and the action for which the accused has been prosecuted.

If evidence is put forward to prove some fact wholly unrelated to the circumstances of the alleged offence, which, if proved, could not show that the action of the accused was honest, or that he had provocation or some other excuse for his action, then that evidence would certainly be irrelevant, and the retention in a judgment of remarks based on it may, if they adversely affect a person, or are otherwise offensive or unnecessary, be such an abuse of the process of the law as to warrant their being expunged. I come to the words:

In order to enforce their argument and further their cause they called into play weapons which would ordinarily be termed highly undesirable. They not only intimidated the person who refused to come within their fold with boycott and excommunication and occasionally threats of something worse, but they frequently fortified the process of proselytizing by actually

7. Emperor v. Rajpal, 1926 Lah 195=99 I O 1052=27 Cr L J 556=7 Lah 15.

carrying out these threats. A volunteer corps was established in Qadian with the object probably of giving sanction to their decrees.

This is not altogether an accurate description of the evidence. There is no evidence that the Qadianis intimidated persons who refused to come within their fold other than persons belonging to their community who had left it or had quarrelled with them. There is ample evidence, of which there is corroboration in the statement of the Mirza Sahib himself, that persons who had become obnoxious to the community were excommunicated or forced by social pressure to leave Qadian, though there is very little to indicate that this pressure was brought to bear illegally. So far as "threats of something worse" are concerned there is the evidence of Abdul Karim that he was threatened with death. The learned Sessions Judge has believed this. I have already referred to the evidence about the volunteer corps. There was a corps, but there is no evidence that it was illegally employed, and there is no basis for the remark that it was established probably to give sanction to the decrees of the community. I do not think it necessary to expunge this passage. The fifth and sixth passages (E and F) contain remarks based upon evidence. It is proved, as I have already noted, that the Qadiani Courts dealt with criminal and civil cases, awarded punishments and passed and executed decrees; but it is not proved that they did so illegally or that they dealt with disputes between others than Qadianis. It is difficult to understand why the learned Sessions Judge has found in these facts ground for mitigating the punishment in this case. He has, however, done so and that ends this particular matter. There is no proper ground for deleting the passages F-1 and F-2. The passage G is as follows:

Bhagat Singh, D. W. 49, stated that he was assaulted by the Mirzais. One Shah Gharib was beaten by the Qadianis, and when he tried to start a case nobody came forward to give evidence on his behalf.

It is contended that the learned Sessions Judge has wrongly attributed the acts of individuals to the whole community and that the evidence does not bear out the statement about Gharib Shah. The evidence of Bhagat Singh is that he was beaten by an Ahmadi missionary and others after an altercation with an Ahmadiya mubbaligh. It is of course

possible that he was beaten with good reason. As regards Gharib Shah the evidence is that he was a missionary of the Ahrars and was beaten by the Ahmadis (Feroz Din, Head Constable, Qadian, P. W. 6), and was threatened with beating by fifty or sixty Ahmadis. I can find no evidence that no one came forward to give evidence for him. There is, however, no good reason for deleting this passage which injures no one now. The next passage objected to (G. 1) is:

Decrees of Court are enforced and there is one instance of a decree for the sale of a house having been executed. Privately stamped paper is manufactured, sold and used for petitions to the Mirza.

There is evidence that a house was sold after a decree had been given, though it is not clear that the sale was enforced. Privately stamped paper was manufactured (but this has been discontinued). The contention of the petitioner is that the stamped paper was for petitions to be presented to the President of the Local Anjuman and not to the Mirza Sahib. The Mirza Sahib was the final Court of appeal in some cases and I see no reason for deleting these words. The next two passages (H and I) which the Court is asked to expunge run as follows:

(H) Then we have the most serious case of Abdul Karim whose story is a veritable tale of woe. This man embraced the Ahmadiya religion and went to Qadian. There, however, he became a prey to religious doubts and renounced the Ahmadiya faith. Then his persecution started. He began to edit a paper called Mubahila which aimed at criticising the cult of the Ahmadiya community. The Mirza in a speech reported in Exhibit D. Z. 39 prophesied and compassed the death of the publishers of the Mubahila. This speech made reference to the people who were ready to kill for the sake of their religion. A murderous attack was made on Abdul Karim soon after this, but he escaped.

(I) The death sentence was in fact carried out, and after his execution the dead body was brought to Qadian and buried in great style in what is called the Bahishti Maqbara (the heavenly graveyard). The murder was extolled and the act of the murderer was praised in 'Alfazel', the organ of the Ahmadiya community. It was given out that the murderer was not guilty and that he had escaped the calumny of death by expiring before the event. God in His justice had thought fit to take away his life before he underwent the ignominy of hanging. The Mirza, when examined in Court with respect to this incident, told a different tale and stated that the murderer of Muhammad Hussain was given a decent burial as he had repented for his offence and was purged of his sin. Ex. D Z 40, however, contradicts this and the intentions and attitude of the Mirza

are plain from the expression of his views as set out in D Z-40. Incidentally the contents of this document amount to contempt of the Lahore High Court.

Reference has already been made to Abdul Karim and his story. It is true that the story is a tale of woe, but his own behaviour seems to have been partly the cause of his afflictions. The evidence is that he was an Ahmadi and settled in Qadian in 1914. He renounced the Qadiani faith in 1914, and fourteen years later started the Mubahila, in which he denounced the Qadianis. Conditions in Qadian (which town, as already noted, belongs to the Mirza Sahib's family) were made so difficult for him that in March 1930 he left his house, and after spending a night in the shelter of the Khalsa boarding house was escorted by the police to Gurdaspur. On 28th March 1930 the Khalifa delivered a sermon (Ex. D. Z. 39) in which, speaking of some 'hypocrites who had severed themselves from the community and were carrying on foul propaganda against him' he stated that 'Allah the Most High had consummated their moral death' and that 'their physical death also will, God willing, approach them with heavenly tortures'. The sermon was published in the Al-Fazal, a Qadiani publication, owned by the Sadar Anjuman-i-Qadian, on 1st April 1930. On the 23rd April Abdul Karim was attacked, as I have mentioned above, by Mohammad Ali who killed another man, Mohammad Hussain, in the assault. Mohammad Hussain was Abdul Karim's surety at the trial in which Abdul Karim was accused under S. 153-A, I. P. C.

After Mohammad Ali had been hanged, his body was brought to Qadian and honoured by burial in the Bahishti Maqbra or Heavenly Graveyard. The Mirza Sahib led the funeral prayer and preached a sermon (Ex. D. Z. 40) which was published in the 'Al-Fazal' of 18th July 1931 under the heading, "The Qazi Sahib has not murdered any man. Why the Qazi Sahib is deserving of praise." The Qazi Sahib was Muhammad Ali. The sermon did not extol the murder but certainly praised Muhammad Ali for the religious zeal he had displayed in sacrificing himself for the sake of truth ("because he spoke the truth and adhered to it") The sermon at one place referred to the judgment of this Court confirming

the death sentence on Muhammad Ali in the following words:

We are not bound by the judgment of the Court. The Court has done its work and following its own opinion has hanged him. But we are not bound to take the decision of the Court as correct. It based its decision on its own viewpoints. The Court was not so well acquainted with his truthfulness as we are.

The 'Al-Fazal' of 6th June 1931 had published another Friday sermon (Ex. D. Z. 52) delivered by one Maulvi Sher Ali on 22nd May 1931. The sermon praised Muhammad Ali for having stated and adhered to the truth at his trial, and so having set an example which would endure until doomsday. It also gave reasons for believing that he had expired before he was actually hanged. I can see no sufficient reason for expunging the whole of these passages H and I. But there is no foundation for the statement that the Khalifa had compassed the death of the publishers of the Mubahila. For the murder of Muhammad Hussain, Muhammad Ali has been hanged. There is nothing on the record to show that the Khalifa had been accused of the murder or that he had intentionally brought about his death. The murderer was a resident of the Frontier Province. The Khalifa in the witness box declared that the Ahmadi community had no hand in the murder of Muhammad Hussain. The words "and compassed" condemn the Mirza Sahib without trial. These words will be expunged. The passage (J) "Muhammad Amin, although he was an Ahmady, had incurred the displeasure of the Mirza and was therefore not a persona grata" is objected to on the ground that the evidence shows that Muhammad Amin, who had been a Qadiani missionary, was dismissed from his office (a preacher) not because he had incurred the displeasure of the Mirza Sahib, but was dismissed by Fateh Muhammad (P. W. 21) as the latter had found him to be dishonest. There is no direct evidence that Muhammad Amin was a person disliked by the Mirza. The Mirza Sahib himself was questioned about the relations between himself and Muhammad Amin but the statement in the judgment objected to is an inference which could reasonably be drawn from the circumstances disclosed generally by the evidence. The passage must, therefore, stand. The next passage referred to in the petition (K) is as follows:

After Abdul Karim was turned out of Qadian his house was burnt down. An attempt was made to demolish it in a quasi-legal manner by obtaining an order from the Small Town Committee of Qadian. These regrettable incidents point to a state of lawlessness accompanied by arson and murder in Qadian. Add to this the circumstance that the Mirza of Qadian spoke of the millions of Muhammadans who did not believe in his supremacy in the most abusive language. His writings furnish a curious commentary on the manners and methods of a pious high priest who not only claims to be a prophet but professes to be the chosen one of God, the Masih-ul-Sani (the second Masiha).

I have already referred to the case of Abdul Karim at some length. It is contended for the petitioner that these observations are not supported by the record, are untrue, or a distortion of facts, and the truth is that Abdul Karim owned no house and was not turned out and that action was taken by the Small Town Committee in a correct and legal manner to have the house demolished because it was in a dilapidated condition. There is no doubt that Abdul Karim left Qadian because he was in fear of his life. It is in evidence that when the Small Town Committee served him with a notice regarding the dilapidated state of his house, he took a photograph of it and submitted it with a petition to the Small Town Committee, and that ultimately the house was not demolished in pursuance of the notice. The house was burnt after Abdul Karim left Qadian. It was taken possession of in 1933 by the petitioner Mirza Sharif Ahmad, who is Naib Nazir of the Education Department. The latter's explanation as a defence witness is that the site was within the limits of the shamilat deh which belonged to the proprietors of Qadian by whom Abdul Karim's father had been permitted to build upon it. In 1930 Fazal Karim, Abdul Karim's father, left the house and when Mirza Sharif Ahmad took possession of it in 1933, only the material and one or two walls were in existence. The walls were demolished by Mirza Sharif Ahmad's Mukhtear and the site was made over to the local Anjuman.

From this evidence and the other evidence to which I have referred in this judgment the learned Sessions Judge has drawn the conclusion that a state of lawlessness accompanied by arson and murder existed in Qadian. The inference is perhaps a bold one. Besides Abdul Karim's house one other building is said to have been burnt by the Qadianis.

It is not shown that in killing Muhammad Amin Fateh Muhammad committed murder. The murder of Muhammad Hussain and the wounding of Abdul Karim by Muhammad Ali did not take place in Qadian. But I do not think that it can be said that there is no evidence upon the record from which the inference, although another Judge might not have considered it justified by the evidence, could have been drawn. It is admitted before me by counsel on both sides that there is evidence that in his writing the Mirza Sahib Ghulam Ahmad did abuse those who differed from his religious views and questioned them in their writings. But objection is taken to the statement that he spoke of the "millions of Mahomedans who did not believe in his supremacy in the most abusive language" because the Mirza Sahib's attack was not upon all Mohomedans but only upon his particular personal enemies. It is however undisputed that these particular enemies were orthodox Mahomedans. On the other hand, what the Mirza Sahib said and did thirty, forty or fifty years ago could not possibly afford any provocation for promoting enmity between the Ahrars and the Qadianis in 1933, and the evidence on which the learned Sessions Judge has based his remark is therefore not relevant matter. The last two sentences in this passage are irrelevant, unnecessary and offensive and I order them to be deleted. The rest of the passage will stand. The next passage (L) which it is sought to have expunged is as follows :

This step was naturally resented by the Qadianis and they made a bold attempt to stop the conference from being held altogether. The Ahrar Conference had acquired the land of one Ishar Singh for the purpose of their meeting. The Qadianis took possession of the land and built a wall on it. This deprived the Ahrars of the only piece of land in Qadian. They were therefore forced to convene their meeting at a spot about a mile from Qadian. The building of the wall shows the bitterness of the feelings that obtained between the parties at the time and the arrogance of the Ahmadis who felt that they were immune from the lawful consequences of their highhandedness.

The words of this passage, while they indicate clearly the position from which the learned Sessions Judge chose to view the case, are not such as can be deleted on the ground that their retention will be an abuse of the process of the Court. I have no hesitation in ordering to be

expunged the next passage to which the petition relates. What the founder of the Qadiani religion ate and drank could not possibly be relevant for the purposes of deciding what punishment should be imposed upon the accused in the present case. It is unnecessary and offensive and should not have found a place in the judgment.

There remains only the passage "N", in which the learned Sessions Judge has given his reasons for holding that the offence of Atta Ullah Shah Bukhari was merely technical. Here again the petitioner's objection is that Mirza Ghulam Ahmad Sahib in the writing to which the learned Sessions Judge refers was not abusing all the Mohamedans of India, but merely his own personal and religious enemies. Whether this objection be well founded or not, it is obvious that what was said by Mirza Ghulam Ahmad in the last century can have no relevancy when the matter under consideration is the punishment to be imposed on a person who has been convicted now under S. 153-A of promoting feelings of enmity or hatred between Qadianis and other Mohamedans. I order that the passage from the words "and the extreme resentment," to the word "bitches" be expunged from the judgment.

B.D./R.K.

Order accordingly.

A. I. R. 1936 Lahore 441

ADDISON AND ABDUL RASHID, JJ.

Commissioner of Income-tax, Punjab
—Petitioner.

v.

Hukam Chand-Jagadhar Mal—Opposite Party.

Civil Ref. No. 67 of 1935, Decided on 24th January 1936, in the matter of assessment from order of Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, D/- 21st October 1935.

Income-tax Act (1922), Ss. 10 (3), 13—Bad debt—Personal decree obtained in year 1928—Appeal against personal decree dismissed in year 1931—Amount due on personal decree claimed to be bad debt during accounting period of 1932-33—Held, that debt did not become bad debt in year 1929.

After a mortgage decree was executed, a certain amount remained unsatisfied, for which a personal decree was obtained in the year 1928. An appeal was preferred by the judgment-debtor against the personal decree which was dismissed in the year 1932. The decree-holder who was

assessed to Income-tax showed the amount of personal decree as bad debt during the period of accounting of 1932-33. The question was whether debt became a bad debt in the year 1929 or in the year 1932-33:

Held: that there was no evidence that the debt became a bad debt in the year 1929. The appeal against the personal decree was still pending and was not dismissed till the end of 1931. The assessee would have been guilty of a fraud if he had attempted to claim it as a bad debt earlier than the accounting year 1932-33.

[P 441 C 2; P 442 C 1]

J. N. Aggarwal—for Petitioner.

Shamair Chand—for Opposite Party.

Order.—On 1st April 1935 a Division Bench of this Court required the Commissioner of Income tax to state a case and refer the following question for decision, namely:

Whether there was any relevant and admissible evidence to support the conclusion that the sum of Rs. 26,721 became a bad debt in 1929. The facts are stated in the order of the Bench and in the reference now made by the Commissioner. On 2nd December 1921, the assessee obtained a mortgage deed in his favour from Sheikh Siraj Din for rupees 45,000 advanced as a loan. A suit was instituted in 1924 for the usual mortgage-decree which was made on 19th December 1925. The property was sold and a balance of Rs. 26,721 remained due. A personal decree for the balance was obtained by the assessee against his debtor in 1928 and there was an appeal by the debtor to this Court against that decision. That appeal was not dismissed till 26th November 1931. In the meantime the assessee had been trying to execute the personal decree he had obtained, although the appeal against it was pending. In the assessment year 1933-34 he claimed the above amount as a bad debt, the accounting period being 1932-33. The Income-tax Officer refused to grant him this relief on the ground that it had become a bad debt in 1929. The assessee appealed to the Assistant Commissioner who held that the debt had not yet become bad, as there was still time to proceed with the execution of the personal decree. The assessee went up to the Commissioner who upheld the original order of the Income-tax Officer that the debt had become bad in 1929. It is in these circumstances that the question arose.

On the record we have no hesitation in finding that there is no evidence of any

kind that the debt became a bad debt in 1929. The appeal against the personal decree was still pending and was not dismissed till the end of 1931. The assessee would have been guilty of a fraud if he had attempted to claim it as a bad debt earlier than the accounting year 1932-33. Whether it became a bad debt in that year or later remains a question of fact to be decided by the Income-tax authorities. With these remarks we answer the question referred in the negative. The assessee will have his costs from the Commissioner of Income-tax.

B.D./R.K. *Reference answered.*

A. I. R. 1936 Lahore 442

BHIDE, J.

Abdul Aziz—Defendant—Judgment-debtor—Appellant.

v.

Anjuman Imdad Bahmi Karza—Plaintiff—Decree-holder—Respondent.

Misc. Second Appeal No. 321 of 1935, Decided on 11th December 1935, from order of Senior Sub-Judge, Gurdaspur, D/- 9th November 1934.

(a) **Jurisdiction**—Objection to, cannot be taken in appeal or revision—Same principle applies to execution proceedings.

An objection to the jurisdiction of Court cannot be raised in appeal or revision even in respect of a suit according to S. 11, Suits Valuation Act, and the same principle will apply to execution proceedings. [P 442 C 2]

(b) **Execution**—Decree binding—Executing Court cannot question validity of decree—Court executing award under Co-operative Societies Act cannot question validity of award.

An executing Court has no jurisdiction to question the validity of the decree sought to be executed. The same rule applies to awards under the Co-operative Societies Act. If the award is invalid for any defect in procedure a person may possibly be able to get it declared invalid as against him by resorting to proper remedies, but the point cannot be raised in executing Court: 1926 Lah 547, Ref. [P 442 C 2; P 443 C 1]

Jagan Nath Malhotra—for Appellant.

Ghulam Rasul—for Respondent.

Judgment.—An award was made on a reference to arbitration under the rules framed under the Co-operative Societies Act and was presented to the Subordinate Judge, 4th Class, Gurdaspur, for enforcement against the petitioner, Abdul Aziz, as a surety for one Abdul Hamid, the principal debtor. Abdul Aziz resisted the execution, inter alia, on the ground that the award was null and void as against

him as he was not a party to the reference. The learned Subordinate Judge upheld the objection. From this decision an appeal was preferred to the Senior Subordinate Judge who came to the conclusion that the objection of Abdul Aziz as to the award being null and void could not be entertained by an executing Court. He therefore accepted the appeal and directed execution to proceed. Abdul Aziz has filed a petition for revision of this order. The contentions raised on his behalf are: (i) the award was for a sum of Rs. 1,152-9-0 and hence the Subordinate Judge, 4th Class, had no jurisdiction to execute it; (ii) that the Senior Subordinate Judge had for the same reason no jurisdiction to entertain the appeal; and (iii) lastly the award could not be executed against the petitioner as he was no party to the reference and was never heard. The first two objections were not raised in the Court below. An objection of this kind cannot be raised in appeal or revision even in respect of a suit according to S. 11, Suits Valuation Act, and I am inclined to think that the same principle will apply to execution proceedings. Moreover the objection does not seem to be supported by the wording of R. 18 (k) relating to the execution of awards under the Co-operative Societies Act, which runs as follows:

A decision or award shall on application to any Civil Court having jurisdiction in which the Society operates, be enforced in the same manner as a decree of such Court.

This rule apparently places no restriction as regards pecuniary jurisdiction on the powers of Civil Courts having jurisdiction in the area in which the Society operates, to enforce awards made in accordance with the rules framed under the Co-operative Societies Act. I hold that objections Nos. 1 and 2 have no force. As regards the third objection, it is a well-established rule that an executing Court has no jurisdiction to question the validity of the decree sought to be executed. The same rule has been held to apply to awards under the Co-operative Societies Act, vide 97 I C 288 (1). If the award was invalid for any defect in procedure, the petitioner might possibly have been able to get it declared invalid as against him by resorting to proper remedies, but I do not think the

1. Ahmad Yar v. Co-operative Credit Society, 1926 Lah 547=97 I C 288.

point could be raised in the executing Court. I dismiss the petition with costs.
B.D./R.K. *Petition dismissed.*

A. I. R. 1936 Lahore 443

JAI LAL AND SALE, JJ.

Mt. Jaswant Kaur—Defendant—Appellant.

v.

Mahant Tipar Chand—Plaintiff and others—Defendants—Respondents.

First Appeal No. 2096 of 1934, Decided on 15th July 1935, from decree of Senior Sub-Judge, Ludhiana, D/- 2nd July 1934.

(a) Sikh Gurdwaras Act (8 of 1925), S. 31—S. 31 is no bar to civil Court's jurisdiction—Proceedings in civil Courts should be stayed till tribunal's decision—Sub-s. (2), S. 31 should be strictly construed.

Section 31 does not bar the jurisdiction of a civil Court but only requires that proceedings to which that section is applicable be stayed till the decision of the tribunal on the question whether the institution is or is not a Sikh Gurdwara. Sub-s. (2), S. 31, must be strictly construed and it only applies in the case of a claim which could have been made in a petition forwarded to the local Government under the provisions of S. 10 and was not so made.

[P 444 C 2]

(b) Will—Construction of — Trustworthy and effective evidence to be given to prove legality of will—Best evidence procurable should be tendered to prove signature of testator.

A will is one of the most solemn documents known to the law. By it a dead man entrusts to the living the carrying out of his wishes, and as it is impossible that he can be called either to deny his signatures or to explain the circumstances in which it was attached, it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of law. Proof of the testator's signature is all that is needed; but, in case of doubt or dispute, justice requires that the best evidence procurable of that signature should be furnished and an attempt to support the signature by anything that falls short of this standard is a matter which, though it may not be fatal, is a serious defect: 1922 P C 366, *Foll.*

[P 447 C 1]

S. L. Puri and Jagan Nath Aggarwal—for Appellant.

Achhuru Ram and Inder Dev—for Respondents.

Sale, J.—This appeal arises out of a suit for a declaration of title to immovable property said to be worth at least Rs. 55,000, attached to an institution known as Dera Jaspal Bangar situated in the Ludhiana district, of which the plaintiff Mahant Tipar Chand Udasi

claims to be in possession. The plaintiff is the brother of the last Mahant Anand Sarup, who as Gaddinashin of the institution claimed to be the sole owner of the property. He died on 20th April 1933, leaving two widows and two brothers. Of the brothers Tipar Chand claims to succeed by virtue of a will dated 16th April 1933 and the other brother Sukhdev Chand supports his claim. The contesting defendant is one of the widows Mt. Jaswant Kaur, the other widow supports the plaintiff's claim. The suit was instituted on 6th June 1933. In the plaint the plaintiff propounded a will by Mahant Anand Sarup, deceased, dated 20th April 1933, declaring that the plaintiff should succeed him as Gaddinashin of the Dera on Mahant Anand Sarup's death without male issue. He further alleged that a few days after the Mahant's death he was publicly accepted as the successor of the deceased and installed as Gaddinashin by the relations, village notables and fakirs of the Udasi sect, and formally entered into possession of the property.

The plaintiff also made a statement that the property in question is secular, not wakf, but that the Gaddinashin has a duty to maintain a langar from the income of the property for travellers and Sadhus, that the property goes with the institution and that the succession to it is settled by nomination by the last Mahant. Mt. Jaswant Kaur, the contesting defendant, denied the execution of the will and the alleged acceptance of the plaintiff as the nominated successor of the deceased Mahant. She controverted the plaintiff's title to succeed to the property in preference to herself. She also averred in her written statement that she was pregnant by the late Mahant, and later alleged that on 14th November 1933, that is seven months after his death, a son was born to her who, she claimed, is the rightful heir. As regards the secular nature of the property in suit, she is at one with the plaintiff; nor is there any denial in the pleadings of the late Mahant's right to nominate a successor by will. The defendant confines herself on this point to denying the execution of the will. The plaintiff denied Mt. Jaswant Kaur's pregnancy and the birth to her of a son by the late Mahant. The trial Court has found in favour of the will propounded

by the plaintiff, and holding the pregnancy unproved and the birth of the posthumous son to be fictitious has granted the plaintiff a decree for a declaration to the effect that he is

the Mahant of Dera Jaspal Bangar by means of a will dated 16th April 1933 and by election and installation by the Bhek and as such entitled to the property as detailed in the plaint.

From this decision Mt. Jaswant Kaur appeals. In the course of proceedings before the lower Court Mt. Jaswant Kaur sought to bring on the record as co-defendant the posthumous son alleged to have been born to her by Mahant Anand Sarup deceased. It appears that sometime after the birth of this boy, in November 1933, his widowed mother made an application to the revenue authorities and some of the property of Mahant Anand Sarup was mutated in the infant's name on 20th March 1934. But the plaintiff declined to recognise the existence of the infant, and objected to his being impleaded. In upholding this objection the lower Court held that though the infant was a proper party, he was not a necessary party, and that as the plaintiff is dominus litis, the infant should not be impleaded against his wish. An application was made by the defendant to this Court for revision of the lower Court's order refusing to make the infant a party but was dismissed in limine. Amongst preliminary objections raised by the defendant before the trial Court the only material one for the purpose of this appeal is that the suit is barred under the provisions of Cl. 2, S. 31, Sikh Gurdwaras Act.

This objection was overruled by the lower Court and has been re-agitated in appeal on behalf of the appellant in a somewhat half-hearted fashion by Mr. Jagan Nath Aggarwal who did not appear to press the objection seriously. It is common ground that a petition has been presented under S. 7, Sikh Gurdwaras Act, that under sub-s. (3) of S. 7 a notification has been published by the Local Government in respect of this institution and that the Mahant in his lifetime presented in reply a petition under S. 10, Sikh Gurdwaras Act, claiming a right, title and interest in the property which is in fact the property now in suit. We are informed that since the Mahant's death, the parties to this suit have been

jointly impleaded in the petition before the Tribunal as legal representatives of the deceased Mahant and the case is still pending before the Tribunal. It is to be noted that S. 31, Sikh Gurdwaras Act, does not bar the jurisdiction of this Court, but only requires that proceedings to which that section is applicable, be stayed till the decision of the Tribunal on the question whether the institution is or is not a Sikh Gurdwara. The matter in issue before the Tribunal is very different from the matter in issue before this Court. The petitioners before the Tribunal (that is certain Sikhs) are not a party to the case before us. Sub-s. (2) of S. 31, which is claimed to operate as a bar to the continuance of these proceedings, must be strictly construed and I am of opinion that on a strict construction of this sub-section it has no application to the facts of the present suit. The sub-section only applies in the case of a claim which could have been made in a petition forwarded to the Local Government under the provisions of S. 10 and was not so made.

But in this case admittedly a claim in respect of the property relating to this institution was made to the Local Government in a petition under S. 10. Consequently this section has no application and as it is not suggested that any other section under the Sikh Gurdwaras Act bars the continuance of the suit, there is no reason to postpone the decision of this appeal until the Tribunal has decided the relevant petition pending before it. Before us arguments on behalf of the appellant have been confined to three points: (1) that a suit for a mere declaration does not lie as the plaintiff is not in possession of all the properties. In this connexion it is also argued that assuming a suit for a mere declaration does lie, the relief claimed being purely discretionary, should not be granted in the circumstances of the present case where the plaintiff has declined to agree to the impleading of the infant son of Mt. Jaswant Kaur, who, according to the defendant-appellant, is now the only person who could be affected by a declaration, which in the circumstances, would not be binding upon him. (2) That the will propounded by the plaintiff is not proved and (3) that the pregnancy of the defendant-appellant by the deceased Mahant and subsequent birth of the son

has been established, and is a bar to the plaintiff's title.

Before discussing the arguments it is to be noted that Mr. Achbru Ram on behalf of the plaintiff-respondent has made it clear before us that his claim to the succession rests solely on the will and not on the alleged installation of the plaintiff as Mahant by the brotherhood. He only relies on the evidence of installation as recognition of the will. Consequently he does not support the declaratory decree of the lower Court in his favour in so far as it gives him a title based on election and installation. His client's case stands or falls therefore on his nomination to the Gaddi by the will propounded in the plaint. The property in suit includes house property left by Mahant Anand Sarup in Ludhiana town and landed property situated in a number of villages. The history of this property is given in the judgment of Mr. Wace, Settlement Commissioner, dated 8th February 1882, printed as Ex. P-41 at p. 167 of the paper-book, the material portions of which have been repeated in the lower Court's judgment. It is unnecessary to recapitulate the history of the property here except to mention that neither side supports before us the description of the institution by Mr. Wace as a Gurdwara. It is, on the contrary, common ground before us that there is no place of worship attached to this property; nor is there any religious ceremony connected with this institution which, as such, exists solely as a Langar for travellers and Sadhus.

On the first question argued before us as to whether a suit for a mere declaration lies, there is a mass of evidence on this record, which has not been questioned by the appellant, to show that the plaintiff since his brother's death has been in possession (both actual and constructive) of the greater part of the property in suit including the house property at Ludhiana. Most of the landed property is in the cultivating possession of tenants, many of whom have been proved to have attorned to the plaintiff, who has been receiving rents from them and paying land revenue on behalf of their holdings through the lambardars concerned. At the same time there is evidence that the plaintiff's title has not passed unquestioned by all the tenants. Although there is nothing to show that

the contesting widow is in physical possession of any of the property in suit, it would seem that her Mukhtear Dan Singh has made considerable efforts to supply evidence of constructive possession through tenants and otherwise. It is proved that he attempted to break open the lock of some of the house property and was bound down to keep the peace under S. 107, Criminal P. C. He has led evidence to show that some of the tenants have attorned to the widow while others have not attorned to either side pending settlement of this dispute. Moreover mutations of some of the property have been entered in the names of the contesting widow and her alleged infant son, whose existence the plaintiff refuses to recognise. As pointed out by the lower Court such conflicting evidence concerning possession is inevitable in a dispute relating to property as scattered as the estate with which we are now concerned; and since it is established that plaintiff is undoubtedly in possession (actual or constructive) of the major portion of the property in suit, I am in agreement with the lower Court in holding that the plaintiff has established possession sufficient to justify the maintainability of his suit for a declaration especially since the attitude of the remaining tenants who have not attorned to the plaintiff would naturally be determined by the decision of the suit on the question of title.

Turning now to the will on which the plaintiff bases his claim and which the trial Court has accepted I am of opinion that this document is not genuine and that no reliance can be placed upon it. On this view it will be unnecessary to discuss the third point argued, viz., the pregnancy of the contesting defendant and consequent birth of the child since the rejection of the will involves the dismissal of the plaintiff's suit. Moreover, it would not be proper in my opinion to come to any decision affecting the legitimacy of the infant in question when that infant is not a party to the suit. The will in question, which is dated 16th April 1933, (that is four days before the death of the Mahant) is printed at p. 177 of the paper-book and runs as follows:

I, Mahant Anand Sarup, son of Mahant Das, wandhi Ram, caste Jat, Got Gil, Sadh Udas, resident of Jaspal Bangar, Tahsil Ludhiana, Gaddinashin of the Dera at Jaspal Bangar,

Tahsil and District Ludhiana, do hereby declare as follows: I have been suffering from asthma for a long time. Life is uncertain. Hence I, in the enjoyment of sound health and right of five senses have executed this will as follows: On my death, if there be any male issue, my eldest son, and if there be no such male issue, my real brother Tipar Chand shall be Gaddinashin of the Dera like myself. I have, therefore, executed this will so that the same may serve as an authority.

It purports to be signed by Mahant Anand Sarup in his own hand in Urdu, to have been written by one Shib Chand and to have been attested by the following five witnesses, Chanan Singh, Sukhdev Chand, Kartar Singh, Natha Singh and Sawan Singh. It will be observed that this will is not concerned with any disposition of property, but merely declares that in the absence of male issue Tipar Chand shall be Gaddinashin of the Dera. It is not here necessary to consider whether the Mahant had a right to nominate by will a person to succeed him as a Gaddinashin and as such heir to the property. This right was decided in the Mahant's favour by the lower Court; and though questioned in the grounds of appeal was not specifically raised in the pleadings nor put into issue, nor has it been argued before us. On the contrary counsel in appeal have confined themselves to the factum of the execution of the will, on the apparent assumption that the will, if proved, does regulate succession to the property. The objections taken to the will on behalf of the appellant are that the Mahant was in no condition to make a will four days before his death, that he did not, in fact, make any will and that the document is a forgery. It is only necessary therefore to decide in this case whether the will in question was executed by the Mahant. It is clear that, since on the admission of the parties, the will is to govern the disposition of immoveable property said to be worth more than Rs. 55,000, the question of its genuineness must be carefully scrutinised. The will is not registered, nor probated, and though neither registration nor probate is necessary it is a matter of surprise that having regard to the value of the property involved the parties interested should not have taken steps at least to have the will registered.

On the contrary, the circumstances attending the execution of the will, as stated by the plaintiff's witnesses, indicate surprising informality. According

to the plaintiff's evidence no person was specially called for the making of this will. The writer Shib Chand (P. W. 28) is not a scribe or a petition-writer, but a casual visitor and a friend of the family who on his own admission had merely gone by chance to enquire after the health of the Mahant who was known to be ill. While present, he was, he says, requested to write out a will at the dictation of the Mahant who, he alleges, signed in his presence. Of the attesting witnesses Chanan Singh and Natha Singh have not been examined in evidence though both are available as witnesses. No satisfactory explanation has been offered for this omission. Natha Singh is said to be a Patwari and his evidence as a presumably independent witness would have been particularly valuable. Of the attesting witnesses examined, Sukhdev Chand is plaintiff's brother and a supporter of his claim. Kartar Singh is a lambardar of a different village who says he had visited the Mahant by chance to enquire after his health and to see about the recovery of the debt alleged to be due to him by the Mahant. Sawan Singh (P. W. 31) is the only attesting witness who says that he was summoned in connection with a will, but in this particular his evidence is not borne out by the plaintiff who says nothing about any intention expressed, beforehand, on the part of the Mahant to execute a will. If there had been any such intention on the part of the Mahant it is difficult to understand why in view of the importance of the document he did not summon a regular scribe or deed-writer to record the will, (though one such was admittedly available in the village) and one or other of the five lambardars of the village as attesting witnesses.

Further, although the attesting witnesses say the Mahant was at the time of sound disposing mind the only medical man who was in attendance on the Mahant during the last week or so of his life, Bhagat Ram Vaid (P. W. 50), makes no mention of any such will. This is the more surprising since this witness (one of plaintiff's own witnesses) says that he was "in constant attendance," remaining at the Mahant's bedside throughout the seven days prior to his death, that is including the supposed date on which the will is said to have been made. It is strange that if this will were genuine this medical

man was not asked to be present to prove that the Mahant was in sound disposing mind. On the contrary defendant has cited witnesses to say that for a week before his death the Mahant was in no condition to make a will, and since the Mahant had been ill for some time and was dying of chronic asthma and apparently other complications, this contention is by no means improbable. In these circumstances it was incumbent on the plaintiff to establish beyond doubt the genuineness of the will and the authenticity of the Mahant's signature which has been questioned. But although other documents bearing the Mahant's admitted signatures were available, no attempt has been made to prove the signature on the will by the independent evidence of an expert. This omission coupled with the failure of the plaintiff to call all the attesting witnesses is a serious defect. As pointed out by their Lordships of the Privy Council in 44 All 495 (1) at p. 500:

A will is one of the most solemn documents known to the law. By it a dead man entrusts to the living the carrying out of his wishes, and as it is impossible that he can be called either to deny his signatures or to explain the circumstances in which it was attached, it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of law. In the present instance, no formalities are essential. Proof of the testator's signature is all that is needed; but, in case of doubt or dispute, justice requires that the best evidence procurable of that signature should be furnished, and an attempt to support the signature by anything that falls short of this standard is a matter which, though it may not be fatal, is a serious defect.

Again there is considerable doubt as to what became of this will between the date of its execution and of its production in Court. It is true that the plaintiff alleges that the existence of the will was reported to the Patwari on the day following the death (see Report No. 254 printed on page 178 of the paper-book); but there is nothing to show that the will itself was produced at the time, and in any case this report is not convincing. The original of this report was produced and proved at a suspiciously late stage of the case, just before arguments; and it is possible that, as argued the last sentence which mentions the existence of a will, is an interpolation since the object of the

report was to inform the Patwari that his dead brother having left no male issue he, the petitioner, was "in accordance with the pedigree-table" entitled to be Gaddinashin. If, as is now the plaintiff's case, his title is based purely on a will, we should have expected the report to the Patwari to state that he was entitled to the Gaddi, not in accordance with the pedigree-table, but in accordance with a will instead of alleging the pedigree-table, and throwing in mention of a will at the end. In any case, no action was taken on this report in the way of entering up a mutation and I am not inclined to place any reliance on it as proving the existence of this will.

Lastly, the plaintiff has relied on evidence of his subsequent installation as Gaddinashin to confirm the execution of the will. But most of the witnesses to the installation do not mention a will at all. For example Mahant Paritam Das (P. W. 57) and Harnam Singh, Zaildar of the Ilqa (P. W. 59), state that the plaintiff was installed as Mahant "because he was heir of the deceased Mahant since the latter had left no son." There is no mention of a nomination by will. Indeed the Zaildar, Harnam Singh (one of plaintiff's own witnesses) is very definite that nobody told him about any will. It is true that one witness Mahant Seva Das (P. W. 54) does mention that the Mahant had executed a will but the witness admitted that no will was produced at the time of the installation nor was any will ever shown to him. His information was admittedly purely hearsay based on what he was told by the plaintiff. Thus it seems clear that no independent person had ever seen this will other than the scribe and attesting witnesses whose evidence is not in my opinion convincing. For these reasons I am not prepared to hold that the will is a genuine document, and in disagreement with the finding of the trial Court I would reject it as the basis of the plaintiff's claim. Since the plaintiff's claim to succeed to the property, as presented in this Court is based entirely on the will, the rejection of the will means that the plaintiff's suit must be dismissed. In the circumstances it is unnecessary to come to any finding on the alleged pregnancy of Mt. Jaswant Kaur and the consequent birth of a child. I would therefore accept the appeal, set aside the decree granted by the lower

1. Ram Gopal Lal v. Aipna Kunwar, 1922 P O 366=69 I O 31=49 I A 413=44 All 495 (P O).

Court and dismiss the plaintiff's suit with costs throughout.

Jai Lal, J.—I agree.

S.R./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 448

BHIDE, J.

Gurdit Singh—Decree-holder—Appellant.

v.

Sher Khan — Judgment-debtor—Respondent.

Misc. Second Appeal No. 1759 of 1935, Decided on 3rd February 1936, from order of Dist. Judge, Mianwali, D/- 15th August 1935.

(a) **Second Appeal—Pure question of law requiring no evidence can be raised in second appeal.**

Where the question is purely one of law, not requiring any additional evidence for its decision, there can be no legal objections to its being raised in second appeal. [P 448 C 2]

(b) **Execution—Executing Court attaching land of judgment-debtor—Land left with judgment-debtor not sufficient for his maintenance—Court can lease out lands.**

The executing Court has no jurisdiction to refuse to lease the land on the ground that the land left with the judgment-debtor is not sufficient for his maintenance: 1936 Lah 30, Rel. on. [P 448 C 2]

V. N. Sethi—for Appellant.

Nand Lal—for Respondent.

Judgment.—This is an appeal arising out of execution proceedings. The judgment-debtor Gurdit Singh is a member of an agricultural tribe and the decree-holder applied for lease of his land for twenty years in satisfaction of his decree. The judgment-debtor owned 325 kanals of land, but it appears from the report of the Collector that it is of a poor quality and yields an income of Rs. 24/12 per annum. The judgment-debtor contended that this was insufficient for the maintenance of himself and his family. The executing Court, however, found that the judgment-debtor was cultivating land belonging to other persons also and was thus not solely dependent on the income of his own land. The Court therefore allowed a lease of 200 kanals out of the judgment-debtor's land in lieu of Rs. 310 for a period of 20 years. From this decision an appeal was preferred to the learned District Judge who held that the executing Court was not right in taking into consideration the fact that the judgment-debtor was also cultivating land belonging to other persons and that as

the income of the land owned by the judgment-debtor was insufficient for the maintenance of himself and his family, the Court should not have allowed any lease. The appeal was accordingly accepted and the order of the executing Court was set aside. From this decision the decree-holder has appealed and the main point of law raised in appeal is that there is no provision in the Civil Procedure Code or in any other enactment entitling an executing Court to refuse execution on the ground that the land of the judgment-debtor was not sufficient for his maintenance. In support of his contention the learned counsel relied on 1936 Lah 30 (1).

The learned counsel for the respondent contended that the above objection was not raised in the Courts below and should not therefore be allowed to be raised in second appeal. But the question is purely one of law, not requiring any additional evidence for its decision and in the circumstances I can see no legal objection to its being raised now. The point relates to the jurisdiction of the executing Court and goes to the root of the case. There is ample authority for the proposition that such a question can be allowed to be raised in second appeal (cf. authorities cited at p. 339, Mulla's Civil Procedure Code, Edn. 10). The point was distinctly raised in the grounds of appeal and the counsel for the respondent cannot be said to have been taken by surprise. On merits the learned counsel for the respondent was unable to cite any provision of law or any authority in point in support of the view taken by the learned District Judge. Admittedly there is no distinct provision of law empowering the executing Court to refuse execution of a decree on the ground that the land left with the judgment-debtor is not sufficient for his maintenance. S. 60, Civil P. C., exempts various properties from attachment and sale, but it is significant that there is no provision in that section exempting land required for the maintenance of the judgment-debtor and his family. The learned counsel for the respondent merely referred to S. 72, Civil P. C., and the rules framed by the Financial Commissioners in connection with the intervention of the Collector under that section. S. 72 is, however,

1. *Naranjan Das v. Fazal Hassan*, 1936 Lah 30 = 158 I C 842.

strictly speaking inapplicable as it comes into operation only when the land is ordered to be sold and the Collector wishes to intervene. In the present instance, the land cannot be sold at all as such a sale is forbidden by S. 16, Punjab Alienation of Land Act.

It is to be observed further that even when S. 72, is applicable the Collector can only intervene if the satisfaction of the decree may be made within a reasonable period by the temporary alienation of the land. In the present instance, the decree was for Rs. 730 carrying interest at annas 4 per cent. per mensem, while the land available for lease yields an income of about Rs. 25 only. According to the provisions of the Alienation of Land Act, the land can be leased for 20 years only and this will not be sufficient to satisfy the decree. In the circumstances it seems to me that the Collector could not have intervened under S. 72, Civil P. C., even if that section were applicable. It seems *prima facie* hard that a man should be liable to be deprived of the whole of his land in order to satisfy his debts. But the judgment-debtor may himself be perhaps responsible for the situation in which he finds himself. But apart from this, the law as it stands does not seem to authorise an executing Court to refuse execution on the ground that the judgment-debtor will not have any land left for his maintenance. S. 60, Civil P. C., only exempts implements of husbandry, tools of artizans, etc., from attachment and sale and the intention of the law appears to be that an agriculturist or an artizan should earn his living by labour with the help of such implements and tools. When a man is reduced to such straits that he cannot pay the debts in full, the proper course for him would appear to be to resort to the insolvency Court.

I agree with the view taken by a learned Judge of this Court in 1936 Lah 30 (1) and hold that the executing Court had no jurisdiction to refuse to lease the land on the ground that the land left with the judgment-debtor was not sufficient for his maintenance. I accept the appeal and setting aside the orders of the Courts below remand the case to the executing Court for further proceedings in the light of the above remarks. In 1936 L/57 & 58

view of all the circumstances, I make no order as to costs.

B.D./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 449 SPECIAL BENCH

ADDISON, COLDSTREAM AND ABDUL RASHID, JJ.

(Firm) Shams Din and others—Petitioners.

v.

Collector, Amritsar, and another—Respondents.

Civil Ref. No. 59 of 1935, Decided on 31st January 1936.

(a) Stamp Act (1899), S. 2, Cl. 12—Signature alone does not complete execution of document—But Cl. 12, S. 2 makes all documents chargeable as soon as they are signed by executant.

Signature alone does not in all cases complete the execution of a document for the purpose of giving it legal validity. But for the purposes of the Stamp Act, Cl. (12), S. 2 of the Act makes all documents which are chargeable with duty when executed, chargeable as soon as they are signed by the executant: 19 Bom 635; 1914 L B 219 and 1921 U B 3, Ref. [P 451 C 1, 2]

(b) Stamp Act (1899), Ss. 2 (12), 40 (1) (b)—Proprietor of firm executing deed selling certain property to creditor firms in part payment of debt and promising to pay balance later—Deed also signed by creditor firms, described as vendees therein—They cannot be said to have drawn, made or executed any bond to pay balance within meaning of Cl. 12.

Where a proprietor of a debtor firm executes a deed reciting that the firm has sold certain property to its creditor-firms for a certain sum in liquidation of a part of its debts and promising to repay the balance within a period of four years and the deed is signed by the creditor-firms who are described therein as 'vendees', the creditor-firms cannot be said to have drawn, made or executed any bond to pay the balance within the meaning of Cl. (12), S. 2, for a person cannot by his own instrument bind another person to pay him money. [P 451 C 2]

Even assuming that the deed implies a promise on the part of the creditor-firms, of forbearance to sue until the expiry of four years, it would be an agreement and not part of the bond and as such chargeable with the duty of one rupee, and the instrument would then embody not two but three matters—a conveyance, an agreement and a bond. [P 452 C 1]

(c) Stamp Act (1899), S. 62—Signing improperly stamped instrument as witness is not criminal—Witness to document does not execute it.

Section 62 does not make criminal execution of an improperly stamped instrument by a witness but the signing of it by persons other than witnesses. The words "signing otherwise than as a witness" must be read together. A witness to an instrument does not draw, make or execute it. [P 452 C 1]

M. L. Puri and Mehr Chand Sud—for Petitioners.

Norman Edmunds—for Respondents.

Coldstream, J.—This is a reference made to this Court under S. 57, Stamp Act, by the Financial Commissioner, Revenue, the Chief Controlling Revenue Authority of the Punjab. The circumstances of the case are as follows: A merchant firm in Amritsar doing business as Mohammad Sharif-Abdur Rahman incurred heavy debts in its dealings with fourteen other firms referred to hereafter as the creditor firms. On 30th April 1928 Mohammad Sharif, proprietor of the debtor firm, executed a registered deed reciting that the firm had sold a certain property to the creditors for a sum of one lakh of rupees in liquidation of part of its debts, leaving a debt outstanding of Rs 55,807-15-0 which amount, together with a sum of Rs. 3,000 to cover the cost of the deed, altogether Rs. 59,107-15-0 the firm promised to pay within a period of four years. The deed bore a stamp of the value of Rs. 3,000 which was the amount of the duty payable on a deed of sale of property worth a lakh of rupees. The deed was signed by the petition-writer below whose signature it was signed by Mohammad Sharif. Below Mohammad Sharif's signature were added the signatures of a number of witnesses and below these the signatures of the fourteen creditor firms. Over the signature of each witness is the word "Gawah Shud (witnessed)" and under the signature of each of the creditor firms are the words "vendee No 1," "vendee No. 2" and so on. The period of four years having expired, one of the creditor firms, Dost Mohammad-Mohammad Aslam, sued Mohammad Sharif-Abdur Rahman to recover the unpaid amount of the debt, putting forward the deed of 30th April 1928 in proof of their claim. Mohammad Sharif raised the objection that the deed was not admissible in evidence as it had not been properly stamped, the argument being that the deed related to two distinct matters, namely a sale by Mohammad Sharif and a bond executed by him in favour of the creditors, and that under the provisions of S. 5, Stamp Act, the instrument ought to have been stamped with stamps of the value of the aggregate amount with which a conveyance and a bond would have been chargeable.

The Subordinate Judge who was trying

the suit accepted this contention, impounded the document under S. 38 (2) of the Stamp Act and forwarded it to the Collector. The Collector decided that in respect of the matter of the bond the deed was chargeable with a duty of Rs. 446-4-0 and he passed an order under S. 40 (1) (b) of the Act requiring the payment of this sum, together with a penalty of ten times this amount, that is to say Rs. 4,908-12-0 by the persons drawing, making or executing the deed. As this sum was not paid and the deed remained insufficiently stamped the Subordinate Judge refused to admit the deed in evidence. After examining the document the Assistant Collector whose duty it was to recover the sum required to be paid by the Collector's order directed recovery to be made from the fourteen creditor firms. Objections were raised before the Collector who ordered that the recovery should be made from the fourteen firms and the firm Mohammad Sharif-Abdur Rahman, jointly and severally. Against this order revision applications were presented to the Commissioner, Lahore Division, one by the creditor firms who contended that the penalty was recoverable from Mohammad Sharif, and the other by Mohammad Sharif, who claimed that the plaintiff firm Dost Mohammad Mohammad Aslam was alone liable to pay the amount on the ground that the Subordinate Judge had ordered that firm, the plaintiff in the suit, to pay it. The Commissioner forwarded the petitions to the Financial Commissioner for decision under S. 56 of the Act, and the Financial Commissioner has made the present reference to this Court. The questions stated for our decision are (1) whether the deed is to be deemed to have been executed by the fourteen creditor firms, and (2) whether the document is to be deemed to have been executed also by the petition-writer and the witnesses. In his referring order the Financial Commissioner has expressed his opinion that the answer to the first question should be 'Yes' and to the second 'No.'

We have heard Mr. M. L. Puri for the creditor firms, and the Assistant Legal Remembrancer, who, on behalf of the Crown, argues that all who signed the deed, Mohammad Sharif, the creditor firms, the petition writer, and the witnesses, are liable to make good the sum

of Rs. 4,908-12-0. Mohammad Sharif has not been represented before us. The Collector based his decision that all the fifteen firms were liable for the amount required to be recovered upon Cl. 12 of S. 2 of the Stamp Act, which lays down that "executed" and "execution" used with reference to instruments mean "signed" and "signature." His view was that as all the firms had signed as parties to the instrument they had all executed the bond and were liable under the provisions of S. 29 (a) (Art. 15). It is not disputed that the deed is one to which the provisions of S. 5 of the Act, are applicable, and that it was chargeable with the duty payable on a bond for Rs. 55,807-15-0 as well as with the duty payable on a sale-deed of property at a price of one lakh of rupees. Mr. Puri's contention is that the meaning of Cl. 12 of S. 2 has been misunderstood and misapplied, its intention being to declare not that any one signing a document executes it, but that for the purpose of the Stamp Act a document shall be deemed to be executed when it is signed by the persons executing, making, or drawing it. He argues that, so far as it is a bond, the deed in question was clearly not drawn, made or executed by the creditor firms, but by Mohammad Sharif, who under the provisions of S. 29 of the Act must bear the expense of providing the proper stamp. In reply the learned Assistant Legal Remembrancer contends, first that the Collector's order is correct, Cl. 12, S. 2 being conclusive against Mr. Puri, as it clearly declares that the signing of an instrument shall be deemed to be the execution of it, and secondly that the creditor firms were parties to the agreement by Mohammad Sharif-Abdul Rahman to pay Rupees 59,107-15-0, an implied condition of which was that they would forbear to sue for recovery of their debt for four years and that, therefore, they, as well as Mohammad Sharif, made and executed the instrument both as parties to the bond and as vendees.

Clause 12, S. 2 of the Act was enacted in 1899. Before that there was no such provision in the Act and the intention of the new clause was to make it clear at what time a document became executed so as to be chargeable with stamp duty under S. 3 of the Act. Signature alone will not, in all cases, complete the execu-

tion of a document for the purpose of giving it legal validity, for instance, a will may not be legally executed until it is duly attested by witnesses; a hundi is not executed until it is delivered: see 19 Bom 635 (1), but for the purpose of the Stamp Act, the clause makes all documents which are chargeable with duty, when executed, chargeable as soon as they are signed by the executant. Thus it has been held by a Full Bench of the Burma Chief Court, in 22 I C 75 (2), that an instrument chargeable with stamp duty on being executed is not liable to duty until it is signed, although this fact does not necessarily imply that the unsigned document is incomplete for the purpose for which it was drawn up.

Again in 66 I C 360 (3), it was observed that unsigned Burmese instruments made since the Stamp Act of 1899 came into force cannot be treated as executed for the purpose of the stamp law. Cl. 12 does not define who is deemed to be the executant nor is its intention to lay it down that every person who appends his signature to an instrument draws, makes or executes it. In order to decide who is liable for payment of the duty we have to look to S. 29. The only question therefore is "Did the vendees and the witnesses draw, make or execute the deed in this case so far as it amounts to a bond?" So far as it embodies a contract of sale the creditor firms, the vendees, properly signed it, and but for the contract to the contrary expressed in the deed they would have been liable to pay the stamp duty chargeable on a conveyance of property for a lakh of rupees. By the instrument they bound themselves to purchase certain property for a certain price. That they signed as vendees is clear from the description below their signatures ('vendee No. 1,' 'vendee No. 2' and so on). But it cannot be said that they drew, made or executed any bond to pay Rs. 59,107-15-0, for a person cannot by his own instrument bind another person to pay him money.

This disposes of the first of the arguments advanced by the Assistant Legal Remembrancer. His second argument is

1. Bhawani Harbhum v. Devji Punja, (1895) 19 Bom 635.
2. In re Chat Po, 1914 L B 219=22 I C 75=7 L B R 77 (F B).
3. Mg. Po Din v. Mg. Po Nyeln, 1921 U B 3=66 I C 360=4 U B R 80.

rebutted by the deed itself. There are no words in it which can be read as recording any undertaking by the vendees. They promise nothing but merely recite the fact of the sale of property for a stated price. Assuming however that the deed implies a promise of forbearance to sue until the expiry of four years this would be an agreement, and not a part of the bond, and as such would be chargeable with a duty of one rupee. In this case the instrument would have to be regarded as one embodying not two but three matters: a conveyance, an agreement and a bond. The Assistant Legal Remembrancer has referred us in the course of his argument to 30 All 271 (4), where it was remarked that the party wishing a document to be admitted in evidence was the person from whom the Collector in the first instance can recover the duty and the penalty required before the documents can be admitted in evidence.

But the question of the propriety of the Collector's order generally is not before us and we have to answer merely the question referred to us by the Financial Commissioner, namely by whom the document is to be deemed to have been executed. In support of his contention that even the witnesses in this case must be deemed to have executed the instrument as a whole, Mr. Edmunds has drawn our attention to S. 62, Stamp Act, which makes punishable (a) the drawing, making, issuing, or endorsing or transferring or signing otherwise than as a witness, of any bill of exchange or promissory note without the same being duly stamped and (b) the executing or signing otherwise than as a witness of any other instrument chargeable with duty without the same being duly stamped. From the words of this section he asks us to infer that a document may be executed by a witness. But the words do not justify any such inference. The section does not make criminal the execution of an improperly stamped instrument by a witness, but the signing of it by persons other than witnesses. The words 'signing otherwise than as a witness' must be read together. A witness to an instrument does not draw, make or execute it. Lastly Mr. Edmunds asks us to notice that two of the vendees were present when

the instrument was registered and signed by Mohammad Sharif. These were parties to the sale and signed, as already mentioned, in that capacity. They are described in the Sub-Registrar's endorsement as present and known to him. Only Mohammad Sharif is recorded as having admitted the execution. For the reasons indicated above I would answer both questions referred to us in the negative.

Addison, J.—I agree.

Abdul Rashid, J.—I agree.

R.M./R.K.

Answers accordingly.

* A. I. R. 1936 Lahore 452

ADDISON, AG. C. J. AND

DIN MOHAMMAD, J.

Hira Nand-Jai Ram Singh—Assessee—Petitioners.

v.

Commissioner of Income-tax, Rawalpindi—Opposite Party.

Civil Ref. No. 18 of 1935, Decided on 5th July 1935, from letter of Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore, D/- 29th March 1935.

* Income-tax Act (1922), S. 24—Assessee salt trader, depositing securities with salt Commissioner for deferring payment for salt purchased—System of deferred payment abolished and salt sold for cash only—Assessee selling securities and incurring loss—Claim that loss was in business—Buying securities held not compulsory as cash could be paid—Hence loss was not in course of business.

The assessee, who was a trader in salt, was in possession of certain securities which had been deposited with the Commissioner of salt against the purchase of salt for which payment could be deferred for 6 months. The system of deferred payments on deposit of securities was abolished, later on and salt could be purchased only on cash payment. The assessee therefore sold his securities and suffered a loss thereby. He claimed that this loss was one suffered in course of the salt business:

Held: that the buying of securities was not compulsory as the assessee could pay cash at once. The loss incurred by him was not one sustained in the course of the salt business. His loss in selling securities was a capital item: *McKinlay v. H. T. Jenkins & Sons Ltd.*, 10 Tax Cases 372, Rel. on. [P 453 C 1]

Gobind Ram Khanna—for Petitioners.
J. N. Aggarwal and Sarv Mitar Sikri—for Opposite Party.

Addison, Ag. C. J.—The question referred is "whether the loss incurred by the petitioning firm owing to the sale of the Government securities is a loss sustained in their salt business." The assessee, who is a general produce dealer

began trading in salt in 1926. At that time salt purchased wholesale from the Government mines could be paid for at once, or payment could be postponed up to six months if securities were deposited with the Commissioner of salt. Later, the system of deferring payment up to six months, on adequate security being given, was abolished and now salt can only be purchased against cash payments. At the time of this change the assessee was in possession of certain securities which had been deposited in the manner described. He sold them and suffered a loss and claims that this loss was one sustained in the course of the salt business. The Commissioner of Income-tax is of opinion that it was not, and we are of the same opinion. In the first place it cannot be said that it was expenditure, and in any case, the deficit was obviously one of a capital nature for which no allowance could be given. As pointed out by the Commissioner, if a man rents business premises, the rent is a revenue expense, but if he buys the premises and sells them at a loss, that is a separate capital adventure, for which no allowance is made. If he borrows capital, interest is a proper charge. If he supplies the capital himself in some convertible form and on conversion there is a difference, that is a separate capital charge, as it is not something he is "dealing in." A somewhat analogous case is reported as (1926) 10 Tax Cases 372 (1). The buying of the securities was not compulsory as he could pay cash at once. His loss, therefore in selling the securities was a capital item. It might be added that, if there had been a gain by the sale, it would not have been included in the return or assessed. For the reasons given we answer the question referred in the negative and allow the Commissioner his costs.

S.R./R.K.

Reference answered.

1. McKinlay v. H. T. Jenkins & Sons Ltd.,
(1926) 10 Tax Cases 372.

A. I. R. 1936 Lahore 453

COLDSTREAM AND JAI LAL, JJ.

M. Mohammad Sharif and others—Appellants.

v.

Teja Singh and others—Respondents.

First Appeal No. 546 of 1929, Decided on 29th April 1935.

(a) Punjab Land Revenue Act (17 of 1887), S. 44 — Presumption applies to records of current settlement.

The statutory presumption raised by S. 44 applies to the records of the current settlement, where these differ from those of previous settlements which have been corrected: 1932 Lah 278 and 1929 Lah 607, Ref. [P 455 C 2]

(b) Custom (Punjab)—Marriage—Jat Sikhs—Strict principles are inapplicable to them.

The Jat Sikhs hold liberal views upon the question of the validity of marriages with women of other castes, and the strict principles of Hindu law are inapplicable to them.

[P 456 C 1]

(c) Custom (Punjab)—Alienation—Widow—Income of property sufficient for necessary purpose — She is not entitled to alienate estate for such purpose.

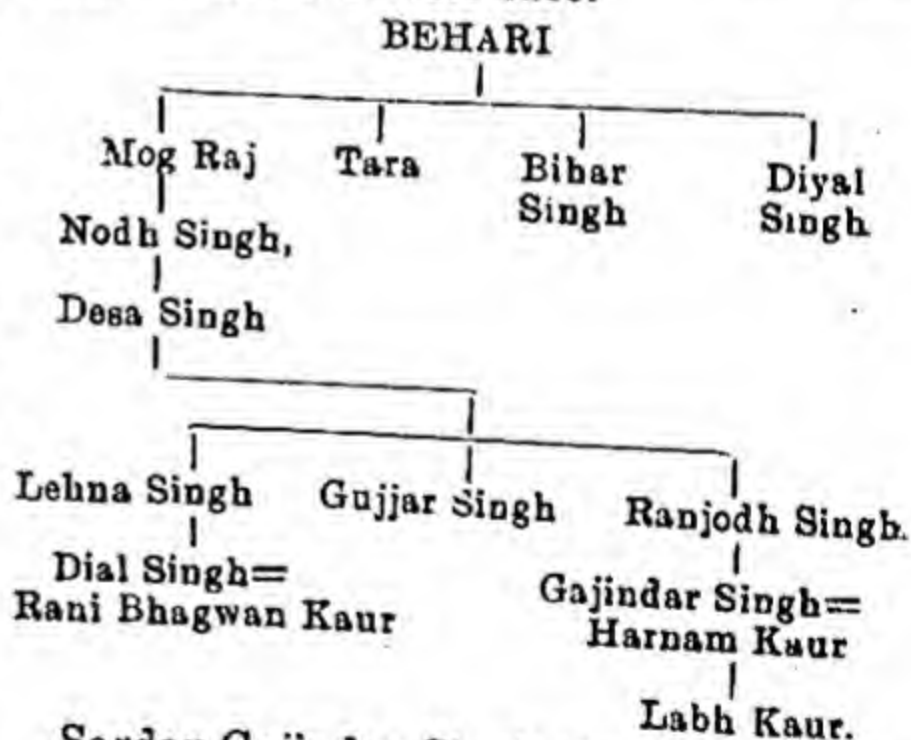
A widow following the Customary law of the province is not entitled to alienate her estate, even for a necessary purpose like daughter's marriage where it is shown that the income of the estate was sufficient for the purpose.

[P 456 C 2]

J. N. Aggarwal, J. G. Sethi and S. M. Sikri—for Appellants.

M. C. Mahajan, H. R. Mahajan, Muhammad Munier for Natha Singh, Harnam Singh, Bhagat Singh and Fauja Singh—for Respondents.

Coldstream, J—The following pedigree table will help to make clear the circumstances of this case:



Sardar Gajindar Singh, Rais of Majitha in Amritsar District, died on 28th October 1908, possessed of considerable immoveable property in Majitha and Amritsar. He was survived by his widow Rani Harnam Kaur and a daughter Labh Kaur. During the proceedings for the mutation of land revenue records relating to the Majitha land, Rani Harnam Kaur put forward a will by Sardar Gajindar Singh, dated 30th July 1908, appointing her heir to the property. This will had been registered in Amritsar on 1st December 1908, the date on which the patwari had entered the mutation for sanc-

tion. Rani Bhagwan Kaur, the widow of Sardar Dial Singh, a cousin of Sardar Gajindar Singh, also claimed the property, putting forward a later will in her favour, registered in Lahore. Neither will was relied upon by the Revenue Officer, who sanctioned the mutation in favour of Sardar Gajindar Singh's widow in accordance with the customary rule of succession.

On 19th April 1920, Rani Harnam Kaur sold 40 kanals 1 marla of irrigated land, part of a garden in Amritsar, known as Chhawaniwala to Jai Gopal and five others for Rs. 45,000. On 11th January 1921, Teja Singh and nine others, descendants of Tara, Bihar Singh and Dial Singh, sons of Behari, instituted against Rani Harnam Kaur, her vendees and some of Sardar Gajindar Singh's collaterals, who had not joined the plaintiffs, the suit from which this appeal arises, praying for a declaration that the sale would not affect their reversionary rights as it had been effected without consideration and necessity. In June 1923 one Karam Din acquired a large portion of the property by pre-emption. He re-sold it to Muhammad Sharif, who in his turn sold parts of what he had bought to others. Karam Din, Muhammad Sharif and his vendees were impleaded as defendants by the Court. Mt. Labh Kaur, Sardar Gajindar Singh's daughter, applied to be made a party and she also was impleaded.

The Court also joined as defendants several other persons who claimed to be the reversioners of the Sardar. The suit was contested on the pleas that the plaintiffs had no locus standi inasmuch as Gajindar Singh's father, Ranjodh Singh, was not the legitimate son of Desa Singh, that Rani Harnam Kaur was full owner of the property she had sold, having inherited it under her husband's will, that the full consideration stated in the deed had been received and that the sale had been effected for the necessary purpose of defraying the costs of Labh Kaur's marriage. A number of other pleas were also raised to which it is not necessary to refer. The decision of some of them was rendered unnecessary by the death of Mt. Labh Kaur, and the arguments in appeal have been restricted to those arising from the pleas here mentioned. The Senior Subordinate Judge

decided that Ranjodh Singh was a legitimate son and that the plaintiffs had therefore a right as Gajindar Singh's reversioners to attack Rani Harnam Kaur's alienations, that the will put forward by the Rani was a fabrication, that necessity for the sale was not proved, and that out of the stated consideration not more than Rs. 13,400 was proved to have passed. On these findings he decreed the plaintiffs' suit. The contesting defendants have appealed and it is urged on their behalf that none of these findings is justified by the evidence. It is not now disputed that, if the will was not genuine, Rani Harnam Kaur (who died during the pendency of the appeal) was not competent to alienate the property in suit except for a purpose which is recognised as necessary by the Customary law governing the powers of widows in dealing with their husband's estates.

The suit property, it may be noted, is admittedly not ancestral of the plaintiffs and Sardar Gajindar Singh, but this fact is immaterial for the disposal of this appeal. That the plaintiffs are descendants of an ancestor of Sardar Gajindar Singh is not disputed. They are shown by the pedigree table to be his collaterals in the sixth degree. The defendants' plea that they have no locus standi is based mainly on a note found in the pedigree table of the proprietors of Majitha prepared for the first Regular Settlement of Amritsar District in 1852. The table shows Nodh Singh, his son Desa Singh and Desa Singh's three sons, Lehna Singh, Gujjar Singh and Ranjodh Singh. Below the name of Ranjodh Singh are the words *farzand bandizada Ranjodh Singh ko koi hissa Majitha me nahin hai ba-ru-i hissa jaddiki* (Ranjodh Singh, the slave-born son, has no share in Majitha by way of ancestral share). It is argued that this note, corroborated by the fact that Ranjodh Singh did not inherit Desa Singh's property in Majitha along with his brother Lehna Singh proves conclusively that Ranjodh Singh was illegitimate. A full account of this branch of the great Majitha family is given at p. 417 of the Book 'Chiefs and Families of Note in the Punjab' compiled under Government instructions by Col. Massay in 1890 and brought up-to-date in 1909 by Major Conran and Mr. (now Sir) Henry Craik. Both parties rely on statements made in this history.

The original Jagir in Amritsar was acquired by Nodh Singh who died in 1788. His son, Desa Singh, became one of Maharaja Ranjit Singh's most trusted and successful generals, receiving extensive grants of land in Jagir of an annual value of nearly a lakh and a quarter rupees. When he died in 1832, he was succeeded in all his estates and honours by his eldest son, Sardar Lehna Singh who was in charge of the hill territory between the Ravi and the Sutlej until 1844, but resided ordinarily in Majitha or Amritsar. Desa Singh's second son Gujjar Singh appears to have held no separate estate of his own. He died in 1836. After Ranjit Singh's death Lehna Singh thought it advisable to go on pilgrimage outside the Punjab. Before leaving, he made over the management of his estates to his half brother Ranjodh Singh, described in the History as 'the youngest son of Sardar Desa Singh by a hill woman.' On his return, two-and-a-half years later, a dispute arose between him and Ranjodh Singh, who claimed a half share in the estates which he had preserved for his half brother. The matter was settled by Lehna Singh giving his brother a Jagir worth Rs. 12,000 per annum. The dispute between Lehna Singh and Ranjodh Singh involved the Majitha property. This matter had been compromised by the grant of a garden by Lehna Singh to his half brother, but Ranjodh Singh declared that the area of the garden was less than the area promised, and he sued for the deficiency to be made good. He lost his case in the Court of the Assistant Settlement Officer and his appeals to the Settlement Officer and the Commissioner, Lahore Division were unsuccessful. The judgments of these officers have been brought on the record by the defendants as proof that Ranjodh Singh did not inherit any of his father's land.

The note about Ranjodh Singh's maternity was not repeated in any of the pedigree tables incorporated in the records of the three subsequent settlements of 1865, 1892 and 1911, which show Ranjodh Singh as Desa Singh's son without any comment. It is argued for the respondents that the later tables must be presumed to be correct under S. 44, Land Revenue Act; and the note of 1852 must be presumed to have been omitted because, when the records were correct-

ed, it was found inaccurate. That the statutory presumption raised by S. 44 applies to the records of the current settlement, where these differ from those of previous settlements which have been corrected, cannot be doubted: see 1932 Lah 278 (1) and 1929 Lah 607 (2); but the point is immaterial here for the note in the pedigree table of 1852 does not justify the assumption that Ranjodh Singh's mother was not Desa Singh's legal wife. Desa Singh was not a Hindu of high caste and there was no bar to his marriage with a girl of humbler birth than himself. In Colonel Massey's History, Ranjodh Singh is described as Lehna Singh's half brother. The pedigree table of 1852 itself does not show him as the founder of a new line of proprietors in Majitha as it would have done had he been illegitimate. The subsequent pedigree tables raise a presumption of Ranjodh Singh's legitimacy and it is significant that in Colonel Massey's History Gajindar Singh is described as representing the most important of the three great Majitha families. The fact that he did not succeed to a share of his father's property cannot in the circumstances of his case be regarded as evidence of illegitimate birth. Desa Singh's estates were not ancestral or family property, but political jagirs, partly, according to the authoritative history, acquired by himself and Lehna Singh jointly.

That Gujjar Singh was legitimate is not disputed, but the records do not disclose that he succeeded to any portion of his father's estate although he outlived his father for five years. There is no suggestion in the judgments of 1854 that Ranjodh Singh was illegitimate. On the other hand the Settlement Officer in his appellate order of 15th March 1854, expresses his astonishment at the continuance of litigation between two Sardars who are brothers. Lastly, when there was litigation over Dial Singh's will, by which he left what he considered his ancestral property to his cousin Gajindar Singh, and other valuable estate in trust for public purposes, Gajindar Singh entered into a caveat to which no objection was raised on the ground of his incompe-

1. Dost Mahomed v. Bahadur, 1932 Lah 278=198 I C 502.

2. Mula Mal v. Emperor, 1929 Lah 607=1929 Cr O 164=120 I C 188=91 Cr L J 49=11 Lah 24.

tency as being of illegitimate origin. The Jat Sikhs hold liberal views upon the question of the validity of marriages with women of other castes and the strict principles of Hindu law are inapplicable to them: see 100 P L R 1913 (3). For all these reasons I consider that the learned Senior Subordinate Judge decided rightly in favour of the plaintiffs-respondents on this point. (His Lordships then considered the evidence regarding genuineness of the will and held that it was not genuine. The judgment then proceeded). There remain the questions whether in her circumstances the Rani was entitled to alienate the property inherited from her husband, and whether as a fact this alienation was effected for consideration really received and for the purpose of repaying debts incurred to meet the costs of Mt. Labh Kaur's marriage.

In her reply to the plaint, the Rani had pleaded (see para. 4 of the additional pleas) that her husband's collaterals had no right to question her alienation inasmuch as she was not an ordinary agriculturist, but belonged to a ruling family. It is however now admitted that the parties must be presumed to follow the custom binding upon their tribe—Gil Jats of Amritsar district—and that Rani Harnam Kaur's power to alienate was no more extensive than that of any other Jat Sikh widow. The arguments of the appellants' counsel is that the sale in this case was necessary to pay the debts incurred to defray the costs of Mt. Labh Kaur's marriage, that this was a 'necessary purpose' for which the Rani was entitled to alienate the property inherited from her husband, that a widow's tenure under the Punjab Customary law is the same as that of a Hindu widow under Hindu law, that under Hindu law a widow need not spend the income derived from the estate to meet such expenses but may alienate the corpus of the estate for the purpose, and that therefore the question whether her income was sufficient for this purpose or not is immaterial. The rule stated in the Customary law (Riwaj i-am) of the Amritsar district, brought up-to-date at the time of the last Land Revenue Settlement in 1914, is that among all the agricultural tribes of the district a widow

cannot sell or mortgage her estate except for necessity. There is no doubt that the marriage of a daughter is a purpose for which a widow may alienate her husband's property if the estate does not yield an income sufficient to meet the reasonable expenses of the marriage.

It has frequently been observed by this Court that the powers of a widow under the Customary law of the Province are analogous to those of a widow governed by Hindu law. It is well settled that they are equally restricted: see 7 Lah 543 (4), but the appellants' counsel has not shown any authority supporting his contention that a widow bound by the Customary law of the Province may alienate her husband's estate in order to celebrate her daughter's marriage even if the income from that estate is enough for the purpose—a contention opposed to judicial decisions consistently followed by this Court (see Explan. 2, para. 65 of Rattigan's Digest of Customary Law). In 14 P R 1883 (5), Barkley and Rattigan, JJ., referring to the powers of a widow remarked that she has full power for necessary purposes to dispose of her property as well as of its income, but to ascertain whether it is necessary to alienate or to charge the property the income must be enquired into and compared with her legitimate expenditure. The wording of the report shows that the case was one of the parties following custom although the judgment purports to explain the law relating to Hindu widows.

The passage cited was quoted with approval in 1 P R 1890 (6), in which the Bench drew attention to the fact that the Courts generally lost sight of the fact that the income of the widow was a matter which had to be investigated in deciding whether an alienation had been necessary: see also 89 I C 960 (7). The Punjab rulings cited by appellants' counsel to support the proposition that the question of the sufficiency of the widow's income from her husband's estate is immaterial where the purpose of an alienation is a proper one, help him only in so

4. Kundan v Secy. of State, 1926 Lah 673=96 I C 895=7 Lah 543.

5. Autar Singh v. Mehr Singh, (1883) 14 P R 1883.

6. Baga Singh v. Sant Singh, (1890) 1 P R 1890.

7. Pars Ram v. Tehu, 1926 Lah 23=89 I C 960.

3. Dalip Kaur v. Fatti, (1913) 99 P R 1913=100 P L R 1913=18 I C 930.

far as they contain remarks to the effect that the interest of a widow in her husband's estate resembles generally, or is analogous to, that of a widow governed by Hindu law. Most of these deal with cases where it was argued before the Court that under custom the widow has wider powers than under Hindu law. None is authority for the broad proposition that by custom a widow in the Punjab may dispose of her widow's estate for a necessary purpose even if the estate yields her ample income to meet the expense reasonable for the purpose. Thus, in 95 P R 1879 (8), (D. B) Plowden, J., after remarking that a widow by custom of the parties in the case took the entire estate of her childless husband with an interest therein resembling generally the interest of a Hindu widow under the Hindu law, proceeded to point out that under the Hindu law, as applied by the Indian Courts,

it is by no means sufficient in all cases to look merely at the purpose for which the debt is incurred or even the object to which it was applied : p. 255

At p. 257 he continued :

According to the argument addressed to us at the hearing of the appeal, it is sufficient to show that the debts incurred by the widow were incurred for purposes for which they might by possibility be legitimately incurred, without regard to the question whether there was a necessity for borrowing. If this were true, the destruction of the reversionary interest would only be a question of time, if the widow was disposed to destroy it. She might take the whole income of the estate, and expend it for her own enjoyment; and for every purpose connected with the management of the estate, for cultivation, and for payment of the Government revenue, she might borrow the requisite funds, and let the debt grow and interest accumulate upon it, until the creditor chose to bring the estate to sale in satisfaction of his claim, whether in her hands or those of the reversioners. This doctrine bears its own refutation with it; for this is nothing else but to say that the widow can be permitted to waste indirectly the estate which it is her duty to protect and preserve from being wasted by her own acts or omissions. The unquestionable rights of reversionary heirs would be placed in the utmost jeopardy, if it was once admitted that the estate was liable for every debt incurred by the widow in connexion with its proper management, notwithstanding that there was no real necessity for resorting to the expedient of borrowing.

In that case, it is true, the debts were not incurred for a daughter's marriage, but I see no justification for holding that the remarks are not generally applicable,

8. *Shahabul v. Ram Das*, (1879) 95 P R 1679.

at any rate, to parties following custom in this province. On the judgments of other Courts cited by appellant's counsel, only three contain passages which appear to support his proposition in some measure. In 31 Cal 433 (9), the learned Judges remarked that the widows whose alienations were attacked in the case were not bound to pay off the debts of their husbands and the costs of certain necessary marriages out of their income. But they did not base their decision upon this ground as they found it proved that the property did not yield an income larger than was necessary for their maintenance and the maintenance of their dependents. In 89 I C 581 (10), the Oudh Judicial Commissioner's Court remarked that a Hindu widow has absolute power of disposal over the property inherited from her husband and when she alienates the property to pay off his debts, no question of pressure on the estate arises.

This merely applies the principle that the estate passes to the widow subject to the liability created by the husband, as was laid down by the Madras Court in 55 Mad 216 (11), where it was observed that a Hindu widow takes her estate subject to payment of debts and that over its income she has full power of disposal. But the test on which the case was decided was simply whether the alienation, which had been effected to discharge a necessary debt, could be justified as the act of a prudent manager. It was decided that the widow had acted in good faith and in the exercise of proper discretion. When the debts are the widows', the principle followed in the Oudh case would not apply: see 1926 Mad 517 (12). The decisions of the Indian Courts generally show that the broad proposition advanced by appellants' counsel as good in Hindu law has not been accepted unreservedly by the Indian Courts. In 60 I C 486 (13), the learned Judges took it to be settled law that necessity for an alienation by a widow is

9. *Debi Dayal Sahu v. Bhan Pertab Singh*, (1909) 81 Cal 488=8 C W N 408.
10. *Bishamber Nath v. Ram Rattan*, 1925 Oudh 529=89 I C 581=2 O W N 522.
11. *Jaganadham v. Vighneswaradu*, 1932 Mad 177=14 I C 810=55 Mad 216=61 M L J 507.
12. *Rajagopalachariar v. Sami Reddi*, 1926 Mad 517=93 I C 49=60 M L J 221.
13. *Sudarshan Prashad Narain Singh v. Sarjug Singh*, (1921) 60 I C 486.

not established unless it be proved that at the time the money was actually advanced, there was not money in the coffer sufficient for the protection of the estate. In that case, the necessity was the payment of costs of litigation to protect the estate against hostile attacks. The Lucknow Court in 4 Luck 279 (14), took a similar view in a case where the alienation was made by a widow to satisfy a decree for arrears of rent passed against her, remarking,

It has been held in similar cases decided by their Lordships of the Privy Council and by the High Courts in India that the payment of a decree for arrears of rent cannot by itself be considered to be legal necessity unless there is evidence to show that the widow had no means to pay that decree and that the borrowing was necessary in order to discharge the debt, which, if not discharged, would have resulted in the sale of the property in her hands and which she had inherited from her husband. If this were not the rule of law, it would be open to a widow to appropriate the entire profits of the property for her own use and benefit without paying rent or revenue which is actually charged on the profits accruing from the property. A Hindu female cannot be considered to be entitled, while she is in possession of the property inherited by her to appropriate the gross profits of the property and to throw the burden of the payment of legitimate charges like those of rent and revenue upon the reversioners.

But whatever be the correct view of the Hindu law on the subject, I have no doubt that, a widow following the Customary Law of the Province is not entitled to alienate her estate, even for a necessary purpose, where it is shown that the income of the estate was sufficient for the purpose. There is ample authority for this view and appellants' counsel has not given any good reasons for holding it to be unsound. Applying this principle to the facts of the present case, the appeal must fail. It is not shown that the Rani's income was insufficient to meet the expenses of Labh Kaur's marriage. On the other hand, it is admitted that she had an ample income from Sardar Gajindar Singh's estate, 40,000 to 50,000 according to the plaintiffs, 12,000 or 13,000 according to the defendants—and as already stated, she had alienated property worth many thousands of rupees. There is no evidence to show what amount would be a reasonable expenditure on Labh Kaur's mar-

riage. No enquiry is proved to have been made by the alienees as to the existence of the debts to repay which the alienation was stated to be necessary. According to the deed, the debts had been incurred to meet the expenses connected with the marriage, and the milni and tirajwan ceremonies. What these two ceremonies cost or what they might reasonably be expected to cost is not proved. [His Lordship then considered the validity of the other debts and concluded.] For all these reasons, I find that the suit was rightly decreed and I would dismiss the appeal with costs.

Jai Lal, J.—I agree.

K.S./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 458

JAI LAL AND SALE, JJ.

(Lala) *Tarif Singh*—Plaintiff—Appellant.

v.

(Lala) *Kanshi Ram* and others—Defendants—Respondents.

Appeal No. 190 of 1935, Decided on 23rd July 1935, from decree of Senior Sub-Judge, First Class, Ludhiana, D/- 28th November 1934.

(a) Partnership—Suit for dissolution and accounts—How effected.

In a suit for dissolution of partnership and settlement of accounts, ordinarily the liabilities have to be paid and assets to be collected and the business has to be wound up. Sometimes this is begun by ascertaining the liabilities and assigning them either to the parties with the consent of the creditors, or by discharging them out of the sale proceeds of the assets of the business. The amounts due to the partnership are valued and assigned to the parties, or auctioned between them, or sold to third parties. [P 459 O 2]

(b) Partnership—Suit for dissolution—Appointment of Commissioner—Dispute regarding possession of account books—Court should decide on evidence—Commissioner is only to examine accounts and settle them.

In a suit for dissolution of partnership it is the duty of the trial Court to record the evidence on question of possession of account books itself and not to appoint a Commissioner for that purpose. This is a matter which cannot be left to the Commissioner and does not fall within the ordinary duties of the Commissioner, whose business is merely to examine the accounts produced before him and to report to the Court the result of the examination of the accounts and also to suggest a proper scheme for the winding up of the business. [P 460 O 1]

(c) Court-fee—Partnership—Suit for dissolution—Plaintiff providing whole capital for business—Amount claimed in final adjustment—Court-fee need not be paid on entire amount.

14. *Jaganath Singh v. Gurcharan Singh*, 1929 Oudh 422 = 114 I C 783 = 4 Luck 279 = 5 O W N1097.

Where the plaintiff provides all the capital for the business of the firm, it is not necessary for him to pay a court-fee stamp on the whole amount, which he claims should be taken into account in adjusting the final accounts between the parties. [P 460 C 2]

(d) Court-fees Act (1870), S. 7 (iv) (f)—Provisions apply to appeals.

The provisions of S. 7 (iv) (f) and S. 11, Court-fees Act, also apply to appeals: 1929 P C 147; 1931 Rang 146 and 1933 Mad 330, Foll.

[P 460 C 2; P 461 C 1]

Jagan Nath Aggarwal and *S. M. Sikri*—for Appellant.

Badri Das and *Krishna Swarup*—for Respondents.

Jai Lal, J.—The appellant *Tarif Singh* instituted a suit for dissolution and settlement of accounts of a partnership business with his brother *Kanshi Ram* and another *Kanshi Ram*, both of whom are respondents in this appeal. A preliminary decree was passed and a Commissioner was appointed to examine the accounts of the parties to submit a scheme for the winding up of the partnership business. The Commissioner examined the accounts of the parties, i. e., whatever accounts were produced before him, and made a report. It appears that the business of the partnership is carried on at Amritsar, Ludhiana and Muzaffarnagar; and the question arose in whose possession the books relating to the business at Muzaffarnagar were. They were not produced before the Commissioner and it also appears from the record that from the very beginning the plaintiff has been making applications with a view to secure from the defendants the production of the books relating to the Muzaffarnagar business. When the Commissioner was appointed, the plaintiff applied to the Court that the Commissioner should be directed to record evidence and to decide in whose possession the Muzaffarnagar books were and an order to that effect was passed by the Court and in pursuance thereof the Commissioner recorded evidence which he forwarded to the trial Court. The trial Court came to the conclusion that the books were in possession of the plaintiff. The Commissioner reported that in respect of the business carried on by the parties up to the date of the report certain amounts were due to the plaintiff. He suggested that the plaintiff alone should in future carry on what was previously the partnership business and after he had realised all the assets and paid off the liabilities of the

firm the balances should be divided between the parties in the manner suggested by him. After examining the Commissioner, as both parties had objected to the report and particularly to the manner in which the business of the partnership was to be carried on after the date of his report and to the disposal of the balance, the trial Court passed a decree accepting practically all the suggestions of the Commissioner. The result is that the business has not really been wound up; it still continues, and it is conceded before us that in case there is a dispute hereafter as to the amounts actually realised by the plaintiff or disbursements made by him, and consequently about the balance due from one party to the other, a fresh suit would have to be brought in order to settle such dispute. This is exactly what is intended to be avoided by the suit for dissolution of a partnership and settlement of its accounts. Ordinarily the liabilities have to be paid and assets to be collected and the business has to be wound up. Sometimes this is begun by ascertaining the liabilities and assigning them either to the parties with the consent of the creditors or by discharging them out of the sale proceeds of the assets of the business. The amounts due to the partnership are valued and assigned to the parties, or auctioned between them, or sold to third parties. Neither of these methods has been adopted either by the Commissioner or by the trial Court. It is not therefore surprising that both parties objected to the report before the learned trial Judge, who does not appear to have applied his mind to the proper procedure to be adopted in such cases.

On this appeal by the plaintiff it is contended that the decision of the trial Court, that the Muzaffarnagar books were in his possession, is not supported by any evidence and that in any case it should not have been based on the evidence recorded by the Commissioner alone. This evidence has not been translated and printed. *Mr. Jagan Nath Aggarwal* attempted to read the vernacular record from the certified copies in his possession, but *Mr. Badri Das* for the respondents objected to this course, on the ground that the evidence should have been printed and that it was the duty of *Mr. Jagan Nath Aggarwal* to see that it was printed. In reply *Mr. Jagan Nath Aggarwal* says that in the notice regard-

ing the printing of the documents an intimation was given to him that any evidence recorded by the Commissioner would, as a matter of ordinary routine, be printed and therefore he did not make any special efforts to have the evidence recorded by the Commissioner printed in this case, especially as the printed record was given to him only a short time before the hearing of the appeal and he had no time to take proper steps. The evidence being in vernacular we declined to give permission to Mr. Jagan Nath Aggarwal to read it. Consequently we have not been able to examine the evidence and to decide the question whether the conclusion of the learned trial Judge, that the books relating to the Muzaffarnagar business are in possession of the plaintiff, is justified by the evidence or not. Though the other objection by Mr. Jagan Nath Aggarwal, that the Court should not have abdicated its functions by leaving it to the Commissioner to decide the question in whose possession the books were, is not open to him, as it was on his own application that this course was adopted by the learned trial Judge, still in my opinion it was the duty of the Court below to record the evidence itself and not to appoint a Commissioner for that purpose. This was a matter which could not be left to the Commissioner and did not fall within the ordinary duties of the Commissioner, whose business was merely to examine the accounts produced before him and to report to the Court the result of the examination of the accounts and also to suggest a proper scheme for the winding up of the business. It was for these purposes alone that he was originally appointed.

In my opinion therefore the best course would be to set aside the final decree passed by the trial Court and to remand the case to it with directions to proceed with the case after the stage at which the preliminary decree was passed, to appoint a new Commissioner and then to pass a final decree, in accordance with law, with due regard to the observations made above. The evidence recorded by the previous Commissioner shall be treated as evidence in the case and it will be open to the Court below to take into consideration his report, if it considers such a course to be necessary in the interests of justice. The Commissioner appointed by the Court shall also be appointed a

receiver in respect of the assets of the partnership and he will be given all powers necessary for the purposes of winding up the partnership business by collecting and realizing the assets and paying off the liabilities of the firm.

As the main objection in this appeal has been as to the relevancy of the evidence recorded by the Commissioner and as we find that that evidence was recorded on an application made by the appellant, we consider that the appellant should pay the costs of this appeal to the respondents irrespective of the result of this litigation. Before concluding this appeal reference must be made to a preliminary objection taken by Mr. Badri Das. It appears that the suit was valued for purposes of court-fee, under S. 7 (4) (f), Court-fees Act, at Rs. 1,300. After the decree of the trial Court the plaintiff has presented this appeal and has valued the relief at Rs. 5,250 and has paid a court-fee stamp on that amount. An objection is taken that the real object of this appeal is that the finding of the trial Judge disallowing an item of Rs. 58,000, which the plaintiff claims to be due to him from the other partners as having been credited to him in the Muzaffarnagar books, should be set aside and he must therefore pay court-fee stamp on that amount. It is however to be noted that the plaintiff does not claim a decree for Rs. 58,000; all that he claims is that in the final settlement of accounts relating to the partnership business Rs. 58,000 which was credited to his account in the partnership business and which represented his profits in the business prior to the date of the credit, and also the amounts actually paid by him as capital for the business, should be taken into account. It may be mentioned that it seems that the plaintiff provided all the capital for the business of the firm. Under such circumstances it seems to me that it is not necessary for the plaintiff to pay a court-fee stamp on the whole amount, which he claims should be taken into account in adjusting the final accounts between the parties.

It has been laid down by their Lordships of the Privy Council in 10 Lah 737 (1), that the provisions of S 7 (4) (f) and S. 11, Court-fees Act, also apply to

1. Faizull h Khan v. Mauladad Khan, 1929 P C 147=117 I C 493=56 I A 232=10 Lah 737 (P C).

appeals. This was the view taken in 9 Rang 165 (2) and 56 Mad 705 (3). In my opinion therefore in this case it was open to the appellant to value his relief for the purpose of court-fee stamp tentatively at such figure as he may choose to fix, under S. 7 (4) (f), and the plaintiff was within his right therefore in fixing the value at Rs. 5,250. I would therefore overrule the preliminary objection.

The net result is that this appeal must be accepted, the final decree passed by the trial Judge set aside and the case remanded to him with directions to proceed with the case as directed above. The case will be sent to the trial Judge with all possible expedition and in any case it should reach him before 6th August 1935, on which date the parties have been directed by us to appear before the learned trial Judge, who would on that date appoint a Commissioner and Receiver. The appellant will pay the costs of this appeal to the respondents irrespective of the result of the suit. The court-fee on the memorandum of appeal shall be refunded to the appellant.

Sale, J.—I agree.

B.D./R.K.

Appeal accepted.

2. C. K. Ummar v. C. K. Ali Ummar, 1931 Rang 146=133 I C 91=9 Rang 165 (F B).

3. In re N. Venkatanandam, 1933 Mad 330=141 I C 602=56 Mad 705=64 M L J 122.

A. I. R. 1936 Lahore 461

JAI LAL, J.

Girdhari Ram and others—Appellants.

v.

Qasim and others—Respondents.

Second Appeal No. 1562 of 1935, Decided on 15th January 1936.

(a) Custom (Punjab)—Tenancy—Person in possession of land without ostensible title—Revenue authorities in Punjab recording him as cultivator—No presumption of tenancy arises—On facts held presumption could be raised.

It is the practice of Revenue Authorities in the Punjab to record a person, who is in possession of land without any ostensible title thereto, in the column of cultivator describing him as a tenant at will and sometimes a remark is added mentioning the grounds on which the person in possession claims to be in possession. No presumption of tenancy necessarily arises in such cases: 1930 Lah 991 and 1932 Lah 586, Ref. [P 462 C 1]

But where in the column of rent paid by the tenant, the amount of rent is mentioned and in the subsequent entries the amount of rent is not mentioned and what is recorded is that the amount is the same as the land revenue payable in respect of the land by the landlord to the Government, on such entry a presump-

tion arises that the relationship of landlord and tenant existed between the parties.

[P 462 C 1]

(b) Landlord and Tenant—Non-payment of rent by tenant—No cessation of relationship—Tenant's possession is not adverse.

The mere non-payment of rent does not cause cessation of the relationship of landlord and tenant, or convert the possession of the tenant into adverse possession. [P 462 C 2]

Jagan Nath Aggarwal—for Appellants.

Mehr Chand Mahajan—for Respds.

Judgment.—A suit brought by the respondents against the appellants for possession of land has been decreed and consequently this second appeal has been presented in this Court. The plaintiffs-respondents allege that they were the owners of the land in suit and that the same was in the occupation of the defendants as tenants under the plaintiffs and for reasons, which it is not necessary to mention here, the defendants were liable to ejectment. The suit has been construed as a suit based on the existence of relationship of landlord and tenant and in the alternative on the title of the plaintiffs. On reading the entries in the Revenue Records the learned District Judge has held that in its inception the possession of the appellants was permissive as tenants under the respondents, but that there is no proof of payment of any rent by the appellants to the respondents, nor is there any proof of any overt act by the appellants denying the title of the respondents and asserting their own title prior to 1922. In that year a suit was instituted for recovery of rent in the Revenue Courts by the respondents against the appellants and the existence of relationship of landlord and tenant was denied by the appellants and finally the suit was dismissed. But from 1922 till the institution of the present suit 12 years have not elapsed and the learned District Judge has found that the adverse possession of the appellants has not extended to more than 12 years so as to destroy the title of the respondents.

On this second appeal it is asserted by the learned counsel for the appellants that the interpretation placed on the revenue entries by the learned District Judge is erroneous and that it does not follow from those entries that originally the possession of the appellants was that of tenants under the respondents. Now the entries in 1901 and 1902 were as follows: The respondents were entered in the column of proprietors. The ap-

pellants were entered in the column of cultivators and were described as tenants at will. In the column relating to rent it was mentioned that "the same amount is paid as rent as is paid by the landlords as land revenue"; in the first entry the amount of rent also is mentioned to be annas 9, annas 3, for the kharif harvest and annas 6 for the rabi harvest and in the column of remarks it is stated that the mutation has been made on account of the land having been newly broken, presumably meaning that the appellants are in possession as tenants paying the same amount as rent as land revenue assessed on the land because they have brought the land under cultivation. I am aware of the fact that it is the practice of revenue authorities in this province to record a person, who is in possession of land without any ostensible title thereto, in the column of cultivator describing him as a tenant-at-will, and that sometimes a remark is added mentioning the grounds on which the person in possession claims to be in possession. No presumption of tenancy necessarily arises in such cases, but in the present case there is something more than that.

In the column of rent paid by the tenant the amount of rent is mentioned. In subsequent entries the amount of rent is not mentioned and what is recorded is that the amount is the same as the land revenue payable in respect of the land by the landlord to the Government. On such an entry in my opinion the learned District Judge has reached the correct conclusion that a presumption arises that the relationship of landlord and tenant existed between the parties. The learned counsel for the appellants has relied upon 11 Lah 410 (1), the decision in which turned upon an entry made in the column of rent in exactly similar terms, and it appears that the view of the learned District Judge was approved that the entry did raise a presumption of the existence of relationship of landlord and tenant; but in that particular case the presumption of correctness of the entry was found to have been rebutted by the evidence produced. The case therefore, so far as the interpretation of the entry is concerned, is against the appellants'

contention. In 13 Lah 432 (2), a Division Bench of this Court considered in detail the effect of such an entry and came to the conclusion that it raises a presumption of the existence of relationship of landlord and tenant. In my opinion it is immaterial in this case whether the presumption has been raised by the District Judge on interpreting the entry made in the jamabandi of 1901 and 1902 or in subsequent jamabandis, but he has raised the presumption of the existence of relationship of landlord and tenant and there is no evidence in rebuttal by the appellants as none has been pointed out before me. It is well recognized that the mere non-payment of rent does not cause cessation of the relationship of landlord and tenant or convert the possession of the tenant into adverse possession.

It was contended that in the pleadings of the plaintiffs it was asserted that the relationship of landlord and tenant commenced ten years before the institution of the suit and that the denial of the plaintiffs' title was five years before the institution of the suit; and, as in 1922, which would be ten years before the institution of the suit, a Revenue Court in a suit instituted by the respondents for recovery of rent had negatived the existence of relationship of landlord and tenant between the parties, and as on this record there is no proof that ten years prior to the institution of the suit relationship of landlord and tenant was created between the parties, the respondents must fail on the cause of action set up by them. But an examination of the plaint shows that the respondents did not assert that the tenancy was created ten years before the institution of the suit. All that they asserted was that the defendants-appellants had been their tenants and had denied their title five years ago. But the counsel for respondents, when examined before the framing of the issues, did make a statement that the relationship of landlord and tenant commenced ten years ago. This might be due to an apprehension due to the result of the previous suit in the Revenue Courts. But obviously the respondents cannot be made to suffer by such a statement which is not contained in the plaint. In any case it has been

1. Ghulam Murtaza v. Nagina, 1930 Lah 991 = 123 I C 278 = 11 Lah 410.

2. Sohawa Singh v. Kesar Singh, 1932 Lah 586 = 140 I C 474 = 13 Lah 432.

found on an interpretation of the Revenue Records, and in my opinion correctly, that the relationship of landlord and tenant existed originally when the land was given by the respondents to the appellants.

It was then contended that as the claim for rent in the suit brought in the Revenue Courts in 1922 was in respect of the years 1919 to 1922, and as that suit was dismissed, it must be held that the possession of the tenants became adverse to the landlords in 1919 and in the alternative that the finding of the Revenue Court must be deemed to be that in 1919 the relationship of landlord and tenant did not exist and the suit having been brought in 1933, the appellants' possession must be deemed to be adverse and for more than 12 years against the respondents. But it must be remembered that it was subsequent to the institution of the suit that in their written statement the appellants denied the title of the landlords and asserted their own right. There is no proof that prior to that they had done so. Moreover the conclusion of the Revenue Court cannot be *res judicata*, because in its judgment that Court has expressly left the question of the existence of the relationship of landlord and tenant to be determined in civil Courts. I hold therefore that the conclusion of the learned District Judge is correct that as in this case at the commencement the possession of the appellants was permissive, the respondents, the real owners of the land in suit, are entitled to a decree in the absence of proof by the appellants that at any time more than twelve years before the institution of the suit, they converted their permissive possession into adverse possession. I dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 463

JAI LAL, J.

Parkash Chand Mahajan—Appellant.

v.

Madan Theatres, Ltd.—Respondent.

Misc. First Appeal No. 1170 of 1935,
Decided on 14th January 1936.

Civil P. C. (1908), S. 145—Decree against judgment-debtor can be executed against his surety to the extent of his liability even if his name is not mentioned in the decree.

A decree against the judgment-debtor can be executed against his surety who has, by means

of a statement made before the Court, undertaken to satisfy the liability of the judgment-debtor. It does not matter that the name of the surety is not mentioned in the decree: 1935 Lah 189, *Rel. on*; 1930 Lah 110 and 1935 Pesh 83, *Disting.* [P 464 C 1]

Harnam Singh—for Appellant.

Jagan Nath Aggarwal—for Respds.

Judgment.—The appellant being a Receiver of the estate of Messrs. Pahlad Das-Bhagwan Das, instituted a suit for recovery of the arrears of rent against the Madan Theatres, Ltd., Calcutta, and impleaded Messrs. Pahlad Das-Bhagwan Das, as pro forma defendants to the suit. One Tara Chand Sajdeh, who appears to be the tenant of the Madan Theatres Ltd., Calcutta, at Lahore, appeared as the attorney for Madan Theatres Ltd., and defended the suit on their behalf. Ultimately the suit was compromised, and he made a statement in the trial Court admitting the claim of the plaintiff and undertaking to pay the future monthly rent of the premises direct to the Receiver without fail and also to pay Rs. 600 a month in satisfaction of the arrears of rent. He admitted liability for the amount claimed by the plaintiff and agreed that a decree be passed in terms of the compromise. It was also agreed that on failure to pay Rs. 600 per month regularly the decree-holder would be entitled to execute the decree for the whole of the balance due and also that on such failure Tara Chand Sajdeh, that is to say the attorney, shall be personally liable for the performance of the decree by payment of any balance that may be due to the decree-holder under it. This statement was made in pursuance of a compromise with the plaintiff and the plaintiff also made a statement agreeing to the terms mentioned by Tara Chand Sajdeh. A decree was passed in pursuance of this compromise which provided that defendant 1, that is to say the Madan Theatres Ltd., do pay unto the plaintiff the sum of Rs. 14,097-1-0 and do also pay Rs. 1,450-7-0, the costs of the suit, and also that defendant 1 shall pay the amount above mentioned by monthly instalments of Rs. 600 each payable on the 17th day of each month, the first instalment falling due on 17th May 1934, that any balance short of Rs. 600 shall be the last instalment and also that if any one of the instalments is not duly paid the decree-holder shall be entitled to recover forthwith the whole

amount, which may at the time of the default remain due under the decree. It is then recited that "Mr. Tara Chand Sajdeh, who holds the power of attorney on behalf of defendant 1 has further undertaken the personal liability to pay this decretal amount and costs."

Only two instalments were paid by the surety in pursuance of this decree and therefore default having been made in the payment of the remaining instalments the decree-holder made an application for the execution of his decree against Tara Chand Sajdeh as a surety by whom an objection was taken that he had not become liable for the performance of the decree and the same could not be executed against him in the form in which it had been passed. The matter was heard by the same learned Judge who had passed the decree and it is curious that he declined to execute it against the surety, holding that it was not an executable decree as against him. The plaintiff decree-holder has consequently presented this appeal.

Another appeal has been presented, which supports the ground taken by the decree-holder, by the judgment-debtor, the Madan Theatres, Ltd. This judgment will dispose of both these appeals.

Now, I have no doubt that the decree could be executed against the respondent Tara Chand Sajdeh as a surety in the same manner in which it could be executed against the original judgment-debtor, the Madan Theatres Ltd. S. 145, Civil P. C., is clear on the point. It provides that where a person has become liable as surety for the performance of any decree or part thereof the decree may be executed against him, to the extent to which he has rendered himself personally liable, in the manner provided for the execution of decrees and such person shall, for the purposes of appeal, be deemed a party within the meaning of S. 47. It is to be noted that the section does not provide that before the decree can be executed against the surety he should be named as a judgment-debtor in it or even that the decree should provide for his liability as a surety or that it should contain a direction against the surety to pay the amount of the decree. Cases are numerous where a person becomes liable by executing a deed on the institution of the suit and during the pendency of the

suit. The Court merely passes a decree against the defendant, who has been originally impleaded in the suit; no mention is made in the decree or in the judgment of the Court of the liability of the surety. The liability of the surety in such cases is determined by the undertaking that he has given to the Court by means of the agreement or statement made by him, which is accepted by the Court, and the case proceeded with on the undertaking given. A somewhat similar case was decided by me in 1935 Lah 189 (1). But the learned Judge below thought that there was some distinction in the principle involved in that case and in this. There is no doubt that the surety in that case was made liable by the decree itself, but that does not make any difference about the liability of the surety even if he is not mentioned in the decree. Two cases relied upon by the learned Judge, 1930 Lah 110 (2) and 1933 Pesh 83 (3), have absolutely no bearing on this case. The question decided in those cases was between the decree-holder and the judgment-debtor against whom the suit had originally been instituted, and turned on the form of the decree. There is no question in this case of an attempt by the decree-holder to execute a declaratory decree. The decree-holder in this case is exercising the right given to him by S. 145, Civil P. C., which has nothing to do with the form of the decree as against the judgment-debtor. In my opinion the view of the learned Subordinate Judge is clearly wrong and I hold that the decree can be executed against Tara Chand Sajdeh as surety under S. 145, C. P. C.

I accept this appeal, set aside the order of the Subordinate Judge and send the case back to him with direction to proceed with the execution of the decree against the respondent Tara Chand Sajdeh, who shall pay the costs of the appellant decree-holder in this Court. The Madan Theatres Ltd., shall bear their own costs in this Court in both the appeals.

M.D./R.K.

Appeal allowed.

1. Gauba v. Sultan Singh, 1935 Lah 189=159 I C 410.
2. Banu Mal v. Pars Ram, 1930 Lah 110=120 I C 597.
3. Hukam Chand Tilok Chand v. Lorinda Ram Gela Ram, 1933 Pesh 83=146 I C 1094.

A. I. R. 1936 Lahore 465

ADDISON AND DIN MOHAMMAD, JJ.

Nur Mohd.—Plaintiff—Appellant.

v.

Bhawan Shah and another—Defendants—Respondents.

First Appeal No. 2 of 1933, Decided on 25th March 1935, from decision of Sub-Judge, 1st Class, Lyallpur, D/- 4th October 1932.

Custom (Punjab) — Adoption—Customary adoption is appointment of heir — Gift to such person is valid.

In the Punjab the customary adoptions are not adoptions in the ordinary sense but are really appointments of heirs. No particular ceremony is necessary for an adoption and if a gift is made to such son it is valid. Even if a gift is not made he will succeed on the death of the person who appointed him as his heir.

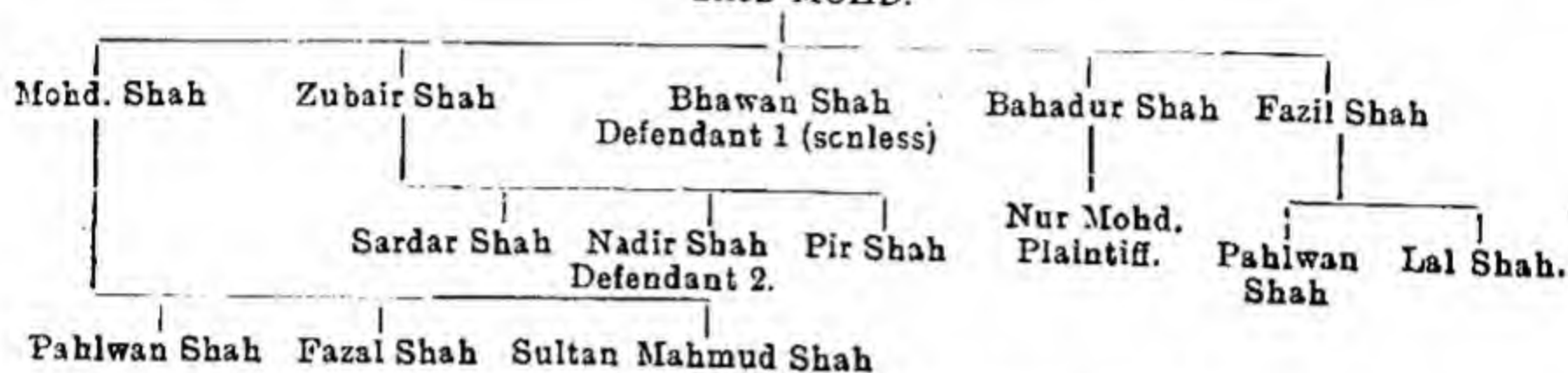
[P 466 C 1]

Janki Nath Wazir and Dev Raj Sawheny—for Appellant.

Ram Chand Manchanda and S. C. Manchanda—for Respondents.

Addison, J.—The following pedigree table is necessary in order to understand this appeal:

SAID MOHD.



The suit has been brought by Nur Mohd. a minor through his next friend, his mother Mt. Maryam, for a declaration that the adoption by Bhawan Shah, defendant 1 of his nephew Nadir Shah defendant 2 and a gift to him of a large part of his land should be declared invalid and not liable to affect the reversionary rights of the plaintiff who is another nephew of Bhawan Shah. A third nephew Pahlwan Shah brought a similar suit but it was allowed to be dismissed under the provisions of O. 9, R. 8, Civil P. C. The present suit has also been dismissed and the plaintiff has appealed. In the plaint it was stated that in matters of alienation the parties were bound by zamindara (agricultural) custom, whatever that may be. In the written statement it was alleged that the parties were bound by the custom prevalent among the Hashmi Qureshis of this village Pindi Sheikh Musa as recorded in the wazib-ul-arz from the year 1858 onwards. Many of the plaintiff's witnesses stated that they never heard of the adoption of Nadir Shah by Bhawan Shah and added that this Qureshis could not make a gift of their ancestral land. Some of them, however admitted that such a gift could be made.

Practically all of them stated that the Qureshis of Pindi Sheikh Musa were governed by the special custom of their own village as recorded in the settlement

1986 L/59 & 60

papers of 1858. In particular P. W. 6 Qutab Shah who is related to both parties has stated that Nadir Shah was adopted by Bhawan Shah and that Bhawan Shah who never married used to live with his brothers. At the time of the adoption he was very much attached to Nadir Shah. P. W. 9 Ganj Baksh stated that a sonless proprietor could adopt his first cousin or second cousin, this being sanctioned by their custom as recorded in the settlement papers. Mt. Maryam the next friend and mother of the plaintiff as P. W. 11 also admitted that the parties were governed by their own custom specially recorded. Nadir Shah, the alleged adopted son, sued her daughter and herself for restitution of conjugal rights alleging that he had been married to her daughter. The suit was unsuccessful as it was held that the marriage was not established. There is thus a certain amount of ill-feeling between Mt. Maryam as well as some of her witnesses and Nadir Shah. The defendant's witnesses similarly stated that they were bound by the custom recorded in the revenue papers. They added that Nadir Shah was adopted by Bhawan Shah and that both the adoption and the gift were allowed by their custom. The oral evidence therefore is overwhelming in favour of the view that the parties are bound by custom while the weight of the evidence is in favour of the factum of adoption.

The factum of the gift is not disputed. On 21st September 1928, Bhawan Shah appeared before the patwari and stated that he wished to give the land in suit to Nadir Shah whom he had adopted and had brought up since he was 4 or 5 years old. He did not gift the land which he owned jointly with his brothers but only so much of his land as he held by himself. This statement was repeated before the revenue officer who sanctioned the mutation on 5th January 1929. The plaintiff's counsel relied on the fact that in the plaint of the suit instituted on 24th February 1921 by Nadir Shah, who was then a minor, through his father for restitution of conjugal rights, Nadir Shah was described as the son of Zubair Shah. This is not remarkable as in the Punjab these customary adoptions are not adoptions in the ordinary sense but are really appointments of heirs. Reliance was also placed by him on a statement made by Bhawan Shah on 29th April 1926 in another suit brought by the plaintiff in this case.

In that statement Bhawan Shah is reported as having said that the sister of the plaintiff was married to Zubair Shah's son. The contention is that he must have meant Nadir Shah and he would have described him as his own son had he been adopted. This contention is not of any force for the reason already given; while Bhawan Shah has not been put into the witness-box to explain this obscene remark. The custom as recorded in the *wazib-ul-arz* of 1858 is as follows:

Laipalik and pichblag sons would not get anything except in the case of a proprietor making a gift in his lifetime. An adopted son is like a real son and he shall become the owner of the estate under all circumstances, etc.

The evidence conclusively establishes that Bhawan Shah up till very lately lived with the father of Nadir Shah and treated Nadir Shah as his son as well as adopted him. No particular ceremony is necessary for an adoption, and it may be held that Bhawan Shah adopted him or took him a laipalik son, that is, who has been taken and reared as a son. If a gift is made to the latter it is valid. Even if a gift is not made, to the former that is the adopted son, he will succeed on the death of the person who appointed him as his heir. In our judgment Nadir Shah must be held to have been adopted and even if he was only taken and reared by Bhawan Shah the gift would still be valid.

The suit was therefore properly dismissed and we dismiss the appeal with costs.

K.S./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 466

AGHA HAIDAR, J.

Asa—Defendant—Petitioner.

v.

Mt. Bhuran — Plaintiff — Opposite Party.

Civil Revn. No. 644 of 1935, Decided on 9th January 1936, from decree of Senior Sub.Judge, Rohtak, D/- 15th July 1935.

(a) Award—Validity of—Arbitrator submitting award beyond date fixed— Parties submitting to arbitration and conducting case before arbitrator after due date—Consent of parties can be inferred — Award is valid though filed out of time.

An arbitrator is a domestic tribunal and the parties who refer their disputes to him for decision can, by mutual consent, which can be inferred from their conduct, acquiesce in the proceedings of the arbitrator who may submit his award beyond the date fixed by the Court for returning the same. Such a consent would be inferred from the fact that the parties conducted the case and took a willing part in the proceedings before the arbitrator, though the date fixed for the filing of the award had expired : 1919 *Pat* 93, *Foll.* [P 467 C 2]

— (b) Award—Validity of — Court referring to arbitration can alone decide question of validity of award — Decree passed on award after disposing objections under para. 15, Sch. 2, Civil P. C.—Decree is final, not open to appeal or revision.

It is only one Court, namely the Court which refers the case to arbitration, that should finally decide the question whether the award is invalid, not only for the reason specifically mentioned in Cl. (c), but on other grounds also. This being so, the decree passed by a Court in terms of an award, after it has disposed of the objections under para. 15, Sch. 2, Civil P. C., is final and not open to appeal. And to allow a revision would be more objectionable than an appeal in such case : 29 *Cal* 167 (P C), *Foll.* [P 468 C 1]

(c) Award—Revision — Order on award — Reference to arbitration during pendency of suit—Purpose of — Order on award is interlocutory order not open to revision.

The arbitration proceedings referred by a Court during the pendency of a suit are merely a ramification of the main suit which is still pending and which would be disposed of on the termination of these proceedings. The order of the Court passed on an award of the arbitrator is therefore an interlocutory order and no revision lies against it : 1933 *Lah* 692 and 1921 *Lah* 425 (F B), *Foll.* [P 468 C 1]

Faqir Chand Mital—for Petitioner.
L. M. Datta—for Opposite Party.

Order. — This is an application in revision against an order of the Court below passing a decree in terms of the award. The plaintiff Mt. Bhuran brought a suit for possession of certain lands on the ground that the defendant had fraudulently obtained a mutation in his favour and was in illegal possession of the same. The plaintiff's case is that the defendant got some one to personate her and that the whole transaction was a fictitious one and without consideration. The defendant pleaded that he had purchased the land in dispute from the plaintiff and had obtained mutation and had paid full consideration for the transfer and that the plaintiff was a consenting party. The parties subsequently referred the matter in dispute to the arbitration of Pandit Ramphul Singh, Pleader. On 31st January 1934 the Court appointed the said Pandit Ramphul Singh as the sole arbitrator. He was to submit the award to the Court on 2nd March 1934. On that date however the award was not filed and the Court extended the time till 27th April 1934. On this date the Court was not sitting as the presiding officer had been transferred and his successor-in-office had not taken over charge. The award was not filed on this date by the arbitrator. The reader of the Court, as a matter of routine, fixed 19th May 1934, for the next hearing of the case. On this date the award was filed.

Various objections were filed by the defendant and one of them was that the arbitrator had filed the award after 27th April 1934 and therefore the award was invalid. To meet this objection the plaintiff filed an affidavit to the effect that the parties had addressed arguments before the arbitrator after 27th April 1934 and had thus acquiesced in the jurisdiction thus exercised by the arbitrator and that therefore it was not open to the defendant to raise the objection. The Court below accepted the allegations in the plaintiff's affidavit and was satisfied that the parties had willingly submitted to the proceedings taken by the arbitrator when he heard their arguments after the expiry of the date which had been fixed for the return of the award to the Court. He accordingly decreed the claim in terms of the award. The defendant has come up in revision to this Court. Mr. Faqir Chand Mital, the learned counsel for the appellant, has argued that there

was no valid award inasmuch as it was not delivered in Court on the date fixed i. e. 27th April 1934, but on 19th May 1934. There is no force in this contention. The point is fully covered by a decision of the Patna High Court in 4 Pat L J 265 (1) where it is laid down that,

Under R. 8, Sch. 2, Civil P. C., it is primarily the Court alone which has authority to extend the time for making an award, but there may be circumstances arising from the conduct of the parties which would justify an inference that the parties intended, and impliedly agreed, that even though the time for making an award was not extended by the Court, the arbitrators should make their award even though literally out of time and that in such a case the parties would be estopped from impeaching the award upon the ground that it was made out of time.

With this proposition of law I fully agree. An arbitrator is a domestic tribunal and the parties who refer their dispute to him for decision can, by mutual consent, which can be inferred from their conduct, acquiesce in the proceedings of the arbitrator who may submit his award beyond the date fixed by the Court for returning the same. Such a consent would be inferred from the fact that the parties conducted the case and took a willing part in the proceedings before the arbitrator. Though the date fixed for the filing of the award had expired. This is exactly what took place in the present case. The evidence had been closed, and after 27th April 1934, the parties argued the case before him. This was undoubtedly a clear indication of their consent to submission to the procedure adopted by the arbitrator. This contention therefore has no force. No doubt before the new Code of Civil Procedure came into operation, there were a number of cases which purported to lay down that for the finality of a decree made in accordance with the award it was essential that there should be an award valid in law, and elaborate arguments used to be put forward on the question as to whether the award was a valid and lawful award in view of the irregularities or errors committed by the arbitrator. But a very important change has been introduced in para. 15, Cl. (c), Sch. 2, Act 5 of 1908, which corresponds to S. 521 of the old Civil P. C. S. 521 (c) runs as follows :

1. Patto Kumari v. Upendra Nath, 1919 Pat 98 = 50 I O 52 = 4 Pat L J 265.

The award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit.

Clause (c), para. 15, runs as follows :

The award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.

It is thus clear that the intention of the legislature was that only one Court, namely the Court which refers the case to arbitration, should finally decide the question whether the award is invalid not only for the reason specifically mentioned in Cl. (c) but on other grounds also. This being so, the decree passed by the Court below in terms of the award, after it has disposed of the objections under para. 15, is final and not open to appeal. To allow a revision against a decree passed on award which has been held by the Court to be valid would be to ignore the law as laid down in the leading Privy Council case, 29 Cal 167 (2), where the finality attaching to decrees passed in terms of the award is emphasised. Their Lordships in that judgment observed that a revision would be more objectionable than an appeal in such a case. There are a number of subsequent decisions in support of the view that revisions should not be entertained against orders which have been held by the highest authority to be final. There is another way of looking at the matter.

The arbitration proceedings are merely a ramification of the main suit which is still pending and which would be disposed of on the termination of these proceedings. The order of the Court is therefore an interlocutory order and no revision lies against it: vide 14 Lah 715 (3) and 5 Lah 288 (4). I would therefore hold that the order of the Court below accepting the award and passing a decree in the terms of the award was in all respects correct, and an application in revision against it is incompetent. The application is dismissed with costs.

B.D./R.K. *Application dismissed.*

2. Ghulam Khan v. Muhammad Hassan, (1902) 29 Cal 167=29 I A 51=8 Sar 154 (PC).
3. Ram Sarup v. Mohan Lal, 1933 Lah 692=143 I C 309=14 Lah 715=34 P L R 651.
4. Lal Chand Mangal Sen v. Behari Lal Meh: Chand, 1924 Lah 425=84 I C 259=5 Lah 288 (FB).

* A. I. R. 1936 Lahore 468

ADDISON AND ABDUL RASHID, JJ.

Dhani Ram-Dharam Pal—Assessee—Petitioners.

v.

Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore—Respondent.

Civil Ref. No. 73 of 1935, Decided on 24th January 1936, in the matter of assessment from order of Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore, D/- 16th November 1935.

* Income-tax Act (1922), Ss. 22 (2), (3) and 29—Return after assessment but before service of demand notice is not valid return.

A return furnished after the assessment order is made but before the service of the demand notice is not a valid return. [P 468 C 2]

Kirpa Ram Bajaj—for Petitioners.

J. N. Aggarwal—for Respondent.

Addison, J.—The one question of law referred by the Commissioner of Income-tax in this case is: What is the legal effect of the return being furnished before the service of the demand notice? A return is due under S. 22 (2), within such period, not being less than thirty days, as may be specified in the notice. As a concession S. 22 (3) allows a person, who has not furnished a return within the time allowed by sub-s. (2), to furnish a return at any time before the assessment is made and a return so made is to be deemed to be a return made in due time. In the present case the return was not made until after the assessment order was made, but was made before the notice of demand specified by S. 29 was served upon the assessee by the Income-tax officer. It seems to us obvious that the return was not made within the time allowed by S. 22 (3), as the assessment was made within the meaning of S. 23 before the return was put in. It is true that the assessee contrived to put it in before the notice of demand was served upon him under S. 29, but this makes no difference. Our answer to the question is that the return furnished after the assessment order was made but before the service of the demand notice was not a valid return. We make no order as to costs.

K.S./R.K.

Reference answered.

A. I. R. 1936 Lahore 469

BHIDE, J.

Kundan Lal—Defendant—Appellant.

v.

Ram Partap—Plaintiff and another—
Defendant—Respondents.

Second Appeal No. 1403 of 1935, Decided on 14th December 1935, from decree of Dist. Judge, Ambala, D/- 25th March 1935.

(a) Punjab Regulation of Accounts Act (1 of 1930), S. 2 (5)—“Creditor” admitting to have advanced several loans even before 1931 is “creditor.”

Where the plaintiff admitted that he had advanced loans to a number of persons and he did not say that he had advanced the loans subsequent to the year 1931 :

Held : that he should be held to have advanced these loans in the regular course of business within the meaning of these definition of the term ‘creditor.’ [P 469 C 2]

(b) Punjab Regulation of Accounts Act (1 of 1930)—Applicability—*Obiter*.

Obiter.—There is no presumption that the provisions of the Punjab Regulation of Accounts Act are applicable to every suit for recovery of a loan. [P 470 C 1]

(c) Practice — Remand — Objection as to onus being wrongly placed by trial Court taken in memo of appeal but not pressed in arguments—Parties having produced all evidence—No remand in second appeal.

Where an objection as to the onus having been placed wrongly by the trial Court is taken in the memorandum of appeal, but the point is not pressed in the course of arguments and the parties have produced such evidence as they had, there is no justification for remand at this stage in second appeal. [P 470 C 1]

(d) Punjab Regulation of Accounts Act (1 of 1930), S. 3—Costs allowed—Appeal therefrom—Court-fee is necessary.

The Court is bound to disallow costs if a case falls within the purview of S. 3, Punjab Regulation of Accounts Act. If, therefore, the defendant wants to have order allowing costs to be set aside, it is incumbent on him to pay court-fee thereon : 1935 Lah 979, *Disting*.

[P 470 C 1]

Shamair Chand—for Appellant.*Tek Chand Vijn*—for Respondents.

Judgment.—This is a suit for recovery of Rs. 1,600 on the basis of a bond. Defendants pleaded that the suit was governed by the provisions of the Punjab Regulation of Accounts Act and issue 1 framed in the case was :

Is the present suit exempt from the provisions of the Punjab Regulation of Accounts Act ?

The trial Court found that the plaintiff was a ‘creditor’ within the meaning of the definition given in the Punjab

Regulation of Accounts Act and as he had not kept accounts in accordance with the requirements of that Act, he was not entitled to claim any interest or costs. As a result of these findings, the plaintiff was granted a decree for Rs. 1,278 only. From this decision an appeal was preferred by the plaintiff to the District Judge who held that it had not been proved that the plaintiff was a ‘creditor’ within the meaning of the Punjab Regulation of Accounts Act, at any rate at the time when the loan in question was advanced. He, therefore, accepted the appeal and granted the plaintiff a decree for Rs. 1,600 with costs in both the Courts. From this decision a second appeal has been preferred to this Court on behalf of the defendants.

The sole point for decision in this appeal is, whether the learned District Judge was right in holding that the plaintiff was not a ‘creditor’ within the meaning of definition of the Punjab Regulation of Accounts Act at the time when the loan was advanced. It may be noted at the outset that the position taken up by the plaintiff in the trial Court was that he was not a ‘creditor’ within the meaning of the Act at any time. He made no distinction between his position in 1931 when the loan was advanced and his position later on. The learned counsel for the appellant contended that the distinction which the learned District Judge has drawn between the two positions is not supported by any evidence on the record and this contention appears to me to be correct. The plaintiff admitted in the course of his cross-examination that he had advanced loans to a number of persons and he did not say that he had advanced these loans subsequent to the year 1931. In the circumstances I do not think that the finding of the learned District Judge can be supported on the ground on which it proceeds. In view of the number of loans which the plaintiff has admitted to have advanced, I do not see why he should not be held to have advanced these loans in the regular course of business within the meaning of the definition of the term ‘creditor.’ The learned counsel for the plaintiff contended that bonds had been taken only from tenants in lieu of arrears of rent, etc., but the evidence on the record does not bear out this contention.

The learned counsel next contended that the burden of proof as regards issue 1 was wrongly placed on the plaintiff and there is no presumption that the provisions of the Punjab Regulation of Accounts Act are applicable to every suit for recovery of a loan. There is some force in this contention, but it appears that no objection was raised on the question of onus in the trial Court, and, although the point was taken in the memorandum of appeal to the learned District Judge, it does not appear to have been pressed in the course of arguments. The parties have apparently produced such evidence as they had on this point and I do not think that there is any justification for a remand at this stage in second appeal. I, therefore, agree with the finding of the trial Court that the plaintiff is a 'creditor' within the meaning of the Punjab Regulation of Accounts Act.

According to S. 3 of that Act that Court may disallow the whole or a portion of the interest in such a suit and is also bound to disallow costs. The learned Judge of the trial Court had disallowed the whole of the interest as well as costs. It was urged that the learned Judge should have used his discretion and should have allowed at least a portion of the interest. The learned counsel has, however, not been able to point out any particular reasons for showing leniency to the plaintiff in this respect.

As regards costs, however, the learned counsel for the respondent is right in pointing out that the appellant is not entitled to raise the question of costs in this appeal as he has not paid any court-fee in respect of the costs. The learned counsel for the appellants urged that costs are only incidental and, therefore, no payment of court-fee was necessary. In support of this contention he relied on 37 P L R 50 (1), but that ruling does not appear to me to be applicable in the circumstances of this case. In the present case the question of costs stands on a different basis as the Court is bound to disallow costs if the case falls within the purview of S. 3, Punjab Regulation of Accounts Act. If, therefore, the defendant wanted to have the order of the District Judge allowing costs to be set

aside, it was, in my opinion, incumbent on him to pay court-fee thereon.

I accept the appeal to the extent of reducing the decree passed by the learned District Judge by the sum of Rs. 322 on account of interest on which the appellant has paid court-fee. The appellants will get their costs in this Court.

K.S./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 470

BHIDE, J.

(Lala) Nathu Shah—Decree-holder—Appellant.

v.

Mulk Raj—Judgment-debtor and another—Surety—Respondents.

Misc. Second Appeal No. 1489 of 1935, Decided on 23rd December 1935, from order of Dist. Judge, Sialkot, D/- 6th July 1935.

Surety—Liability of—Alteration in judgment-debtor's position by act of third party—Security remains enforceable—Bond given to secure balance left after sale of D's property—And D's interest in property reduced—Surety not absolved.

Under a mortgage decree property was put up for sale. On appeal to the High Court by judgment-debtor, execution was ordered to be stayed provided security was given for satisfaction of any balance left after the house was sold. Such security was given and sale stayed. Meanwhile it was found that another person had an interest in the property which reduced the share of the mortgagor in the property. The share of the mortgagor was sold in due course. The decree-holder mortgagee sued the surety to recover the balance of his decree. The surety contended that he was absolved from his liability as the judgment-debtor's share in the mortgaged house had been reduced:

Held: the order of Court in respect of the security bond was that the judgment-debtor should give security for the recovery of any balance due after the property was sold if at all in execution of the decree. The bond did not specify the share in the property which was liable to be sold. Moreover it was only the judgment-debtor's right, title and interest that was sold. Where it is found that the judgment-debtor's interest in the property is subject to another right as obtained under a decree by such other person, it cannot be said that the terms of the bond were altered by the decree. Further the bond was given to the Court and an alteration made in the judgment-debtor's position by the act of a third party did not render the bond unenforceable as the Contract Act S. 133, did not apply in such circumstances: 1935 Nag 258, Rel. on. [P 471 C 1, 2]

Charinjiva Lal Aggarwal—for Appellant.

Bodh Raj Sawhney—for Respondents.

Judgment.—The material facts of the case giving rise to this second appeal are the following: One Mulkha mortgaged his half share in a house to Nathu Shah by a deed dated 15th February 1919. Nathu Shah obtained a decree on the basis of this deed for sale of the house in satisfaction of his debt. An appeal was preferred to the High Court and execution was ordered to be stayed provided security was given for satisfaction of any balance left after the house was sold. Security was accordingly furnished by one Khazan Singh. In the meantime, the mother of the judgment-debtor sued him claiming a charge on the house in respect of right of residence and got a decree for one-fourth share therein. Thus the judgment-debtor's share was reduced to one-fourth and this was sold after dismissal of his appeal. The decree-holder then sued for the recovery of the balance of his decree from Khazan Singh. Khazan Singh pleaded that he was absolved from his liability as the judgment-debtor's share in the mortgaged house had been reduced from one-half to one-fourth. This plea has been upheld by the Courts below and Khazan Singh has been absolved from liability. From this decision the decree-holder has appealed.

The decision of this question depends primarily on the terms of the bond and the effect thereon, if any, of the decree obtained by the mother of the judgment-debtor in respect of one-fourth share in the house. The order of this Court in respect of the security bond was that the judgment-debtor should give security for the recovery of any balance due after the house was sold—if at all—in execution of the decree. The bond does not specify the share in the house which was liable to be sold and it is not clear whether the surety had given any thought to this matter at all. But in any case it is clear that it is only the judgment-debtor's right, title and interest that is sold in such cases. In the present instance, the judgment-debtor's interest in the house was subject to his mother's right of residence and the decree obtained by the mother only gave effect to this right. It did not really create any new right. It cannot, therefore, be said that the terms of the bond were altered by the decree. Further, the bond was given to the Court and it has been held that an alteration made in the judgment-debtor's

position by the act of a third party does not render the bond unenforceable as S. 133 does not apply in such circumstances: 1935 Nag 258 (1). I accept the appeal, and setting aside the orders of the Courts below remand the case for decision of the application to enforce the bond against Khazan Singh on the merits. In view of all the circumstances I leave the parties to bear their costs.

B.D./R.K.

Appeal accepted.

1. Madan Lal Moti Lal v. Radha Kisan Lakshmi Narain, 1935 Nag 258=160 I C 236.

A. I. R. 1936 Lahore 471

YOUNG, C. J.

Lal Mohammad and another—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1179 of 1935, Decided on 17th December 1935, from order of Sess. Judge, Hoshiarpur, D/- 13th July 1935.

Penal Code (1860), S. 330—Sentence—Difference between Ss. 323 and 330—Beating person to extort confession from him is serious offence—Offence under S. 330 is and can be seldom proved—Courts should pass deterrent sentence.

The law clearly draws a very great distinction between simple hurt caused in the ordinary way and simple hurt caused for the purpose of extorting a confession or making an accused person recover any property. Conduct of causing hurt under S. 330, Penal Code, by responsible police officers engaged in the investigation of a crime is one of the most serious offences known to the law. The result of third degree methods or of actual torture or beating must be that innocent persons might well be convicted, confessions being forced from them which are false. In almost every case in which a confession is recorded, in criminal Courts, it is alleged by the defence that the police have resorted to methods such as these. It is seldom, however, that an offence of this nature is or can be proved. It clearly is the duty of the Courts when a case of this kind is proved to pass sentence which may have deterrent effect. [P 473 C 1]

Abdul Aziz—for Petitioners.

Ram Lal—for the Crown.

Order.—A Head Constable Lal Mohammad and a Constable named Gian Chand were charged in the Court of Sardar Harnam Singh, 1st Class Magistrate with S. 30 Powers, Kangra District, at Dharamsala, under S. 330, Penal Code, i. e.:

For causing hurt for the purpose of extorting a confession or information which may lead to the detection of an offence, or for the purpose of constraining the sufferer to cause the restoration of any property or valuable security.

The learned Magistrate sentenced Lal Mohammad to two years' rigorous imprisonment and a fine of Rs. 250 and in default of payment further six months' rigorous imprisonment. He sentenced Gian Chand to one year's rigorous imprisonment and a fine of Rs. 50 and in default of payment a further two months' rigorous imprisonment. The two convicts appealed to the Court of the learned Sessions Judge, Hoshiarpur, who dismissed the appeal, but reduced the sentences to six months in the case of Lal Mohammad and a fine of Rs. 100; in the case of Gian Chand he reduced the sentence to three months' rigorous imprisonment and a fine of Rs. 50. The convicts have filed an application in revision to this Court and on a Single Judge issuing notice for enhancement of sentence, the learned Government Advocate appears on behalf of the Crown to ask that the sentence should be enhanced. The facts are that one Mt. Naro reported a burglary on 30th January 1935. She suspected one Ganju. Shortly afterwards the accused Lal Mohammad and Gian Chand met Ganju and made him accompany them to his own house. They wished him to give information as regards the stolen property. It is alleged that in order to get Ganju to make a recovery of the stolen property they beat him and that as a result of that beating Ganju died shortly afterwards. This occurred on the afternoon of 4th February 1935. Early the next morning the widow of Singhu, who was Ganju's brother, sent a telegram to the police complaining that Ganju had died as a result of cruel beating. This telegram was sent off very early in the morning. The accused seeing that Ganju was dead also sent a message to the police station.

It is notable that in that message it was alleged that Ganju had died from a fall from the ceiling of his house. It appears to be clear from the evidence that the Naib Tahsildar who was sent to make enquiries carried out an enquiry for the purpose of white-washing the two accused. The learned Judge in the Court below points out that the enquiry held by this officer was irregular as he had no jurisdiction so to do. He also points out

that the Naib Tahsildar did not hold a proper enquiry and was biased in favour of the police in his report. This appears to be clear. Five witnesses were called at the trial and there can be no doubt that they gave true evidence and that their evidence establishes clearly the fact that the two accused did beat Ganju, and that while the beating was taking place Ganju fell down insensible. He died some few hours later. Counsel, who appears for the applicants in revision in this Court, does not seriously contest the facts. He contends, however, that the physical condition of the deceased was such that a very small amount of beating would produce the unfortunate result of this death. When Ganju was first challenged by the police he told them that he was suffering from a pain in his ribs. The medical evidence in this case clearly establishes that Ganju had pneumonia in its preliminary stages and further that he died from shock brought about by a beating and in particular from injury No. 7 which appears to be an extensive bruise on both sides of his back. The medical officer further states that the then condition of the lung of the patient was not such as would cause death. This medical evidence strongly corroborates the oral evidence.

There can be no doubt whatever that Ganju had been beaten and beaten by the two accused. The conduct of the accused in sending a false message to the police station on the morning of the 5th shows their guilty knowledge. There could be no question in this case of Ganju falling from anywhere and so killing himself. There was only a slight scab on the top of his head. If Ganju had fallen on the top of his head from the ceiling of his house he would certainly have broken his neck or there would have been very much more damage to the skull if death resulted from it. In any event, the injuries on Ganju's body, as described in the medical evidence, could not possibly result from a fall. I am satisfied, therefore, beyond any doubt that the two accused were properly convicted. The only question which remains is the question of sentence. The learned Government Advocate presses for the maximum sentence of seven years' rigorous imprisonment. He points out the great difference between a conviction under this section and S. 323, both of

which concern simple hurt. The law clearly draws a very great distinction between simple hurt caused in the ordinary way and simple hurt caused for the purpose of extorting a confession or making an accused person recover any property. No doubt the beating would not ordinarily have caused death. If indeed this had been the case the two constables might have been charged under S. 302, I. P. C. The learned Judge of the Court below came to the conclusion that the beating was not severe and he, therefore, reduced the sentence on this account.

In my opinion, however, conduct of this sort by responsible police officers engaged in the investigation of a crime is one of the most serious offences known to the law. The result of third degree methods or of actual torture or beating such as in this case must be that innocent persons might well be convicted, confessions being forced from them which are false. In almost every case in which a confession is recorded, in criminal Courts, it is alleged by the defence that the police have resorted to methods such as these. It is seldom, however, that an offence of this nature is or can be proved. It clearly is the duty of the Courts when a case of this kind is proved to pass sentences which may have a deterrent effect. Under all the circumstances of the case I consider that a sentence of four years' rigorous imprisonment should be imposed upon Lal Mohammad, Head Constable, together with a fine of Rs. 50; with regard to Gian Chand he will undergo rigorous imprisonment for three years and a fine of Rs. 50. In default of payment in both cases they will serve two months' further rigorous imprisonment. This is not a case, in my opinion, where Government should make a profit out of the offence. The fine of Rs. 100, if realized, will be paid by way of compensation to Mt. Nanki, who lost the support of Ganju by the action of the police. The revision is, therefore, dismissed and the application for enhancement is allowed to the extent above indicated. A copy of this judgment will be sent to the Chief Secretary with a request that the Inspector-General of Police should circulate it to all Police Officers and Stations.

B.D./R.K.

*Revision dismissed.***A. I. R. 1936 Lahore 473**

CURRIE, J.

Pindi Das—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1543 of 1935, Decided on 20th January 1936, from order of Sess. Judge, Lahore, D/- 1st November 1935.

Criminal Trial—Benefit of doubt—Plea of alibi—Plea, although not established on record, taken at early stage of investigation—Presence of accused at place of offence appearing doubtful—He should be given benefit of doubt.

Where in the trial of an offence under S. 147, I. P. C. the accused, although he fails to establish his plea of alibi on the record before Court, has taken the plea at any early stage of the investigation and from the evidence, his presence at the affray is somewhat doubtful, the accused is entitled to the benefit of the doubt, more specially so, when such doubt would not have arisen had the police whom the accused cited as witnesses had given their evidence frankly. [P 474 C 2]

*Amolak Ram Kapur—for Petitioner.**Ram Lal—for the Crown.*

Order.—The six petitioners were convicted under S. 147, I. P. C. On appeal the learned Sessions Judge maintained the convictions but reduced the sentences of imprisonment in the case of Roshan Lal and Badri Nath to four months' rigorous imprisonment and Pindi Das to three months, maintaining the sentences of fine imposed on the other three. There is not the least doubt that on 12th July 1934 an affray did take place in Bazaz Hatta between 5.30 p. m. and 6 p. m. Arur Chand, P. . . . was preparing Municipal electoral rolls in Ward No. 6 where there was a contest between the sitting member Dilawar Singh and a rival candidate Kanshi Ram Khosla. The partisans of rival candidates were present and the prosecution story is that there was bad blood between Jagan Nath, a protege of Dilawar Singh, and Pindi Das. Pindi Das appeared on the scene and incited the rival candidate's partisans to assault Jagan Nath. The defence denied that there had been any fight and alibis were preferred on behalf of Badri Nath and Pindi Das. The learned Sessions Judge has dealt with the case in an exhaustive judgment and I see no reason for disagreeing with his view that an affray did take place as alleged. He rejected the alibi of Badri Nath and I see no ground for differing from that view. The only

difficulty in the case is regarding the alibi preferred by Pindi Das. Admittedly Pindi Das at that time was under police surveillance and from the beginning he alleged that he was in Amritsar, at the time of this affray and attempted to obtain proof thereof from the police. Durga Das, the constable who was shadowing him, appeared as D. W. 11 and denied that he heard of any case against Pindi Das. This statement is obviously false.

The witness has been called to produce his diary of 12th July but apparently made no attempt to obtain permission to produce the diary or at least to refresh his memory from it. The petitioner made efforts to call officials of the C. I. D. in Lahore and Amritsar but the learned Magistrate did not call them and on 3rd February 1935, recorded an order saying that he had seen the zimnis and did not consider it necessary to call for the C. I. D. diaries. The learned Sessions Judge examined the zimnis of 2nd August 1934, 23rd August 1934 and 4th September 1934 and I have also examined these diaries. As the learned Sessions Judge remarks there appears to be a suggestion that enquiries showed that Pindi Das had been seen in Amritsar on the day of occurrence at 4-30 p. m. and again in the Jallianwala Bagh about 7-30 p. m. The learned Sessions Judge remarks that there was no evidence on the record to establish the fact that Pindi Das had been so seen at Amritsar and then went on to say that assuming he had been so seen the evidence would not constitute an alibi as he could have got back from Amritsar in time to take part in the affray at Lahore at 6 p. m. and then got back to Amritsar in time to be in Jallianwala Bagh at 7-30 p. m. with a view to establish an alibi. That is true, but I find that the petitioner has to appear in a case on 13th July in Amritsar so that it is hard to see why he should have returned to Lahore after 4-30 p. m. on the 12th. It is true that on the record the petitioner has failed to establish an alibi but it must be conceded that he made every effort by calling various police witnesses and trying to call others to establish his presence in Amritsar on that date.

The City Inspector of Police, Lahore, Ali Husain Shah, D. W. 9, refused to refresh his memory by reference to the

zimnis and denied that he had ever asked for the discharge of Pindi Das. It appears however that at one time he certainly thought that Pindi Das had succeeded in establishing his alibi though he is not going so far as to recommend that he should be discharged. His refusal to refresh his memory is regrettable. A similar position was adopted by D. W. 20, Sub-Inspector Lakshmi Narain, but in his case the learned Magistrate ordered him to refresh his memory regarding the date on which he recorded the statement of Abdul Majid. This is a case in which had the police officers given their evidence frankly there should have been no doubt as to who reported the presence of the petitioner in Amritsar and who could have deposed to his presence there, but unfortunately, owing to the attitude adopted by the investigating officers this information was not disclosed and it was impossible to find out who was in a position to give the necessary information. On this record the petitioner has failed to establish his plea of alibi but it is in his favour that he put it forward at an early stage of the investigation. After a careful consideration of the evidence of the police witnesses and the zimnis for the three dates mentioned by the learned Sessions Judge I have come to the conclusion that the presence of Pindi Das at the affray is somewhat doubtful. In my opinion he is entitled to the benefit of the doubt which would not have arisen if the police had given their evidence frankly. I therefore, accept his petition, set aside his conviction and acquit him. As regards the remaining petitioners I see no ground for interfering in their case and dismiss their petition. They will surrender to their bail and undergo the remainder of the sentences.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Lahore 474

COLDSTREAM, J.

Jhanda Singh — Defendant — Appellant.

v.

Shib Dev Singh — Plaintiff and others — Defendants — Respondents.

Second Appeal No. 2234 of 1935, Decided on 12th February 1936, from decree of Addl. Dist. Judge, Amritsar, D/- 2nd July 1934.

(a) Custom (Punjab)—Alienation—Abadi—Village Sangatpura, Amritsar District—Non-proprietors cannot alienate.

A non-proprietary resident of village Sangatpura in Amritsar District has no right to alienate his house site in the village abadi without consent of the proprietary body.

[P 475 C 2; P 476 C 1]

(b) Custom (Punjab)—Alienation—Sale of land by resident—Objection not taken by proprietary body—Proprietors do not lose their right to object to further sale.

Proof of particular sale having taken place without objection by the proprietary body would be very good evidence of the title of the purchaser to the land sold and while such sales would give good title to individuals in particular portions of the village site, they would not prove that the rights of the proprietary body over the remainder of the site had been extinguished: 85 P R 1882; 1926 Lah 622 and 1928 Lah 467 Rel. on.

[P 476 C 1]

Mohammed Akbar Khan and Mohan Singh—for Appellant.

Harnam Singh — for Respondent (Plaintiff).

Judgment.—One Ganga Ram, a resident of village Sangatpura in Amritsar District, but not a member of the proprietary body of the village, mortgaged a house occupied by him and its site, situated in the abadi of the village in favour of Jhanda Singh by a registered mortgage deed on 21st January 1927. One of the proprietors of the village, Shibdev Singh, sued for possession of the site, impleading the proprietary body, his case being that Ganga Ram not being a member of the proprietary body had no power to alienate the site of his residence. The suit was resisted by Ganga Ram and Jhanda Singh. The trial Court gave the plaintiff a decree holding that no special custom had been proved to exist in Sangatpura village by which a non-proprietor had power to alienate the site of his house. This decision was upheld on appeal by the District Judge. Jhanda Singh has come to this Court on second appeal. Both the lower Courts have found that the site alienated does not belong to Ganga Ram, but the learned District Judge has granted Jhanda Singh a certificate under the provisions of S. 41, Punjab Courts Act, permitting an appeal on the question whether in this village non-proprietors were entitled to sell the sites of their houses. It is contended before me that the evidence produced by Jhanda Singh proves that according to custom non-proprietors of this village have authority to alienate the sites of

their houses. The nature of this evidence, which is both oral and documentary, has been fully described in the judgment of the trial Court, with whose conclusions as to its value I am in agreement.

Several of Jhanda Singh's own witnesses, who are village proprietors, gave evidence against him. The documentary evidence consists of some 26 documents showing that non-proprietors have from time to time since 1905 alienated certain property in the village. Whether these properties were situated on the abadi shamilat land is not distinctly proved nor is there any evidence to show how the alienor in each case had come into possession of the property he alienated. Most of the deeds state that the vendor or mortgagor, as the case may be, was owner of the property he was alienating, and the presumption is that he had a good title to alienate if no objection to the alienation was made. Many of the instances of alienation cited were of property which, according to the conveyance deeds produced, had been purchased by the alienor. The presumption is that the purchase was from one of the village proprietors or had been made with their concurrence. This evidence is certainly not sufficient to prove the existence of the custom alleged by Jhanda Singh. It is admitted that the rule that a non-proprietor in a village has no authority to alienate the site of his house without the consent of the proprietors of the village (see para. 236 of Rattigan's Digest of Customary Law) existed in this village of Sangatpura. The Wajib-ul-arz drawn up in 1865 recorded the rule that if a non-proprietor left the village he could not remove the materials of his house if they had been supplied by the proprietors and that he was not entitled to sell the site of his house. The Wajib-ul-arz of 1892-93 did not record any change in this rule. Very strong proof was necessary to rebut the presumption that the rule did not still prevail.

It has been laid down in several cases by the Chief Court and this Court that the proprietors' acquiescence in previous alienations does not necessarily imply renunciation of their discretionary right to object to a subsequent alienation and that the evidence of a number of previous alienations without objection does

not prove a custom of unrestricted alienation; see for instance 85 P R 1882 (1), where it was remarked in the judgment of Plowden and Brandreth, JJ., that proof of particular sales having taken place without objection would be very good evidence of the title of the purchaser to the land sold, and while such sales would give good title to individuals in particular portions of the village site, they would not prove that the rights of the proprietary body over the remainder of the site had been extinguished. See also 97 I C 263 (2), and 111 I C 716 (3), where Tek Chand J., remarked that this proposition was well-established. In 1923 Lah 467 (4), over 100 documents evidencing sales and mortgages by non-proprietors were produced to prove the right of non-proprietors in a village to alienate their land at will, but the learned Judges followed the rule laid down in 1882 finding that there was no evidence disclosing the circumstances under which the alienations were made. In this village on the only two occasions, one in 1907 (Ex. P-6) and one in 1915 (Ex. P-5) on which a landlord has questioned in the Civil Court the right of a non-proprietor to alienate his site, the decision was against the non-proprietors.

In the present case the suit was rightly dismissed on the simple ground that Ganga Ram had failed to prove that he was the owner of the site which he had mortgaged as he alleged he was. Finding that he has failed to prove any custom allowing him to alienate the abadi's site, which belongs to the village proprietary body, I dismiss this appeal with costs.

B.D./R.K. *Appeal dismissed.*

1. Kharak Singh v. Alla Ditta, (1882) 85 P R 1882.
2. Jaswant Singh v. Tula Ram, 1926 Lah 622 = 97 I C 263 = 27 P L R 653.
3. Sant Ram v. Nagina, (1928) 111 I C 716.
4. Seva Singh v. Ghulam, 1923 Lah 467 = 82 I C 522.

A. I. R. 1936 Lahore 476

BHIDE, J.

(Firm) Guranditta Mal-Sant Ram and another—Defendants—Petitioners.
v.

(Firm) Labhu Ram-Lachman Das — Plaintiff—Opposite Party.

Civil Revn. No. 582 of 1935, Decided on 11th December 1935, from order of Sm. C. C., Judge, Amritsar, D/- 29th July 1935.

Contract—Novation—Mere agreement to substitute new contract in future is not sufficient.

In order to avail of the plea of novation of contract, there must be present substitution of another contract for the original contract and not a mere agreement to substitute one in future: 1928 Nag 289 and 1929 All 503, *Foll.*

[P 477 C 1]

Achhru Ram and Indar Dev—for Petitioners.

Shamair Chand—for Opposite Party.

Order—This is a petition for revision of the order of the Judge, Small Cause Court, Amritsar, decreeing the plaintiffs' suit for recovery of Rs. 278-5-6 on the basis of a hundi. The defendant's contentions were that Guranditta Mal alone was the proprietor of the defendant firm and not with his sons as alleged by the plaintiff; and secondly, that the plaintiff could not sue on the basis of the hundi as there had been a novation of the contract, and another contract to sell and mortgage certain properties had been substituted for the hundi, along with certain other claims. The learned Judge held that Guranditta Mal and his sons formed a joint Hindu family and were all liable, and secondly, that though there had been an 'agreement' to substitute another contract in supersession of the hundi, it was never carried into effect and hence the plaintiff could sue on the basis of his original cause of action on the hundi. The learned counsel for the defendant petitioner challenges both the findings. He contends that the mere fact that no separation of the joint family is proved, does not give rise to any presumption that the business was joint and that the onus was wrongly placed on the defendants to prove that Guranditta Mal was the sole proprietor of the defendant firm. As regards the onus it was not objected to in the Court below, and as both parties have apparently led all their evidence on the point, I do not think the petitioners have been prejudiced. The fact that Sant Ram's name is included in the name of the firm shows that he is connected with the business and there is also evidence to the effect that Gir-dhari Lal, the other son, is working as a partner. I therefore agree with the learned Judge's finding that Guranditta Mal is not the sole proprietor of the firm. The business appears to belong to the joint Hindu family. At the same time, there is no evidence to show that Guranditta

Mal and his sons constituted an ordinary partnership. In the circumstances, the sons, who were not parties to the hundi, will only be liable to the extent of their interest in the joint family property.

As regards the novation of the contract the learned counsel for the petitioners urged that according to the wording of S. 62, Contract Act, as soon as there is an 'agreement' to substitute another contract for the original one, the latter is discharged. He therefore contended that although the deed of sale and mortgage had not been executed in pursuance of the agreement, the plaintiff had lost his right to sue on the original cause of action on the hundi. The learned counsel was unable to cite any authority directly in point to support this interpretation and the interpretation was definitely rejected in 1929 All 503 (1) and 1928 Nag 289 (2) relied on by the learned counsel for the respondent. It was held in these rulings that there must be present substitution of another contract for the original contract and not a mere agreement to substitute one in future. The wording of S. 62 is not perhaps happy, but in view of the above authorities, I uphold the decision of the learned Subordinate Judge on this point. I accept the petition for revision only to the extent of directing that Sant Ram and Girdhari Lal sons of Guranditta Mal, will only be liable to the extent of their interest in the joint family property, for satisfaction of the decree. The petitioners will get half of the costs of this petition.

B.D./R.K.

Petition dismissed.

1. Angan Lal v. Saran Behari, 1929 All 503=121 I C 221=51 All 799=1929 A L J 526.

2. Krishnaji v. Tukaram, 1928 Nag 289=111 I C 402.

A. I. R. 1936 Lahore 477

JAL LAL, J.

Ghulam Ali—Defendant—Appellant.

v.

Qutab Din—Plaintiff—Respondent.

Second Appeals Nos. 1596 and 1597 of 1935, Decided on 9th January 1936, from decree of Senior Sub-Judge, Gujrat, D/-2nd July 1935.

Punjab Pre-emption Act (I of 1913), S. 15 (b)—Cognates of vendor can pre-empt—Preferential pre-emptor takes away right of subsequent pre-emptors.

A person who is a cognate of the vendor is entitled to pre-empt a sale of property in favour of any stranger. The right to pre-empt is avail-

able to every person who is entitled to pre-empt but only if a preferential pre-emptor chooses to pre-empt, right of subsequent pre-emptors is lost: 1917 Lah 157, Ref. [P 473 C 1]

Kishori Lal Mehra—for Appellant.

Khurshid Zaman—for Respondent.

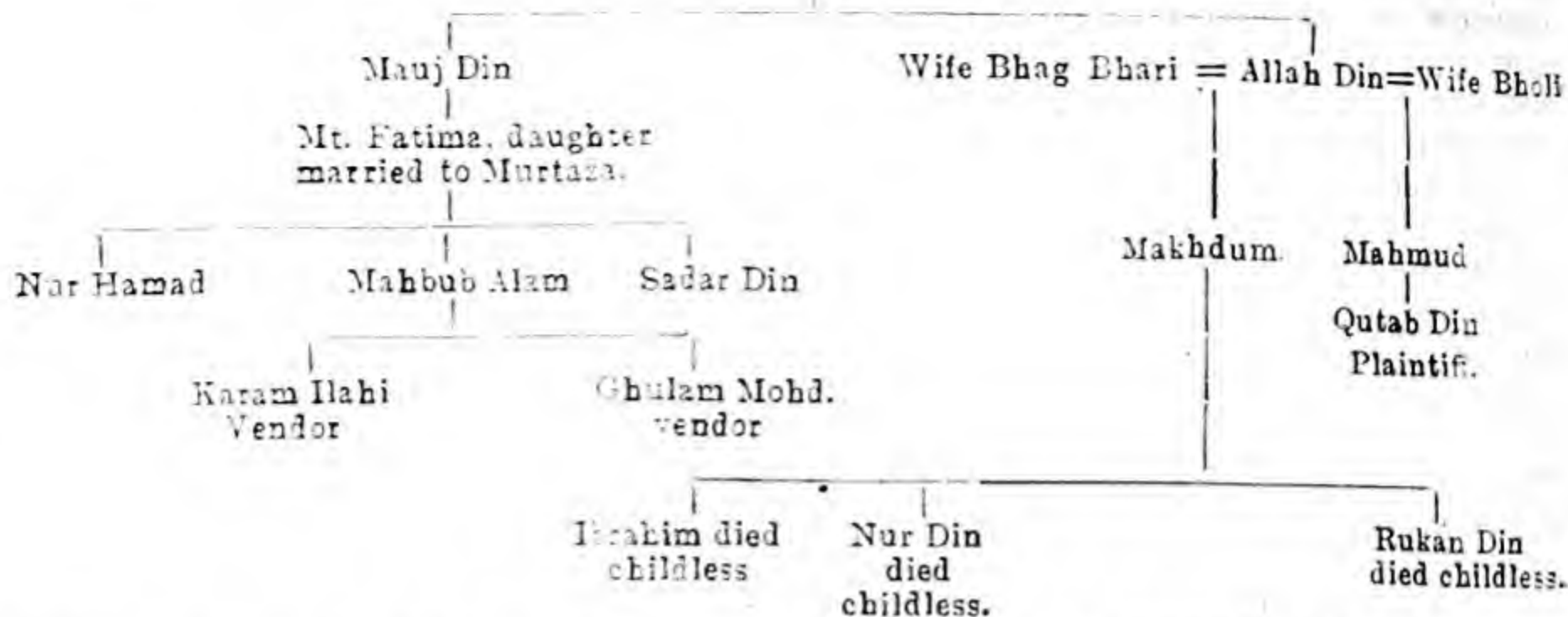
Judgment.—These appeals are by the defendant vendee in two suits for pre-emption of two sales. The only question is whether the plaintiff-respondents are entitled to pre-empt the sales. The sales were by Karam Ilahi and Ghulam Mohammad, sons of Mahbub Alam, respectively. Mahbub Alam and two others are sons of Mt. Fatima, their father being Murtza. Mt. Fatima was a daughter of Mauj Din. The plaintiff Qutab Din is a son of Mahmud who was a son of Allah Din from his wife Mt. Bholi. Allah Din had another wife Mt. Bhag Bhari by whom he had a son called Makhdun who left three sons who have died childless. I have mentioned these facts because the pedigree given by the learned Senior Subordinate Judge in his judgment is wrong. The correct pedigree is as follows:

(See p. 478)

It is common ground that this property once belonged to Mauj Din and went to Mt. Fatima from him, but whether by gift or by inheritance or otherwise has not been established. This, however, is immaterial for the purposes of this case. It is admitted that the property was held by Mt. Fatima and descended to her sons after her death. The respondent Qutab Din claimed the right of pre-emption under S. 15 (b) thirdly, as persons not being lineal descendants of the vendor nor co-sharers who are cognates and who but for the sales which are sought to be pre-empted would be entitled on the death of the vendors to inherit the land sold in order of succession. The learned Senior Subordinate Judge has held that the plaintiff would be entitled to inherit the property in dispute, but it is likely that his view was based on a wrong assumption as to the real relationship of the plaintiff with the vendors. According to the correct pedigree mentioned on p. 478 the plaintiff is the cognate of the vendors. In 28 P R 1917 (1), a cognate was held entitled to succeed to the property of a childless proprietor in preference to the proprietary body of the village and conse-

1 Rahman v. Karim Bakhsh, 1917 Lah 157=89 I C 113=28 P R 1917.

MOHAMMAD



quently the father's sister's son among the Mahomedan Rajputs was held entitled to a preferential right to pre-empt a sale in favour of a proprietor in the village who was not related to the vendor in any way. Therefore, a father's sister's son was held to be a cognate. The plaintiff respondent would be a cognate and would be entitled to pre-empt the sale in favour of a stranger. It is, however, contended by the appellant's counsel that the right to pre-empt vests in the plaintiff only if there be no nearer heirs in existence at the time of the suit, and as in this case there are nearer relations of the vendors in existence who would be entitled to inherit their estate, in case they died childless, the plaintiff-pre-emptor is not entitled to maintain the suits for pre-emption. The use of the expression however 'in order of succession' in the clause clearly indicates that every person who would be entitled to succeed under the law is entitled to maintain a suit for pre-emption, but if a preferential heir chooses to exercise the right then the right of the remoter heir is defeated; that is the only meaning of the clause under which the plaintiff claims a right of pre-emption. The conclusion of the learned Senior Subordinate Judge is, therefore, correct and these appeals are dismissed with costs.

B.D./R.K.

*Appeals dismissed.***A. I. R. 1936 Lahore 478**

YOUNG, C. J. AND MONROE, J.

Ram Lal and another—Decree-holders—Appellants.

v.

Kidar Nath—Auction-purchaser and others — Judgment-debtors — Respondents.

Letters Patent Appeal No. 104 of 1935, Decided on 11th December 1935, from order of Abdul Rashid, J., reported in 1935 Lah 802.

Execution — Appeal — Application to set aside sale dismissed—Order confirming sale — Auction-purchaser necessary party to appeal from such order—Auction-purchaser not made party within time—Appeal should be dismissed.

In an execution of a decree certain property was put up for sale. An application to set aside the sale was made under O. 21, R. 90 but that was refused and sale was confirmed. An appeal was preferred against this order but the auction-purchaser was not made a respondent. Afterwards he was sought to be impleaded as a respondent but the time fixed for filing the appeal had expired:

Held: that as the auction-purchaser was a necessary party and was not impleaded within time, the appeal should be dismissed.

[P 479 C 1]

*J. N. Aggarwal—for Appellants.**M. C. Mahajan, J. L. Kapur, Har Bhajan Das and Yashpal Gandhi—for Respondent (Auction-purchaser).*

Young, C. J.—This is a Letters Patent appeal from the judgment of Mr. Justice Abdul Rashid. An application was brought in the Subordinate Court to set aside a sale in execution of a decree under O. 21, R. 90, Civil P. C., by the creditor. The application to set aside the sale was refused and the sale was confirmed. An appeal was taken against

this order to this Court, but the auction-purchaser was not impleaded as a respondent. Afterwards an application was made to the Court for adjournment of the case 'until the auction-purchaser should appear or be duly served with notice. The auction-purchaser was then served after the time limited for instituting the appeal, and on the hearing of the appeal Mr. Justice Abdul Rashid held that as the auction-purchaser had not been made a party to the appeal as a respondent within the time limited for filing the appeal it could not proceed so as to affect his rights; so he dismissed the appeal with costs. The question appears to be concluded by authorities of this Court. It has been held in three Division Bench decisions reported as 186 P R 1882 (1), 1 Lah 21 (2) and 1929 Lah 778 (3), that the auction-purchaser is a necessary party to an appeal of this kind. The learned counsel for the appellants has, however, argued that these cases should now be treated as being no longer law; that it was formerly held that under O. 21, R. 92, Civil P. C., it was necessary to make the auction-purchaser a party to an application under R. 90 but that the series of decisions in which that proposition was laid down has been recently departed from by all the Courts, e.g. 11 Pat 504 (4), 52 Mad 861 (5) and 51 All 910 (6).

The learned counsel asked us, therefore, to conclude that, since the earlier series of decisions on this question had been overruled, the modern view was that it was not necessary to make the auction-purchaser a party, so we should hold that in an appeal the auction-purchaser was not a necessary respondent but might be brought before the Court at any time, even though the period fixed by the statute of limitation had expired. We cannot agree with this argument. R. 92 does not apply to appeals and we are content to follow the decisions of this

Court which, so far as we know, have never been overruled nor criticised. The question of the effect of R. 92 is not actually before us except in this argument and we think that it would be unwise for us to express any opinion on the decisions referred to by the learned counsel. We are in agreement with the judgment of the learned Single Judge and for the reasons given by him and already given by us we consider that his judgment ought to be affirmed. It has been suggested by the learned counsel for the appellants that the delay should in this case be condoned. But, in the first place, the question of condonation of delay was a matter for the discretion of the learned Single Judge and it has not been suggested to us that he has in any way improperly exercised his discretion. In the second place no ground has been put forward in the notice of appeal showing why a discretion should be exercised in favour of the appellants. Para. 4 of the notice of appeal suggests that it is the case of an accidental omission. To our minds it is a very curious accidental omission to leave out the name of the person most interested in the result of the appeal. We dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

* A. I. R. 1936 Lahore 479

BHIDE, J.

Secy. of State—Appellant.

v.

Mt. Reshmo and others—Respondents;
Miso. First Appeal No. 192 of 1935,
Decided on 23rd December 1935, from
order of Senior Sub-Judge, Simla, D/- 29th
October 1934.

* Execution—Limitation—Dismissal of appeal for non-prosecution after admission and appearance of parties is not final decree or order—Limitation for execution runs only from date of decree.

Even a dismissal of an appeal for non-prosecution after admission and appearance of the parties does not constitute a final decree or order within the meaning of Art. 182 (2), Lim. Act. Hence limitation for execution of the decree runs only from the date of the decree and not from date of dismissal by appellate Court: 1914 P O 66; 1922 P O 187 and 1932 Pat 251, *Rel. on*; 1921 Pat 6, *Dissent*. [P 480 C 2]

For when a case is dismissed for want of prosecution, there is practically no appeal and the decree of the lower Court stands unaffected.

[P 480 C 2]

*Ram Lal—for Appellant.**Nawal Kishore—for Respondents.*

1. Khuda Bakhsh v. Budhar Mal, (1892) 186 P R 1882.
2. Khaira v. Salem Raj, 1919 Lah 3=51 I C 995=1 Lah 21.
3. Bahadur Ali v. Co-operative Credit Society, Basti Baba Khel, 1929 Lah 778=120 I C 165.
4. Nitai Dutta v. Bishun Lal Sao, 1932 Pat 255=189 I C 810=11 Pat 504=18 P L T 488.
5. Narayana Sahu v. Pentamma, 1929 Mad 768=121 I C 855=52 Mad 861=57 M L J 810.
6. Dip Chand v. Sheo Prasad, 1929 All 593=119 I C 103=51 All 910=1929 A L J 769.

Judgment.—This appeal arises out of execution proceedings for realisation of court-fee in a pauper suit. The suit was decreed and an application was made on behalf of the Collector for attachment of certain properties in the hands of the defendant. One of the objections taken was that the application for execution was time-barred. The decree in question had been passed on 1st April 1930 while the execution was taken out on 16th February 1934. The appellant relied on the fact that an appeal had been presented to this Court in the meantime and was dismissed on 2nd June 1933. It was urged on behalf of the appellant that the period of limitation ran from the date of final order in appeal on 2nd June 1933 and therefore the application was within time under Art. 182 (2), Lim. Act. The learned Senior Subordinate Judge however rejected this contention on the authority of 36 All 350 (1). He further held that the applicant was not entitled to execute the decree against the defendant as there was no direction in the decree to that effect as required by R. 10, O. 33, Civil P. C. The application was accordingly dismissed and from this decision the present appeal has been preferred. The learned Government Advocate has tried to distinguish the Privy Council ruling relied on by the learned Subordinate Judge on two grounds, viz. (i) that in the Privy Council case the dismissal in default of prosecution was automatic and as no order was passed on the appeal, the case did not come within the purview of Art. 182 and (ii) that the words 'or withdrawal of the appeal' which were added at the end of Cl. 2, Art. 182 of the Indian Limitation Act 1908, clearly bring the present case within the purview of that article. As regards the first point, reliance was placed on a ruling of the Patna High Court reported as 59 I C 896 (2). This ruling was however considered in a later ruling of the same Court reported as 1932 Pat 251 (3). In the latter ruling the Privy Council rules on the subject of dismissal of appeals for want of prosecution were considered and it was pointed out that the ap-

peal had been admitted and therefore the dismissal in 36 All 350 (1), could not have been merely automatic.

The fact that the view of their Lordships of the Privy Council is that even a dismissal for non-prosecution after admission and appearance of the parties does not constitute a 'final decree or order' within the meaning of Art. 182 (2), Lim. Act, will also appear from a later decision of their Lordships of the Privy Council reported as 49 Cal 203 (4), at p. 213 in which 36 All 350 (1), was referred to with approval. As to the second point, the appeal in the present case does not appear to have been withdrawn but was dismissed for want of prosecution (vide order of the High Court dated 2nd June 1933). Secondly, the addition of the words 'or withdrawal of the appeal' does not appear really to make any difference to the ratio decidendi of the Privy Council decisions, which appears to be that when a case is dismissed for want of prosecution, there is practically no appeal and the decree of the lower Court stands unaffected. In view of the above decisions of their Lordships of the Privy Council the learned Subordinate Judge's finding on the issue of limitation must, I think, be upheld. It is unnecessary to discuss any other points in the circumstances. I dismiss the appeal, but in view of all the facts leave the parties to bear their costs.

K.S./R.K.

Appeal dismissed.

4. Sachindra Nath v. Maharaj Bahadur Singh, 1922 P C 187=74 I C 660=49 Cal 203=49 I A 335 (P C).

* A. I. R. 1936 Lahore 480

YOUNG, C. J.

Mulk Raj Bhalla—Objector—Petitioner.

v.

Peoples Bank of Northern India, Ltd. (in liquidation) through Official Liquidator—Opposite Party.

Civil Misc. Petn. No. 38 of 1935, Decided on 13th December 1935.

* Company—Shares transferred to person as qualification for directorship—Such person holding out that he is share-holder and member of company—Liquidation of company—He is estopped from denying that he is share-holder or member of company.

Where a person has been given shares or shares have been transferred to him, as qualification for a directorship, such a transfer makes the transferee a member of the company within the meaning of S. 30, Cl. (2), Companies Act.

1. Abdul Majid v. Jawahir Lal, 1914 P C 66=23 I C 649=36 All 350 (P C).
2. Ragho Prasad v. Jadunandan Prasad, 1921 Pat 6=59 I C 896=2 P L T 28.
3. Hirday Narayan v. Maheshwari Prasad, 1932 Pat 251=139 I C 198=11 Pat 477.

And if such person holds out that he is a shareholder and member of the company, he is estopped from denying that he is a member or a shareholder where the company goes into liquidation on the ground that transfer was a mere colourable transaction and cannot object to his name being included in the list of contributories: *Bugg's case*, 143 R R 229; *Cox's case*, 146 R R 219 and *Budd's case*, 130 R R 138, *Disting.* [P 481 C 2]

M. C. Mahajan—for Petitioner.

Bhagwat Dayal—for Opposite Party.

Order.—This is an objection by Lala Mulk Raj Bhalla against being included in the list of contributories of the Peoples Bank of Northern India, Limited, in liquidation. Counsel says the facts are that in August 1931 the objector was invited by L. Harkishan Lal and the other directors of the Bank to become Managing Director of the Bank at a period when the Bank was in great difficulties, that the objector agreed to the proposition and agreed to serve without remuneration, that Lala Harkishan Lal provided the qualification shares for the objector and the shares were transferred to the objector without any payment by the objector for them. It is argued therefore by counsel that the objector is not a member of the company within the meaning of S. 30 (2), Companies Act, that the objector does not come in within the meaning of S. 33, Companies Act, that he cannot be held to be a trustee for the shares and therefore liable, and that the transaction between Lala Harkishan Lal and Lala Mulk Raj Bhalla was a mere colourable transaction, the shares always remaining the property of Lala Harkishan Lal. In support of this contention counsel relies upon certain cases reported in *Bugg's case* 143 R R 229 (1), *Cox's case* 146 R R 219 (2) and *Budd's case* 130 R R 138 (3). In these cases the Courts held that, where there had been some fraudulent transfer of shares when the company was in difficulties in order that the real holder should be relieved of liability, the real holder could be put on the register of members. None of these cases apply to the facts in this case at all. I asked counsel if he could produce to me one authority for the proposition that where a person had been given

shares, or shares had been transferred to him, as qualification for a directorship, such a transfer did not make the transferee a member of the company within the meaning of S. 30, Cl. (2), Companies Act; he is unable to direct my attention to any such authority.

In my opinion there is no doubt about this case. Under S. 30 (2) the objector certainly is a member of the company. He agreed to become a member and his name has been entered in the register of members. Further, under Art. 85 he had to be a shareholder in order to become a Director, and it is idle for him now to say that in reality he is not a shareholder and that he never was properly qualified therefore to be a Director. On a construction of these relevant sections themselves in the Act, there is no doubt about the position. But in addition to this the objector is estopped from raising any objection now. He purchased the shares, signed an ordinary transfer deed in which it was said that he had paid Rs. 7,000 for the shares and that he was to get the dividends in future. As Managing Director of the Company, i.e. as a properly qualified shareholder, he put forward the first scheme for reconstruction in the month of October 1931. In the months of January, February and March 1932 he attended meetings of the shareholders and held proxies on behalf of other shareholders. While he was still Managing Director a letter of demand was sent to him for calls that accrued due upon the shares: he never replied to this letter and never denied that he was a shareholder. In May 1932 he resigned and in his letter of resignation he never mentioned his shares. In June 1932 he received another registered demand for calls that had accrued due: he never answered this letter or denied that he was a shareholder. Although threatened by an action the objector never on that date sent a letter to the company saying that he was not a shareholder. In my opinion the objector is clearly estopped from taking up the present position. He has held himself throughout to everyone—except, perhaps to the Directors of the Board—that he is a properly constituted shareholder and member of the company. He has slept over his rights, if indeed he ever had any. It is too late when the company is in liquidation for him now to raise these points. For these reasons

1. (1865) 143 R R 229=2 Dr & Sm 452=35 L J Ch 48=18 W R 911.

2. (1865) 146 R R 219=4 D J & S 58=83 L J Ch 145=12 W R 92.

3. (1861) 130 R R 138=3 D F & J 297=31 L J Ch 4=10 W R 51.

the objection must be dismissed with costs fixed at Rs. 200 which will be taxed as costs.

K.S./R.K. *Objection dismissed.*

**** A. I. R. 1936 Lahore 482**

ADDISON AND ABDUL RASHID, JJ.

Benares Bank, Ltd., Saharanpur—
Defendant—Appellant.

v.

Har Parshad and others—Plaintiffs—
Defendants—Respondents.

First Appeal No. 830 of 1935, Decided on 11th November 1935, from preliminary decree of Senior Sub-Judge, Delhi, D/- 25th January 1935.

**** (a) Notice—Document relating to immoveable property executed at Delhi—Registered at Lahore under S. 30 (2) of Registration Act—Notice will take effect only when memorandum is filed in Registrar's office at Delhi under S. 51 of the Act.**

Where a document relating to immoveable property at Delhi registered under provisions of S. 30 (2), Registration Act, by the Registrar at Lahore, it will not amount to a notice unless a memorandum of the instrument is entered in the files by the Registrar's office of Delhi under S. 51, Registration Act. [P 483 C 2]

**** (b) Mortgage—Charge—Distinction between—Charge creates right *jus ad rem*—Mortgage creates right in *rem*—Difference between charge and mortgage is very slight—Charge restricts right to specific fund or property—If personal liability is created charge amounts to mortgage.**

The words 'transfer of an interest' distinguish a mortgage from a charge. In a charge no right in *rem* is created, but the right is something more than a personal obligation, for it is a *jus ad rem*, that is a right to payment out of property specified, while a simple mortgage is a right in *rem*. There is thus very little difference between a charge and a simple mortgage except that a charge is only good as against a subsequent transferee with notice. The distinction between the two forms of instruments, one mortgage and the other charge being very slight, the question must in each particular case be decided on the facts thereof; however when a charge is created by act of party the specification of the particular fund or property negatives a personal liability and the remedy of the holder of the charge is against the property charged only. When there is in addition a personal covenant the security will become collateral to that personal covenant and the security would in that case appear to become a transfer of a right of sale to support the personal covenant, and as the right of sale is a right in *rem* the transaction would be a mortgage. For this reason the absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage: 32 *Cal* 494; 1919 *Mad* 528 and 31 *Mad* 330, *Foll.*

[P 484 C 1, 2]

*Badri Dass and Madan Lal—*for Appellant.

Shamair Chand, Radha Mohan Lal (for Plaintiffs) *Bhagwat Dayal* (for Alopī Pershad, Defendant)—for Respondents.

Addison, J.—Ganga Ram, defendant 1, mortgaged on 6th February 1928 certain immoveable property with possession in favour of the plaintiffs. The consideration was Rs. 80,000 and the transaction was effected by a registered deed. The mortgagor executed a deed of lease in favour of the mortgagees, the rent fixed being Rs. 650 per mensem. On 13th March 1928 a further deed of mortgage for the sum of Rs. 25,000 was executed by the mortgagor in favour of the same mortgagees. There was a third deed of mortgage for Rs. 45,000 executed on 19th July 1928, the secured property being the same together, with a house not included in the first two mortgages. A deed of lease was also executed by the mortgagor in favour of the mortgagees with respect to this additional house, the rent being fixed at Rs. 32 per mensem. In the mortgages were included terms as regards interest and interest in default. On 22nd December 1930 the mortgagees sued Ganga Ram, their mortgagor, defendant 1, on the mortgages, and impleaded Bala Parshad Alopī Parshad, subsequent mortgagees, as defendant 2. The mortgage in favour of defendant 2 was executed on 25th July 1930. The plaintiffs-mortgagees claimed Rs. 1,58,775 on the basis of their three mortgage deeds. On 27th February 1931 a compromise was arranged between the mortgagees and the mortgagor. It was filed in Court on 2nd March 1931, but counsel for defendant 2 did not agree to its terms. Issues were framed and the case adjourned for evidence. The case came on for hearing on 28th April 1931.

Both the defendants were absent and an *ex parte* decree was granted to the plaintiffs in terms of the compromise. At the instance of defendant 2 the *ex parte* decree was set aside on 27th June 1932. On 2nd August 1932 the plaintiffs applied for leave to amend their plaint so as to implead Rameshwar Das as defendant 3 and the Benares Bank, Limited as defendant 4 as it had come to their knowledge that they were also interested in the mortgaged property. Leave to amend was granted and the case went for trial. Rameshwar Das,

defendant 3, did not appear and his claim has therefore gone in default. Defendants 2 and 4, that is, Bala Parshad-Alopi Parshad and the Benares Bank Limited, took certain pleas and also disputed the priority of each other's mortgages. As a result of the suit the Subordinate Judge, 1st class, Delhi, has granted the plaintiffs a preliminary decree for Rs. 2,55,839.4.0 with costs to be realised by sale of the mortgaged property under the provisions of O 34, R. 4, Civil P. C. He further held that if any balance was left after satisfaction of the plaintiffs' claim it was first to go towards satisfaction of the mortgage debt, due to defendant 2, Bala Parshad-Alopi Parshad, which was held to amount to Rs. 22,987.8.0 and then towards the discharge of the secured debt of the Benares Bank Limited, defendant 4, amounting to Rs. 74,389.4.0. This means that defendant 2's claim was given priority over that of defendant 4.

Defendant 4, the Benares Bank Limited, has appealed. Only two grounds were argued before us. The first was that the interest allowed to the plaintiffs was excessive and that the decree should not be in excess of what was first decreed on 28th April 1931 under the compromise. The second was that the trial Judge was wrong in holding that the mortgage of defendant 2 had priority over the mortgage of the appellant Bank. At the hearing the question of interest was compromised before us and this compromise will be mentioned later. The only question for decision therefore in this appeal is, which of the two mortgages of defendants 2 and 4 should have priority. It has already been stated that the mortgage of defendant 2 is dated 25th July 1930. The appellant Bank claims that it holds a mortgage over the property which is dated 17th April 1930. The Bank had two simple money decrees against Ganga Ram, the mortgagor, in the Saharanpur Courts. One of them was for over Rs. 40,000 and the other for something over Rs. 9,000. The Bank took out execution against Ganga Ram and in those proceedings compromised with him. In order to complete this compromise Ganga Ram executed in their favour and put into Court what is described as a security bond. It is stamped with a non-judicial stamp of Rs. 7.8.0. Part of this security bond runs as follows:

Whereas the decree-holder wishes to execute the said decrees immediately and whereas the judgment-debtor will suffer if this is done, therefore the said decree-holder has agreed to stay execution of the decrees for a period of six months provided sufficient security is given by the judgment-debtor. Accordingly the decree-holder has accepted the security of the property hereinafter fully described, known as Ganga Niwas situated in Chandni Chowk, Delhi for both the said decrees. The judgment-debtor hereby covenants that the said property shall remain as such till the entire amount under the two decrees with interest and costs is paid to the decree-holder while the decree-holder shall be entitled to realise all his dues under the decrees after the lapse of six months by the sale (subject to prior mortgages) of the said property hereby given in security and in case of its insufficiency by the sale of other property of the judgment-debtor and from his person also.

This deed is dated 17th April 1930 and was registered on 26th May 1930 at Lahore under the provisions of S. 30 (2), Registration Act, this being permissible under that sub-section although the property is situated in Delhi. It was presented to the executing Court at Saharanpur along with a petition on 20th June 1930. This petition is in the same terms as the so-called security bond and sets out the prior mortgages, namely, the three mortgages in favour of the plaintiffs. At that time the mortgage in favour of defendant 2 had not been entered into. Under the compromise, execution in the Saharanpur Courts was stayed. The contention of defendant 2 is that the security bond only creates a charge on the property and that as he had no notice of that charge his mortgage, though of later date, must be given priority. One witness was produced to prove that defendant 2 had notice of this transaction but the trial Judge has not believed him and we are not prepared to differ from his finding. It was at first contended on behalf of the appellant that registration of the bond itself amounted to notice under Expl. (1) to S. 3, T. P. Act. This contention must be repelled as the instrument was registered under sub-s. (2), S. 30, Registration Act, and notice would therefore only take effect from the date on which any memorandum of the document was filed by the Sub-Registrar at Delhi. There is no evidence on this record that any memorandum of it was ever filed by the Sub-Registrar there. Nor is there any evidence that the instrument or memorandum had been duly entered or filed in books kept under S. 51,

Registration Act, as required by proviso (2) to Explan. (1), S. 3, T. P. Act. This means that if the document of the appellant Bank only creates a charge the mortgage of defendant 2 must have priority as it must be held that he had no notice of the charge. But this instrument must be held to be a simple mortgage and not a document creating a charge. 'Mortgage' as defined in S. 58, T. P. Act, is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability. There has, therefore, to be a transfer of an interest in specific immoveable property for the purpose of securing the payment of money. Charge is defined in S. 100, T. P. Act, as follows:

Where immoveable property of one person is, by act of parties or operation of law, made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property.

The words 'transfer of an interest' thus distinguish a mortgage from a charge. In a charge no right in rem is created but the right is something more than a personal obligation, for it is a *jus ad rem*, that is, a right to payment out of property specified, while a simple mortgage is a right in rem. There is thus very little difference between a charge and a simple mortgage except that a charge is only good as against a subsequent transferee with notice. In 1 Pat 387 (1), Das, J., said :

Now the broad distinction between a charge and a mortgage is that whereas a charge only gives right to payment out of a particular fund or particular property without transferring that fund or property, a mortgage is in essence a transfer of an interest in specific immoveable property.

No particular form of words is necessary for the creation of a mortgage and the Court will ascertain the intention by looking at the substance and essence of the transaction and not the mere form of the deed. Even if the deed calls itself a mortgage its nature will be determined not by the name the parties give it but by the relation constituted by it. The fact, therefore, that the instrument of the appellant Bank is called a security bond is not of great importance. It was

stamped obviously under the provisions of Art. 57, Sch. 1, Stamp Act, the heading of which is

Security bond or mortgage-deed executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract.

The question of registration does not arise if it is held to be a mortgage deed because it was registered. The distinction between the two forms of instruments being thus very slight, the question must in each particular case be decided on the facts thereof. It may be said however that when a charge is created by act of party the specification of the particular fund or property negatives a personal liability and the remedy of the holder of the charge is against the property charged only. When there is in addition a personal covenant the security will become collateral to that personal covenant and the security would in that case appear to become a transfer of a right of sale to support the personal covenant and as the right of sale is a right in rem the transaction would be a mortgage. For this reason it has been held that the absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage. It is not necessary to discuss all the authorities cited at the Bar. I wish, however, to refer to one or two of them. In 32 Cal 494 (2), the appellants executed as security for the costs of the respondent in an appeal to the Privy Council a duly attested and registered bond whereby they put certain immoveable property in security for such costs. It was held that the effect of the bond was to create a mortgage. This case goes very far. In 51 I C 963 (3), a decision of the Madras High Court, Sadasiva Aiyar, J., held that an obligor who executes a bond creating a charge on specific immoveable property did in his opinion transfer an interest therein. 31 Mad 330 (4), is a decision on facts nearly on all fours with the present case. A security bond was given to the Court in the following terms :

Until the disposal of my appeal in the District Court I pledge my immoveable property

2. Tokhan Singh v. Ghrwar Singh, (1905) 32 Cal 494=9 O W N 372.
3. Srinivasa Raghava v. Ranganatha Iyengar, 1919 Mad 528=51 I C 963=36 M L J 618.
4. N. Sambayya v. T. Subbayya, (1908) 31 Mad 330=3 M L T 317.

1. Shiva Prasad v Beni Madhab, 1922 Pat 529=70 I O 24=1 Pat 387=4 P L T 6.

which is described in the Schedule annexed and which is free from all encumbrances to the Court for a certain sum (which was the amount of the decree of the plaintiffs). If the result of the decree be against me I hereby bind myself to allow the plaintiff to recover the whole amount of the said decree by my immoveable property and if it be insufficient, from me. Until the whole of the decretal amount is discharged I will not sell or make a gift of the said property to others. I have thus executed a security bond.

It was held that the security bond amounted to a mortgage within the meaning of S. 58, T. P. Act. In the case before us the appellant Bank was entitled under the security bond to realize its dues under its decrees after the lapse of six months by the sale, subject to prior mortgages of the property mentioned in the security bond and in case of its insufficiency by the sale of other property of the judgment-debtor and from his person also. The right of sale was given specifically and there was also the personal liability specifically set out. The document therefore must be held to be a mortgage and as such it has priority over the mortgage of defendant 2 which is later in time. The compromise as to the amount of the decree, which was accepted by all the parties, is as follows: The consent decree, dated 28th April 1931, which followed the compromise of 27th February 1931 was accepted subject to a certain condition. This means that the amount fixed as due to the plaintiffs on their three mortgages, including costs of the trial Court, was Rs. 1,63,254-5-3. Defendant 1 was to deliver possession of the property to the plaintiffs on 1st March 1931 and this has been done. From that date the plaintiffs were to realize rent from the tenants and keep regular accounts. Future interest at 12 annas per cent per mensem till realization was to be allowed on the sum of Rs. 1,63,254-5-3 from 1st March 1931 and the plaintiffs had to credit rent received towards interest due, the deficit being added to the abovementioned sum at the time of the final decree.

The plaintiffs allowed the defendant mortgagor two and a half years' time to pay. This time has expired and we are no longer concerned with it and the plaintiffs are now entitled to a final decree. For the purpose of fixing the amount due under the final decree we fix 6th January 1936 as the date up to which calculations should be made for the pur-

pose of ascertaining the amount due so that a final decree may be drawn up on application being made to that effect. The plaintiffs were also allowed to pay house tax, water rate, Municipal rents and other taxes to the Municipality in respect of the property out of the rent received by them, and they were given power to construct a verandah in front of the property with the permission of the Municipality, the cost of which was to be included in the final decretal amount: such cost to be established by the plaintiffs who had to keep regular accounts and produce vouchers. These were the terms of the consent decree dated 28th April 1931 and the parties further agreed before us that the plaintiffs will be entitled to an additional sum of Rs. 16,000 with simple interest thereon at 12 annas per cent per mensem from the date of this Court's decree. As regards the amount due to the plaintiffs therefore our order is as above in terms of the compromise. The parties will bear their own costs of the appeal as regards this part of the case while the costs of the trial Court are already included in the amount mentioned.

We further accept the appeal to the extent of setting aside the trial Court's order to the effect that the mortgage of defendant 2 had priority and hereby declare that the mortgage of defendant 4, the appellant Bank, will have priority over that of defendant 2, Bala Parshad-Alopi Parshad. We think that the parties should bear their own costs with respect to this portion of the appeal also.

B.D./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 485

ADDISON AND ABDUL RASHID, JJ.

Amrik Singh—Plaintiff—Appellant.

v.

Sant Singh and another—Defendants—Respondents.

Second Appeal No. 1087 of 1935, Decided on 21st January 1936, from order of Dist. Judge, Jhelum, D/- 20th May 1935.

Limitation Act (1908), S. 22—Omission to record all partners as defendants according to R. 3, O. 30, Civil P. C., amounts to not naming defendants and not misdescription under S. 22.

Where the plaintiff in the original plaint has recorded four dissolved firms as defendants, but in the amended plaint he records only two of the partners of the four defendant firms despite

R. 3, O 30, Civil P. C. The omission of remaining defendants amounts to "not naming defendants" and not misdescription under Section 22, Limitation Act, and the plaintiff cannot take the protection of S. 22 and the suit is time barred. [P 486 C 1, 2]

Achhru Ram — for Appellant.

Mehr Chand Mahajan — for Respondents.

Addison, J.—The plaintiffs obtained a decree for Rs. 2,021-2-3 with interest on 15th June 1926 from the Vice Consul at Duzdab in Persia and on 20th February 1930 sued four firms on the basis of this foreign judgment. The suit was decreed, but on appeal the learned District Judge held that there was no suit before the Court as a suit against foreign firms could not be instituted in India. He, however, allowed the plaint to be amended and directed that after this was done the parties should appear on a certain date in the trial Court.

The plaint as amended was against only two of the partners in the firms formerly sued, namely, Sant Singh and Mahal Singh. The suit was again decreed by the trial Court, but it was again dismissed in the Court of the District Judge on appeal on the ground that the suit was barred by time. Against this decision, this second appeal has been preferred. The learned District Judge held that this was not a case of misdescription of the defendants, but a case where no defendants at all had been named in the plaint as originally put in. In his view S. 22, Limitation Act, applied and the suit was barred by time.

It is clear from the original plaint and the amended plaint that the firms, which were sued, were firms which carried on dealings only in Persia and that they had dissolved before the original plaint was put in and the partners had returned to their home in India. Under O. 30, R. 1, Civil P. C., any two or more persons, claiming or being liable as partners and carrying on business in British India, may sue or be sued in the name of the firm. It appears, however, from the proviso to R. 3 of O. 30 that in the case of such a partnership carrying on business in British India, which has been dissolved to the knowledge of the plaintiff the summons shall be served upon every person within British India whom it is sought to make liable. Even, therefore, if the firm had carried on business in British India, it was necessary to

serve every person sought to be made liable, whereas only the four firms were served. It was argued before us that the naming of four partnership firms as defendants, instead of naming individual partners, was merely a misdescription, but seeing that the firms never carried on business in British India, and had been dissolved before the suit was brought, it seems to us that this was a case where no defendants were named and that the view taken by the District Judge is correct. In these circumstances, it is unnecessary to discuss the authorities cited between which there appears to be some conflict. For the reasons given, we dismiss the appeal, but make no order as to costs here.

M.D./R.K.

Appeal dismissed.

*** * A. I. R. 1936 Lahore 486**

JAI LAL, J.

Gurdial Singh — Judgment-debtor—Petitioner.

v.

Khazan Chand — Decree-holder and another — Judgment-debtor — Opposite Parties.

Civ. Misc. Petn. No. 641 of 1935, Decided on 4th December 1935, from order of Beckett, J., D/- 11th June 1935, reported as 1935 Lah 914.

(a) Attachment—Precept—Object of S. 46, Civil P. C., explained — Indefinite order making permanent attachment is not contemplated by S. 46.

The object of S. 46 is to attach property of the judgment-debtor in another Court in order to prevent the judgment-debtor from alienating or otherwise dealing with it to the detriment of the decree-holder till proper proceedings for the sale of the property in pursuance of an application for execution can be taken, and it is for this reason that the effect of an attachment in pursuance of a precept is limited to two months and power is given to the Court which passed the decree to extend this period of two months in order to meet contingencies which may arise due to the delay in transferring the decree to the Court to which the precept has been sent. An indefinite order stating that an attachment is made permanently is not one contemplated by S. 46. [P 487 C 2; P 488 C 1]

* * (b) Execution — Attachment — Money attached in execution of one decree—Another decree-holder subsequently attaching it — Money cannot be paid over to such decree-holder—Attachment under precept lies only for sixty days—Money attached under precept can be paid to another after expiry of two months : 161 I C 418 = 1935 Lah 914, *Reversed.*

When money is attached in execution of a decree it cannot be paid over to another decree-

holder who subsequently attaches it, but when money is not attached in execution of a decree but it is attached in pursuance of a precept under S. 46, Civil P. C., the effect of which is limited only for two months after which period the attachment no longer exists, the money attached under a precept can be paid over to another decree-holder who subsequently attaches it: 161 I C 418=1935 Lah 914, Reversed. [P 488 C 2]

(c) Review—Judgment to be reviewed based on misapprehension of nature of attachment—Judgment can be reviewed.

Where the decision of the Judge, which is sought to be reviewed, is based on an obvious misapprehension of the nature of attachment it is sufficient reason for review.

[P 488 C 2; P 489 C 1]

Petitioner in person.

Roop Chand—for Opposite Parties.

Order.—This is an application for review of an order passed by Beckett, J., on 11th June 1935. The facts are these: It appears that relations between the petitioner Gurdial Singh and his brother Moti Singh are not friendly. Moti Singh obtained a money-decree against Gurdial Singh in the Court of the Senior Subordinate, Judge, Amritsar in pursuance of which Gurdial Singh paid in Court Rs. 2962 on 3rd December 1930. The money, however was not paid to Moti Singh on account of an application made by Gurdial Singh. Khazan Chand, respondent in the present case obtained a decree against Moti Singh for Rs 4,800 on 2nd November 1931. This decree, it is alleged by Gurdial Singh, was a collusive decree suffered to be passed by Moti Singh in order to secure the money paid in the Amritsar Court by Gurdial Singh, payment of which to Moti Singh has been stayed on account of a suit which had been brought by Gurdial Singh against Moti Singh. The matter however is not directly before me and I will assume that the decree obtained by Khazan Chand against Moti Singh was a proper decree. In execution of that decree Khazan Chand applied to the Sialkot Court under S. 46, Civil P. C. for a precept to be sent to the Senior Subordinate Judge of Amritsar to attach the money deposited by Gurdial Singh for payment to Moti Singh, i. e. Rs. 2,962. A precept was accordingly sent to Amritsar but it was not complied with and returned to the Sialkot Court with a remark that there was a dispute about the money and therefore it could not be attached. On the application of the decree-holder however another precept was sent by the

Sialkot Court to the Amritsar Court requesting it to attach the money, subject to the result of the dispute about it. This order was duly complied with by the Amritsar Court and intimation sent to the Sialkot Court.

This intimation however was sent after a reminder had been sent by the Sialkot Court. The attachment took place in March 1932 in pursuance of the precept. Subsequently on an application made by Khazan Chand an order was issued by the Sialkot Court to the Amritsar Court to remit the money to it and a reply was sent that the money could not be remitted to the Sialkot Court, specially as an attachment under a precept could continue only for 60 days and the decree had not been transferred to the Amritsar Court. This was obviously a correct reply, because under S. 46, Civil P. C. an attachment made in pursuance of a precept cannot continue in force for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of the attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property. Instead of following the procedure laid down in S. 46 neither the decree-holder, Khazan Chand, moved the Sialkot Court to extend the time and to transfer the decree for execution to Amritsar Court nor did the Sialkot Court itself extend the time for the continuation of the attachment or took steps to transfer the decree to the Amritsar Court. On the other hand, presumably at the instance of the decree-holder, an entirely wrong order was passed that the attachment had been made permanently and the money should be remitted to the Sialkot Court. I am unable to agree with the contention of the learned counsel for the respondents that the remark that the attachment had been made permanently is tantamount to an extension of time of attachment as is contemplated by S. 46. The object of S. 46 is to attach property of the judgment-debtor in another Court in order to prevent the judgment-debtor from alienating or otherwise dealing with it to the detriment of the decree-holder till proper proceedings for the sale of the property in pursuance of an application for execu-

tion can be taken, and it is for this reason that the effect of an attachment in pursuance of a precept is limited to two months and power is given to the Court which passed the decree to extend this period of two months in order to meet contingencies which may arise due to the delay in transferring the decree to the Court to which the precept has been sent. An indefinite order, even if it be assumed that in this case such an order was actually passed and conveyed to the Amritsar Court that the attachment had been made permanently, is not one contemplated by S. 46. In fact the remark that the attachment had been made permanently was made after it was pointed out to the Sialkot Court that the period of 60 days had already expired.

It appears that on 5th May 1932 the Sialkot Court had filed the proceedings in its Court stating that the attachment had been made in pursuance of its precept. It also appears that on subsequent application, which was made to it on the prescribed form for execution of decrees and in which the only prayer made by the decree-holder was that the attachment had already been effected and therefore the money be sent for from the Amritsar Court, an order was sent to the Amritsar Court by the Sialkot Court requesting it to send the money and it was in reply to this requisition that it was pointed out to Sialkot Court that the attachment under the precept had already expired. The suit filed by Gurdial Singh against Moti Singh was ultimately decreed and Gurdial Singh made an application to the Amritsar Court to execute his decree by adjusting it against the decree which had been passed in favour of Moti Singh and in satisfaction whereof Rs. 2,962 had been deposited by him in Court. It was thus in execution of the decree obtained by Gurdial Singh against Moti Singh that the whole money deposited by Gurdial Singh was paid back to him. This happened on 2nd December 1933, that is to say, more than 18 months after it was pointed out to the Sialkot Court that the attachment made in pursuance of the precept had ceased to be operative by the expiry of two months and in the absence of transfer of the decree for execution to the Amritsar Court.

In the meantime no attachment had

been made by the Sialkot Court of the money in dispute either in pursuance of an application for execution made to it by the decree-holder or after transferring the decree to the Amritsar Court and an application to that Court to execute the decree. From the order returning the money to Gurdial Singh an application for revision was presented in this Court by Khazan Chand and was accepted by Beckett, J. by his order which is sought to be reviewed by this petition. The learned Judge has accepted the application merely on the ground that when money is attached in execution of a decree it cannot be paid over to another decree-holder who subsequently attaches it, but as I have pointed out above, the money in this case was not attached in execution of a decree; it was attached in pursuance of a precept under S. 46 the effect of which is limited in the manner already indicated. Therefore all the judgments on which the learned Judge has relied have no application to the facts of the present case, as here the attachment made in pursuance of the precept had ceased to exist when the money was attached and paid over to Gurdial Singh in execution of his decree. I may incidentally remark that there is no force in the contention that the precept was not obeyed by the Amritsar Court for about a year.

The attachment in pursuance of the precept was made in March 1932 and on 5th May 1932 it was noted by the Sialkot Court that attachment had been made and the proceedings were filed. Khazan Chand's decree was passed on 2nd November 1931 and an application for precept was made on 4th November 1931. The precept was acknowledged on 13th November 1931 with an objection to attachment on account of a dispute and a fresh precept was sent on 14th January 1932, but it was returned with the request for further details and a third precept was sent on 3rd March 1932 and attachment in pursuance of it was made on 10th March 1932. This petition for review was admitted to a hearing by a Division Bench, but an objection is raised by the respondents' counsel that no application for review lies. I am, however, unable to agree. It is obvious that the decision of the learned Judge, which is sought to be reviewed, is based on obvious misapprehension.

of the nature of attachment and therefore there are sufficient reasons for review. I accordingly accept this petition with costs and review the order passed on 11th June 1935 and dismiss the petition for revision with costs.

B.D./R.K.

Petition accepted.

A. I. R. 1936 Lahore 489

ADDISON AND ABDUL RASHID, JJ.

Banarsi Das—Petitioner.

v.

Commissioner of Income-tax, Punjab, N. W. F. & Delhi Provinces, Lahore—Respondent.

Civil Miso. Petn. No. 444 of 1935, Decided on 27th January 1936.

(a) Income-tax Act (1922), S. 23 (4)—Partial default in complying with notices under S. 22 (4) or S. 23 (2) of the Act—Consequences are those of complete default.

A partial default in complying with notices issued under S. 22 (4) or S. 23 (2) involves the same consequences under S. 23 (4) of the Act as a total default. [P 491 C 1]

(b) Income-tax Act (1922), S. 27—"Sufficient cause" or "not reasonable opportunity"—Income-tax Officer as matter of law can find as matter of fact that assessee has not established "sufficient cause," etc.

It is possible as a matter of law for the Income-tax Officer to find as fact that a particular assessee had failed to establish "sufficient cause" or "not reasonable opportunity" within the meaning of S. 27 of the Act. [P 492 C 1]

Achhru Ram and Asa Ram Aggarwal—for Petitioner.

Jagan Nath Aggarwal—for Respondent.

Abdul Rashid, J.—This is an application under S. 66 (3), Income-tax Act, for a mandamus to compel the Commissioner of Income-tax, Punjab, to state the case of Rai Bahadur Banarsi Das, and refer the points of law arising therein to this Court. The following points of law have been formulated on behalf of the assessee: (1) Whether an Income-tax Officer is competent to review the order of his predecessor in office adjourning the case till the decision of the criminal litigation and start proceedings at his will without submitting the case to the Commissioner of Income-tax for revision of his predecessor's order under S. 33, Income-tax Act. (2) Whether attendance in a Criminal Court under orders of a Magistrate is a sufficient cause for non-appearance before the Income-tax Officer

within the meaning of S. 27 of the Act. (3) Whether in the circumstances of the case the petitioner had reasonable opportunity to comply with the terms of the notices under S. 23 (2) of the Act or whether he was prevented by sufficient cause from complying with them. (4) Whether the consequences contemplated by S. 23 (4) would follow the non-compliance with the second notice under S. 22 (4) at least to the extent to which the Income-tax Officer was satisfied that it had been complied with, specially when the second notice does not specify the points on which the account books were required as contemplated by S. 23 (3) of the Act. (5) Whether in the circumstances of the case, the petitioner should be asked to produce the account books of the Kul-dip Oil Mills, Lahore, which were not in his possession at that time and income from which was not liable to be assessed in his hands in view of the provisions of S. 26 (2), Income-tax Act and whether its non-compliance would warrant an assessment under S. 23 (4) of the Act. (6) Whether when default in respect of notices under S. 22 (4) is not properly explained but the default of the notices under S. 23 (2) is satisfactorily accounted for, it is not the duty of the Income-tax authorities to cancel the 23 (4) assessment, re-issue the notice under S. 23 (2) and make the assessment afresh. (7) Whether the assessment made by an Income-tax Officer to the best of his judgment under S. 23 (4) includes penal assessment. (8) Whether in the circumstances of the case when the petitioner had requested the Income-tax Officer for transfer of the case, was not the latter bound to grant some time for moving the Commissioner of Income-tax for that purpose if he was not prepared to forward the request of the petitioner to his superiors himself. The Commissioner of Income-tax has refused to refer the questions alluded to above. He has however taken action under S. 66 (1) of the Act and has propounded the following question of law for the opinion of this Court:

Whether as a matter of law it was not possible for the Income-tax Officer to find as fact that the assessee had failed to establish 'sufficient cause' or 'not reasonable opportunity' within the meaning of S. 27 of the Act.

The material facts of the case may be briefly stated. Rai Bahadur Lala Benarsi Das is a mill owner of Ambala. He carries on his business with an admitted capital

of half a crore of rupees and his principal sources of income are Flour Mills, Oil Mills, Ice Factory, Banking and House property. He had paid no income-tax since 1925-26 and had accumulated 5½ lacs of depreciation to be set off against future income. He submitted a return for the assessment year 1932-33 declaring a gross income of Rs. 25,639 against which however Rs. 76,885 was claimed on account of depreciation. The Income-tax Officer issued a notice on 18th March 1933, under S. 22 (4) of the Act calling upon the assessee to produce complete accounts of his income from all sources during 1931-32. This notice was not served on the assessee, and another similar notice was therefore issued on 21st March. In response to this notice some books of accounts were produced, which were examined partially by the Accountant on 23rd March. The case was then adjourned to 24th March when a number of other books relating to business at Ambala were examined. Books relating to Kuldip Oil Mills, Lahore, were, however, not produced by the assessee. On 24th March an application was filed on behalf of the assessee praying for eight months' extension of time for production of accounts relating to Kuldip Oil Mills. It was stated in this application that as civil and criminal litigation between the assessee and his wife Mt. Prem Kaur and Sardar Kartar Singh, the ex-Manager of the Mills, was going on at Lahore, the assessee was unable to produce the accounts of the Kuldip Oil Mills as these books were in Court. An assurance was given that the books would be produced as soon as they were given to the assessee by the Court. The Income-tax Officer thereupon passed the following order :

I adjourn the case sine die. Books of Kuldip Oil Mills to be called after the decision of the criminal case.

It appears that in the beginning of July 1933, the Income-tax Officer who had been dealing with the case so far, was transferred and his successor issued a notice under S. 22 (4) of the Act on the 10th of July for the production of assessee's accounts from all sources of income on the 22nd of July. The peon went with the notice to the assessee's place of business on the 11th of July. He was told that the assessee had gone to Lahore and his agents, Uggur Sen and Jagan Nath,

who had been appearing in Income-tax matters previously, refused to accept service of the notice. The notice was therefore affixed to the door of the premises in the presence of the agents of the assessee. The assessee on the 21st July wrote from Lahore making enquiries about this notice, and the Income-tax Officer sent a reply stating that as a special case he would give the assessee another opportunity to produce his accounts on 1st August 1933. With this letter a notice under S. 23 (2) of the Act was also sent asking the assessee to produce any evidence on which he wished to rely in support of his return on 1st August, 1933. These notices were served on the assessee after the fixed date, i. e., on the 2nd of August. The Income-tax Officer, therefore, issued fresh notices on the 5th of August for production of accounts on the 15th of August. In reply to the first issue of notice a letter dated the 7th of August was received from the assessee to the following effect :

It would appear from correspondence in your office that your predecessor had already granted me time till 31st October 1933. Thus there is no question of any adjournment in this connexion.

In reply to the second notice the assessee sent a letter dated the 13th of August stating that the Ambala accounts had already been examined, and that an extension of eight months had been allowed for the production of the Oil Mills accounts. It was stated in this letter that the Income-tax Officer was helping those who were responsible for involving the assessee in baseless litigation at Lahore and that the Income tax machinery was being misused in order to assist the enemies of the assessee. It is unnecessary to give details of further correspondence between the assessee and the Income-tax Officer. Suffice it to say that the Income-tax Officer in one of his letters stated that if any of the books on which the assessee relied were in "some Court or elsewhere", the assessee should give the requisite information and the Income-tax Officer will take proper steps to have them produced. In reply the assessee stated that the account books of the Kuldip Oil Mills were in the control of the Trustees of Rai Bahadur Lala, Benarsi Das Trust at Lahore which was then functioning. As no books were produced on the 15th of August the Income-tax Officer gave a further opportunity to the assessee and

issued fresh notices for the 2nd of September under Ss 22 (4) and 23 (2) of the Act. These notices were accompanied by a covering letter requesting the assessee to assist the Income-tax Department in arriving at a correct estimate of his income, and also pointing out the consequences of failure to comply with the notices. These notices were served on 18th August 1933. As no appearance was put in by or on behalf of the assessee on the 2nd September, the Income-tax Officer proceeded to assess the income under S 23 (4) of the Act to the best of his judgment, and the assessment was completed on 8th September 1933.

The first question of law formulated on behalf of the assessee was not pressed by the learned counsel during the course of his arguments. The second and the third questions fall within the ambit of the question of law referred to by the Commissioner of Income-tax under S. 66 (1) of the Act. We therefore proceed to deal with question No. 4. The Commissioner of Income-tax found it difficult to understand this question. We also find that the language in which question No. 4 is framed is very involved. It was explained to us by the counsel that the real meaning of question 4 is, whether if there is only partial default in the production of account books, can an assessment be made under S. 23 (4).

The language of S. 23 (4) makes it clear that if the assessee fails to comply with all the terms of a notice issued under sub-s. (4) of S. 22 or, having made a return, fails to comply with all the terms of a notice issued under sub-s. 2 of S. 23, the Income-tax Officer shall make the assessment to the best of his judgment. A partial default therefore involves the same consequences under S. 23 (4) of the Act as a total default. With respect to question 5 it was contended by the learned counsel for the petitioner that as the Kuldip Oil Mills had been handed over to a Trust before August 1933, the assessment should have been made against the Trust which was the successor of the assessee with respect to the Oil Mills business under the provisions of S. 26 (2) of the Act. This point was never raised in the proceedings before the Income-tax Officer. Moreover it had not been established on the record that the trust had succeeded

to the Oil Mills business before August 1933. The onus on the question of establishing the succession with respect to this business lay upon the assessee. He did not furnish any particulars of the Trust and did not even forward a copy of the trust deed to the Income-tax Officer before the assessment was made. The fact of succession not having been established the fifth question formulated by the assessee does not arise so far as the assessment of 1932-33, now under consideration, is concerned. Question No. 6 practically involves the same point as Question No. 4 and it is unnecessary to deal with it separately.

The point underlying Question No. 7 is whether the assessment made by the Income-tax Officer was not to the best of his judgment but was a mala fide and perverse assessment. We are of the opinion that there is no evidence or indication on the present record which may show that the Income-tax Officer was acting in a mala fide manner. As pointed out by the Commissioner an assessment at 6½ lacs on a person with half a crore of capital could hardly be described as mala fide. We are further of the opinion that the Income-tax Officer acted in a perfectly bona fide and reasonable manner in allowing the assessee a large amount of depreciation in various accounts and in assessing his net income at the sum of Rs. 55,066. On the above finding of fact, Question No. 7 does not arise. Question No. 8 was not pressed by the learned counsel for the assessee. With reference to the question referred by the Commissioner under S. 66 (1) we are of the opinion that the letters of the assessee furnish sufficient material for the finding of fact that the assessee was deliberately delaying the assessment, and that he was not prevented by any sufficient cause from complying with the notices issued to him under Ss 22 and 23 of the Act. There is also material for the finding that the assessee had reasonable opportunity to comply with the different notices and it was, therefore open to the Income-tax Officer to find as a fact that in spite of reasonable opportunity the assessee had failed to comply with the notices issued to him under Ss. 22 and 23. For the reasons given above we dismiss the petition for a mandamus. So far as the question referred by the Commissioner is concerned, we hold that "it was possi-

ble for the Income-tax Officer to find as fact that the assessee had failed to establish 'sufficient cause' or 'not reasonable opportunity' within the meaning of S. 27 of the Act."

In view of all the circumstances, we leave the parties to bear their own costs in this Court.

B.D./R.K.

Petition dismissed.

A. I. R. 1936 Lahore 492

JAI LAL, J.

(Firm) Ram Dhan Das-Ramji Das—
Plaintiff—Petitioner.

v.

(Firm) Shankar Das-Devi Dayal —
Defendants—Opposite Parties.

Civil Revn. No. 694 of 1935, Decided on 17th January 1936, from decree of Senior Sub-Judge, D/- 12th June 1935.

(a) Award—Agreement to refer future disputes to arbitration Agreement and consequent award are valid.

An award made on an agreement to refer future disputes to arbitration can be legally filed in Court. There is nothing illegal in such agreements and an award made on such reference to arbitration is perfectly valid.

[P 493 C 1, 2]

(b) Arbitration—Arbitrator must make inquiry—He need not keep record of his enquiry—Award should be in writing.

There is no law, which requires an arbitrator to keep a record of his proceedings. All that is necessary is that there should be an award in writing by the arbitrator. He is, of course, bound to make enquiry, but he is not bound to keep a record of such an enquiry. [P 493 C 1]

(c) Award—Arbitrator considering vouchers said to have been signed by minors—Objection not raised before arbitrator—Arbitrator not bound to decide legality—Failure to make enquiry is not judicial misconduct.

On a petition filing an award in Court, an objection was raised that certain vouchers taken into consideration by the arbitrator were signed by minors, and as the arbitrator made no enquiry regarding the legality of those vouchers, the award was vitiated. This objection however was not raised before the arbitrators. It was also contended that absence of enquiry amounts to judicial misconduct on the part of the arbitrators :

Held: that the arbitrators, under the circumstances, were not bound to anticipate or guess any possible objections that might be made by the respondents, and then to investigate such objections. Even assuming that the person who signed the vouchers was a minor, the arbitrators were not bound to hold that legally the objectors were not bound to pay the amount due on such vouchers. The decision of this question is entirely within the authority of the arbitrators and the absence of an enquiry does not amount to judicial misconduct on their part. [P 493 C 1]

Jiwan Lal Kapur—for Petitioner.

Muhammad Amin Khan—for Opposite Parties.

Order.—This is a petition against the order of the Senior Subordinate Judge of Ferozepore accepting the appeal and dismissing the petitioners' application to file an award. The parties entered into an agreement for sale and purchase of goods. The agreement was duly assigned. Cl. 14 of the agreement is that :

if there be dispute or difference in regard to any matter, the matter shall be referred to the arbitration of two grain or sugar merchants of Ferozepore City each of us having a right to nominate his arbitrator. In case we fail to nominate our arbitrator within a week from the date of notice, you shall have full powers to nominate the arbitrator on our behalf also which shall be binding on both of us and in all Courts.

It appears that there are disputes between the parties. The petitioners made a claim against the respondents which was repudiated. They consequently appointed their own arbitrator and gave an intimation to the respondents of this fact and called upon them to nominate their own arbitrator within a week. The latter, however, failed to nominate their arbitrator. Consequently, the petitioners nominated an arbitrator on their behalf also, and these arbitrators after giving notice to the respondents, proceeded to arbitration. The respondents, however, failed to appear before the arbitrators. Consequently, an award was made after enquiry held by the arbitrators against the respondents. An application was made to file this award and was resisted on the ground that the arbitrators had not been properly appointed, that one of the arbitrators was a relation of the petitioners, that the arbitrators kept no record of their proceedings, that some of the vouchers relied upon by the petitioners before the arbitrators had been signed by Khairati Lal, minor, and should have been disallowed after an enquiry as to the age of the alleged minor and lastly that an award made on agreement to refer future disputes to arbitration, as in this case, cannot legally be filed in Court. It was, in fact, alleged that such an agreement is not contemplated by law. The Senior Subordinate Judge is of opinion that there is no proof of relationship between one of the arbitrators and the petitioners and further that there were disputes between the parties which had been referred to arbitration. He has,

however, refused to file the award and thus has set aside the order of the trial Judge on the ground that the arbitrators were guilty of judicial misconduct as they kept no record of their proceedings.

The award is in writing, but there is no record of the evidence heard by the arbitrators. I am not aware of any law which requires an arbitrator to keep a record of his proceedings. All that is necessary is that there should be an award in writing by the arbitrator. He is, of course, bound to make enquiry, but he is not bound to keep a record of such an enquiry.

With regard to the second ground on which the Senior Subordinate Judge has set aside the order of the trial Judge that no enquiry as to the age of the person, who had signed some of the vouchers on behalf of the respondents, was made by the arbitrators, no question was raised and could be raised by anybody before the arbitrators because the respondents had allowed the proceedings to go against them in default of appearance. The arbitrators, under the circumstances, were not bound to anticipate or guess any possible objections that might be made by the respondents and then to investigate such objections. In any case, even assuming that the person who signed the vouchers, was a minor, the arbitrators were not bound to hold that legally the respondents were not bound to pay the amount due on such vouchers. The decision of this question was entirely within the authority of the arbitrators and the absence of an enquiry does not amount to judicial misconduct on their part. The third ground of the decision of the Senior Subordinate Judge is that an award on an agreement like this, and consequently the agreement like the one produced in the suit, is illegal. No authority in support of this novel proposition has been cited at the bar before me. It is, however, contended that such an agreement is opposed to S. 89, Civil P. C. S. 89, Civil P. C., has nothing to say as to the legality or illegality of such a condition. All that it says is that except as provided in the Arbitration Act or any other law relating to arbitration proceedings, all arbitration proceedings shall be in accordance with the provisions of Sch. 2, Civil P. C. There is nothing in Sch. 2, Civil P. C., which declares such agreements to be invalid.

In fact agreements to refer to arbitration, as in this case, are generally to be found in commercial documents and have invariably been enforced in the Courts in this province and in other provinces. I see nothing illegal either in the agreement to refer to arbitration or in the award which has been given in pursuance of the agreement. The order of the Senior Subordinate Judge, therefore, cannot be maintained. I accept this petition, set aside the order of the Senior Subordinate Judge and restore that of the trial Judge with costs throughout.

B.D./R.K.

Petition accepted.

A. I. R. 1936 Lahore 493

TEK CHAND AND SKEMP, JJ.

Najju—Defendant—Appellant.

v.

Mt. Aimna Bibi and others—Plaintiffs and another Defendant—Respondents.

First Appeal No. 1807 of 1933, Decided on 16th April 1935, from decree of Senior Sub-Judge, Lyallpur, D/- 26th October 1936.

Custom (Punjab)—Succession—Gujjars of Shakargarh Tahsil—Daughters succeed to non-ancestral property in preference to collaterals.

Amongst Gujjars of Shakargarh Tahsil, daughters of deceased succeed to the non-ancestral property to the exclusion of his collaterals. [P 495 C 2]

Abdul Karim and Aslam—for Applt.

Mohammad Amin and Mohammad Sharif for Mazhar Ali Azhar—for Respondents.

Tek Chand, J.—The land in dispute which is situate in Lyallpur District was owned by Farangi, a Gujjar of Mouza Thikrian, Tahsil Shakargarh, Gurdaspur District, who migrated to the colony many years ago. Farangi died in 1923 and his widow Mt. Kimo took possession of the land, and it was duly entered in her name in the revenue papers. Farangi's only son Ilam Din had predeceased him and had left a widow Mt. Karam Bibi (defendant 2) and three daughters: Mt. Aimna Bibi, Mt. Masum Bibi and Mt. Sakina Bibi, (plaintiffs 1 to 3). On Mt. Kimo's death, mutation was sanctioned in the name of her daughter-in-law Mt. Karam Bibi, widow of Ilam Din. After some time Mt. Karam Bibi gifted the land to her daughters, the plaintiffs, and they are in possession. The revenue authorities however dis-

allowed the mutation in favour of the donees on the objection of Najju, defendant 1, who is a brother of Farangi. Thereupon the plaintiffs instituted a suit in the civil Court for a declaration that they were in lawful possession of the land and that after the death of Mt. Karam Bibi they would inherit it as the heirs of Farangi. Najju pleaded that according to the custom prevailing among the Gujjars of Shakargarh Tahsil he was the preferential heir to the self-acquired property of his brother as against the latter's married grand-daughters. The only issue framed was whether "the plaintiffs are not the heirs of Farangi deceased and as such not entitled to succeed to the land in suit after the death of Mt Karam Bibi."

The learned Senior Subordinate Judge has found against the defendant on the issue and has passed a decree in favour of the plaintiffs. The defendant Najju appeals. The main contention raised before us by the learned counsel for the appellant is that the onus of the issue was incorrectly placed upon him. It was urged that in view of the answers to questions Nos. 16 and 17 of Kennaway's Customary Law of Gurdaspur District compiled in the course of the settlement of 1911-1912 the onus ought to have been placed on the plaintiffs. In my opinion this contention is without force. In the answer to Question No. 16 it is stated that the general rule is that daughters were excluded by the widow and male kindred of the deceased however remote, but to this general rule several exceptions are given. One of these exceptions refers to the Gujjars of Shakargarh Tahsil among whom, it is stated, a difference of opinion existed as to the right of a daughter to succeed to her father, some persons having declared that in the absence of male issue daughters should get their share according to Muhammadan law, while others, who opposed the statement, stated that daughters could not have inherited. In the answer to Question No. 17 however it is made clear that the difference of opinion among the Gujjars of Shakargarh Tahsil was confined to ancestral property only. As regards self-acquired property it was stated that all Gujjars were agreed that in the absence of male issue daughters should get their share according to Muhammadan law.

These answers are not very happily expressed, but it is clear that none of the Gujjars of Shakargarh Tahsil stated that in succession to non-ancestral property daughters were excluded by collaterals, near or remote. Whether the rule actually prevailing in the tribe is as recorded, that a daughter gets her share in her father's estate according to Muhammadan law in the presence of sons, is a matter which was not relevant to the point at issue before us and no opinion need be expressed on it here. What is important for the decision of this case is that, unlike the other tribes, the Gujjars of this Tahsil drew a clear distinction between succession to ancestral and non-ancestral property and that it was not suggested by any one that the collaterals had a preferential right to succeed to non-ancestral property. It will thus be seen that there is no entry in the *riwaj-i am* in favour of the collaterals, and I have no doubt that the onus of the issue was correctly placed on the defendant. The oral evidence produced by the parties is not of much value and was rightly disregarded by the learned Senior Subordinate Judge. Of the documents produced by the defendant, several are not in point as they relate to occupancy rights in lands in the Chenab Colony, succession to which had opened out before (Punjab) Act 3 of 1920 came into force. It was conceded by Mr. Abdul Karim that succession to such occupancy tenancies was governed by different considerations and therefore evidence relating to them need not be considered.

This leaves us with two instances on which the appellant's learned counsel relied: (1) Exhibits D. W. C. 1/4. This relates to succession to the property of Maula Bakhsh alias Maula Dad who had acquired land in the Colony. On his dying sonless his widow Mt. Bibi took possession. On Mt. Bibi's death mutation was effected in the name of Fazal Dad, brother of Maula Bakhsh. It is important to note that in the course of the mutation proceedings it was not suggested that any daughter of Maula Bakhsh and Mt. Bibi was in existence. On the other hand, in the report of the patwari, it was stated that Mt. Bibi had died lawald or childless. There is some oral evidence to the effect that Maula Bakhsh had left daughters who had been

married in other families and were living at the time of Mt. Bibo's death. None of the daughters however was called as a witness at the trial, and it is not possible to say how far reliance can be placed on the oral evidence. But be that as it may, the instance is not of much importance as mutation in favour of Fazal Dad was sanctioned *ex parte* on 9th May 1933, about a year after the institution of the present suit, and the daughters of Maula Baksh (if they are in existence) have ample time to contest it by a civil suit. (2) Exhibit D. W. 1-1. This relates to succession to the self-acquired land of Malang, a Gujjar of Gurdaspur District, who had migrated to the Colony. On his death his land was taken by his two unmarried daughters and mutation was sanctioned in their names. Subsequently, when one of them married, her share was entered in the name of her younger sister, and on the death of the latter in 1923 the entire property passed to the brothers of Malang. This is certainly an instance in favour of the defendant.

As against this the plaintiffs relied on two instances supported by judgments of civil Courts: (1) Exhibit P. 1, *Shukar Din v. Kima*, decided by the District Judge, Gurdaspur, on 10th January 1928. The parties were Gujjars of Mouza Hao Kalan, Tahsil Shakargarh, and the dispute related to the property of one Fateh Din, the rival claimants being the daughter's son named Shankar Din, and his collaterals of the fourth degree. In the plaint the collaterals had alleged that the property was ancestral and they had tried to prove it by oral and documentary evidence. They led no evidence to show that even if the property was found to be non-ancestral, they had a right to succeed to the exclusion of the daughters according to the custom prevailing in the tribe. On appeal the learned District Judge held a part of the property to be ancestral and the other part to be non-ancestral. As a last resort, it was urged before him that the case be remanded for further enquiry into the prevailing custom as regards succession to non-ancestral property, but the learned District Judge declined to accede to this prayer, and following the general custom held that daughters were preferential heirs so far as such property was concerned. (2) Exhibit P. 2. *Chiragh Din v. Bhagan*, decided by Saiyad Abdul Haq, Subordi-

nate Judge, Gurdaspur. The parties were Gujjars of Tahsil Pathankot and the dispute was between the daughters of the last male owner and his collaterals of the sixth degree. After enquiry the learned Judge found in favour of the daughters and dismissed the suit of the collaterals. It will thus be seen that there is one proved instance in favour of the defendant as against two judicial instances, one from this Tahsil and the other from Pathankot, proved by the plaintiffs. It is obviously impossible to hold on this evidence that the defendant has succeeded in establishing that he has a preferential right to succeed to non-ancestral property of the deceased Farangi to the exclusion of the plaintiffs. I would accordingly uphold the judgment and decree of the learned Senior Subordinate Judge and dismiss the appeal with costs.

Skemp, J.—I agree.

B.D./R.K.

Appeal dismissed.

* A. I. R. 1936 Lahore 495

CURRIE, J.

Mt. Karam Bhari—Petitioner.

v.

Jagan Nath—Respondent.

Civil Revn. No. 809 of 1934, Decided on 14th January 1936, from order of Sub-Judge, 4th Class, Lahore, D/- 27th March 1934.

* Limitation—Application for restoration of suit dismissed for default—Art. 163, Limitation Act, applies—Having recourse to S. 151, Civil P. C., cannot help limitation—No notice necessary to plaintiff of date fixed for hearing after setting aside of *ex parte* decree.

When an order setting aside an *ex parte* decree has been passed in the absence of the plaintiff, there is no obligation again to issue notice to the plaintiff of the date on which the restored case is to be taken up. Where on the date so fixed the plaintiff is absent and his suit is subsequently dismissed, the limitation for filing an application for restoration of suit is governed by Art. 163, Limitation Act, and this cannot be avoided by recourse to S. 151, Civil P. C.: 1920 *Lah* 309, *Rel. on.* [P 496 C 1]

M. A. Majid—for Petitioner.

Madan Mohan—for Respondent.

Order.—*Mt. Jiwan* sued the respondent *Jagan Nath* for Rs 850 on a bond. On 18th June 1931 she obtained an *ex parte* decree against him. He applied for the setting aside of the *ex parte* decree. Notices were issued to *Mt. Jiwan* but were not served, and eventually sub-

stituted service by means of proclamation under O. 5, R. 20, Civil P. C., was effected. The decree was set aside on 18th March 1932, the learned Subordinate Judge recording that as Mt. Jiwan had been served, there was no need to issue further notice to her. He called on the defendant to file a written statement. This was done and the defendant admitted Rs. 30 to be owing. Accordingly a decree was granted in favour of Mt. Jiwan for that amount and the balance of her suit was dismissed under O. 9, R. 8, Civil P. C., on 4th April 1932. On 22nd of August 1932 Mt. Jiwan applied for restoration of her suit under S. 151, Civil P. C. She died and her place was taken by her daughter, the present petitioner. The application was rejected by the learned Subordinate Judge who held that limitation was governed by Art. 163, Sch. 1 to the Limitation Act, and that there was "no getting out of the scope of this article." For the petitioner, Mr. Majid urges that in reality Art. 163 is not strictly applicable. His contention is that as under that article limitation runs from the date of dismissal, it pre-supposes that the plaintiff is aware of the date fixed for the hearing.

In the present case, he urges that the plaintiff was in ignorance of the date as the order setting aside the ex parte decree and restoring the suit had been passed in her absence. At first sight that argument appears to have some force, but as Mr. Majid has frankly admitted, he is unable to cite any rule under which, when an order setting aside an ex parte decree has been passed in the absence of the plaintiff, there is any obligation again to issue notice to the plaintiff of the date on which the restored case is to be taken up. In the absence of any such rule, it is impossible to hold that the order dismissing the petitioner's suit under O. 9, R. 8, was wrongly passed. If that order was rightly passed, then Art. 163 must apply and the petitioner's application would be barred by time. This cannot be avoided by recourse to S. 151, Civil P. C., vide 1 Lah 363(1). The case is undoubtedly a hard one and accordingly while dismissing the petition, I leave the parties to bear their own costs.

B.D./B.K. *Petition dismissed.*

1. Bissamal v. Kesar Singh, 1920 Lah 309 = 53 I O 789 = 1 Lah 863 = 163 P L R 1920.

A. I. R. 1936 Lahore 496

DALIP SINGH, J.

Imam Ali Shah—Judgment-debtor—Petitioner.

v.

Thakar Das—Decree-holder—Respondent.

Civil Revn. No. 738 of 1935, Decided on 31st January 1936, from order of Senior Sub-Judge, Jullundur, D/- 20th May 1935.

Custom (Punjab)—Caste—Fakir—Fakir is not caste but class—Revision to High Court maintainable.

Fakir is not a caste as such but only a class of persons. A revision to the High Court for a decision on such point is competent: 1925 All 253, *Foll.* [P 497 C 1]

Muhammad Sharif—for Petitioner.

Achhru Ram—for Respondent.

Order.—In this case the decree-holder attached land of the judgment-debtor in execution of a decree. The judgment-debtor objected that he was an agriculturist within the meaning of S. 16, Punjab Alienation of Land Act, being a Rajput, and therefore his land could not be attached. The decree-holder contended that the judgment-debtor was a Fakir and not a Rajput. As the judgment-debtor was described in the revenue records as caste Fakir, got Pawar, the onus was put on him to prove that he was a Rajput as claimed by him. The trial Court held that he had failed to prove this and, therefore, dismissed his application. On appeal the lower appellate Court also held that it was not proved that the judgment-debtor was a Rajput. The judgment-debtor has come in revision. The learned counsel for the petitioner contends that Fakir is not a caste at all but a class of persons belonging to different communities, that Pawar is mentioned as a got of the Rajputs and is not mentioned as a got of any other tribe in the Census Reports, etc., and that the Courts have misread the documentary evidence on the record. The petitioner relied on a sale deed in favour of one Pole Shah, who, he stated, was his ancestor. He gave a pedigree-table in oral evidence in Court and the pedigree-table from the revenue records shows that Pole Shah had acquired this land from one Mauju Khan. As the sale deed was produced by the cousin of the judgment-debtor, it seems to me fairly obvious

that the identity of the Pole Shah of the sale deed and the ancestor of the judgment-debtor was sufficiently established. Moreover, in the latest Census Report by Raja Hari Kishen Kaul it is remarked that Fakir, which is mentioned as one of the castes or tribes in the district, is not really such but is only a class. Persons of different tribes and castes may join this group of persons who may either be holy men or may be beggars.

The list of the sub-castes of Fakirs given in the Census Report also shows that Fakir is not a caste at all. On the evidence produced I would have no hesitation in holding that the judgment-debtor is proved to be a Rajput as he claims. The learned counsel for the respondent, however, contends that this is a revision and at best there is only an error of fact or law in the judgment of the lower appellate Court and that this in itself is no ground for revision. The learned counsel for the petitioner cites 1925 All 253 (1), where a Division Bench of the Allahabad High Court appears to have held that in a case similar to the present a revision was competent. Following this ruling I would, therefore, accept this petition and hold that the land of the petitioner cannot be attached in execution of the decree. In view of the fact that the petitioner was himself largely to blame for the doubt cast on his original tribe by the fact that he had allowed his caste to be entered as Fakir in the revenue papers and had actually sold some land to a non-agriculturist, evidently passing himself off as a non-agriculturist, I would leave the parties to bear their own costs throughout.

B.D./R.K.

Petition allowed.

1. Jaswant Rao v. Kashi Nath Rao, 1925 All 253=86 I C 208.

A. I. R. 1936 Lahore 497

JAI LAL, J.

Ranbir Sen and others—Petitioners.

v.

Mohammad Din and another—Opposite Parties.

Civil Revn. No. 526 of 1935, Decided on 13th January 1936, from order of Judge, Sm. C. C., Lahore, D/- 14th March 1935.

(a) Restitution—Right of auction-purchaser—Right arises both under S. 144, Civil P. C., and under principles of justice and equity—Case not coming under S. 144, Civil P. C.—Relief can be granted under equity.

1936 L/68 & 64

The right of the auction-purchaser to a refund of the money paid by him arises both under S. 144, Civil P. C., and also on principles of equity and justice and if the case does not come under S. 144, the Court can exercise its inherent jurisdiction to direct a refund of the money to the auction-purchaser.

[P 498 C 2; P 499 C 1]

(b) Restitution—Right to claim refund recognized against decree-holder—Sale whether set aside under S. 47 or O. 21, R. 92, Civil P. C., makes no difference.

A right to claim refund in restitution is recognized against the decree-holder in O. 21, R. 93. In principle there is no difference between this liability of the decree-holder whether the sale is set aside under O. 21, R. 92 or under S. 47.

[P 499 C 1]

*D. N. Aggarwal—*for Petitioners.

*N. C. Mehra—*for Opposite Parties.

Order.—This is an application for revision of an order passed by the Judge, Small Cause Court, Lahore, on 14th March 1935, directing the petitioner decree-holder to refund Rs. 372 with interest at 6 per cent per annum from the 16th of December till realization to the respondent.

The respondent is an auction-purchaser. The property of the judgment-debtor was sold in execution of a decree obtained by the petitioner. The sale was confirmed, the purchase price was paid by the auction-purchaser and was duly paid over to the petitioner in satisfaction of his decree. Subsequently on an application by the judgment-debtor the sale was set aside on the ground that the proceedings in execution were without jurisdiction and were illegal. They were held to be without jurisdiction because the sale had been effected by a Judge, Small Cause Court, and they were held to be illegal because a notice under O. 21, R. 22, was not given to the judgment-debtor. After the sale had been set aside the possession of the property sold was restored to the judgment-debtor on his application and the auction-purchaser having lost possession of the property purchased by him made an application for restitution of the money paid by him.

On this petition it is contended that no restitution could be ordered against the decree-holder. The matter is not covered by any direct authority. If the sale had been set aside in pursuance of an application made under O. 21, R. 90 then, under O. 21, R. 93, the Court could direct the person to whom the money had been paid to refund it to the auction-purchaser. But the sale in this case was

not set aside on an application made under O. 21, R. 90 and it is contended that as it was set aside under S. 47, Civil P. C., therefore an order for restitution cannot be made under S. 144. It is no doubt true that strictly speaking the case is not governed by S. 144, Civil P. C., because the restitution is not claimed by virtue of a decree having been set aside on appeal, but the principles of the section would govern this case.

The only case which has been cited at the bar, and in which S. 144 has been applied to circumstances somewhat similar to those in this case, is 2 Pat 10 (1), a judgment of their Lordships of the Privy Council. In that case also the sale had been set aside on the application of the judgment-debtor who had subsequently made an application for restoration of the property to him. The sale had been set aside on the ground that property which should have been sold was not sold but another property was sold. The auction-purchaser resisted this application inter alia on the ground that before the property be restored to the judgment-debtor he should be made to pay to him the price that the auction-purchaser had paid for the property, because to that extent the judgment-debtor had been benefited by the sale, as the sale price had been paid to his decree-holder in satisfaction of a decree passed against him. The learned Judges of the Patna High Court directed that before the property be restored to the judgment-debtor he should pay to the auction-purchaser the purchase price paid by the latter. A plea raised on behalf of the judgment-debtor that the auction-purchaser should get the refund of the amount from the decree-holders was negatived with the following remark by order of the learned Judges :

Mr. Pugh contends that it is the business of the auction-purchaser to get that money out of the decree-holder as best as he can by subsequent proceedings. I can see no force at all in this argument. The words of the section are clear : "Any party entitled to any benefit by way of restitution should be placed in the position which he would have occupied but for the erroneous order made." But for the erroneous order made the auction-purchasers would have had in October 1908 Rs. 1,12,000 in their pocket, and it is the business of the Court to see that Rs. 1,12,000 is put back into their

pocket simultaneously with the restoration of the judgment-debtor to his property.

The other learned Judge also concurred with this view. The case ultimately went up to the Privy Council and their Lordships affirmed the order of the High Court so far as the condition as to the refund of the purchase price to the auction-purchaser was concerned. On the main question, viz., whether the auction-purchaser was entitled to repayment of the deposit paid into Court as a condition precedent to handing over possession to the judgment-debtors their Lordships observed :

Their Lordships are in agreement with the judgment of the High Court, and think the order already referred to should on this point be affirmed. It is the duty of the Court under S. 144, Civil P. C., to "place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed." Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Cairns, L. C., in 3 P C 465 (2) at p. 475 : "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors ; and when the expression 'the act of the Court' is used, it does not mean merely the act of the primary Court. * * * " The auction-purchasers have parted with their purchase money which they paid into Court on the faith of the order of confirmation and certificate of sale already referred to. This money has been distributed amongst the creditors of the judgment-debtor who had attached the unencumbered property in question and could have realised their judgment debts by a sale of this property in execution and it would be inequitable and contrary to justice that the judgment-debtor should be restored to this property without making good to the auction-purchaser the moneys which have been applied for his benefit.

Then with regard to the contention of the judgment-debtor that the auction-purchasers should claim refund from the decree-holder their Lordships remarked that they "could not agree with either of these suggestions and for the reasons stated by the Judges of the High Court." From the above it would be observed that the right of the auction-purchaser to a refund of the money paid by him has been established both under S. 144, Civil P. C., and also on principles of equity and justice and if the case had not been governed by S. 144, the Court

1. Jai Berham v. Kedar Nath, 1922 P C 269 = 69 I C 278 = 49 I A 351 = 2 Pat 10 (PC).

2. Rodger v. Comptoir D'Escompte De Paris, (1871) 3 P C 465 = 40 L J P C 1 = 24 L T 111 = 19 W R 449 = 7 Moor P C N S 814.

would have exercised its inherent jurisdiction to direct a refund of the money to the auction-purchaser. I do not think that the case cited above is an authority in support of the contention of the decree-holder that no refund could be ordered against him but only against the judgment-debtor. In the case before their Lordships the possession of the property had not yet been given to the judgment-debtor and the auction-purchaser resisted his application for possession and claimed equitable relief of refund as a condition precedent to his being deprived of possession of property purchased by him. As the applicant in the case decided by their Lordships was the judgment-debtor it was held that he could not transfer his legal or equitable liability to make a refund to the decree-holder. We consider that neither the learned Judges of the Patna High Court nor their Lordships of the Privy Council expressly decided that the right to claim refund from the decree-holder does not exist in a case like the present after the auction-purchaser has been deprived of the possession of the property purchased by him on the ground that its sale was illegal.

It is to be observed that such a right has been recognized against the decree-holder in O. 21, R. 93. In principle there is no difference between this liability of the decree-holder whether the sale is set aside under O. 21, R. 92 or under S. 47. It is also to be remembered that in the present case the sale was set aside for reasons which were attributable to the decree-holder. In my opinion, therefore, the order of the learned Judge of the Small Cause Court is correct and I dismiss this petition with costs.

B.D./R.K.

*Petition dismissed.***A. I. R. 1936 Lahore 499**

JAI LAL, J.

Mt. Chand Kaur—Appellant.

v.

Official Receiver and others—Respondents.

Misc. First Appeal No. 1487 of 1935, Decided on 16th January 1936, from order of Dist. Judge, Attock, D/- 26th August 1935.

Provincial Insolvency Act (1920), S. 24—Petition by person claiming to be creditor—Other creditors can contest petition on ground that petitioner is not creditor at all.

Where an insolvency petition has been presented by a person claiming to be a creditor of the debtor, it is open to another creditor of the debtor to contest the petition on ground that the petitioner is not a creditor at all.

[P 500 C 1, 2]

H. S. Khorana—for Appellant.*Amolak Ram, Mukand Lal Puri and Fakir Chand Mital*—for Respondents.

Judgment.—Diwan Chand respondent presented an insolvency petition against Lachhman Das claiming that the latter was indebted to him to the extent of more than Rs. 500 and had committed an act of insolvency. This petition was admitted by the District Judge on 23rd November 1934 and notice was issued to the alleged insolvent and his other creditors. On the day fixed for the hearing of the petition the appellant Mt. Chand Kaur contested the petition alleging that the petitioning creditor was not in fact a creditor of the alleged insolvent, but that he was a bogus creditor and that she was the only creditor of the insolvent who was well able to pay his debts. Lachhman Das admitted that he was indebted to Diwan Chand for more than Rs. 500 and that he was unable to pay his debts. He, in fact, did what the learned District Judge describes "confess judgment." An objection was raised that Mt. Chand Kaur being another creditor of Lachhman Das was not competent to resist the petition of Diwan Chand, and the learned District Judge held that she was not competent to do so on the ground that the only person who can resist an insolvency petition of a creditor is the debtor. Finally he passed an adjudication order. Mt. Chand Kaur has consequently appealed to this Court.

Now I must mention some facts, which have a bearing on the necessity of allowing Mt. Chand Kaur to resist the application of Diwan Chand. This lady had obtained a money decree against Lachhman Das and in execution of that decree had attached his immoveable property and had it sold. The sale had taken place and the deposit of the 25 per cent had to be made on 24th November 1934: the rest had to be paid subsequently, and on the 23rd, that is to say, a day previous to the date fixed for the deposit, the insolvency petition was admitted, having been made on the same day. It is obvious that the adjudication of Lachhman Das on the petition of Diwan Chand may materially affect the rights of Mt. Chand Kaur

under the sale in execution of her decree. I am however directly concerned with the conclusion of the learned District Judge that a creditor is not entitled to contest the insolvency petition of another person claiming to be a creditor on the ground that the petitioner is not a creditor at all.

Now S. 24, Provincial Insolvency Act, provides that on the day fixed for the hearing of the petition, the Court shall require proof that the creditor or the debtor, as the case may be, is entitled to present a petition, provided that, where the debtor is the petitioner, he shall, for the purpose of proving his inability to pay his debts, be required to furnish only such proof as to satisfy the Court that there are prima facie grounds for believing the same and the Court, if and when so satisfied, shall not be bound to hear any further evidence thereon. Sub-s. (3) provides that the Court shall, if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the application. This section shows that while in the case of a petition by the debtor only prima facie proof of his right to present the petition is necessary to enable the Court to adjudicate him an insolvent, strict proof of his right to present the petition must be given by the creditor and also that other creditors are entitled to produce evidence.

Section 9 of the Act provides that a creditor shall not be entitled to present an insolvency petition against a debtor unless inter alia the debt owing by the debtor to him amounts to Rs. 500. Therefore in order to decide the right of the creditor to present the petition under S. 24 it is necessary for the Court to determine whether more than Rs. 500 is due to him and a person who is admitted to be a creditor and who has been summoned to the Court to appear at the date of the hearing of the petition is necessarily entitled to question the right of the petitioning creditor to present the petition. The remarks of the learned Judge that in such a case the dispute is revolved into a dispute between two rival creditors which it may be inconvenient to the Court to adjudicate are beside the point. The Court is bound to make an inquiry under the Act and this inquiry must be made in the presence of all the

persons interested in it and certainly a creditor is a person interested in showing that the petitioning creditor is not a creditor at all. No case law on the subject has been cited on either side, but, in my opinion the question is clear from the phraseology of S. 24. I accept this appeal, set aside the order of the District Judge adjudicating Lachhman Das as an insolvent and direct him to rehear the petition of Diwan Chand after giving an opportunity to Mt. Chand Kaur to contest his right to present the petition. I make no order as to the costs of this appeal.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 500

AGHA HAIDAR, J.

K. L. Gauba—Judgment-debtor—Appellant.

v.

Indo Swiss Trading Co., Ltd.—Decree-holder—Respondent.

Misc. First Appeal No. 2033 of 1935, Decided on 10th February 1936, from order of Sub-Judge, 1st Class, Lahore, D/- 26th July 1935.

Civil P. C. (1908), O. 3, R. 4—Pleader appearing for another pleader engaged by party—No document required by O. 3, R. 4 executed in his favour—Such pleader can only plead and not 'act' on behalf of party—Presentation of appeal amounts to acting—Appeal presented by such pleader is not properly presented.

A pleader who appears on behalf of another pleader engaged by a party, can appear for the latter pleader, only to "plead" on behalf of the party, but he has no power to "act" on his behalf without a document in writing executed in his favour in the manner prescribed by O. 3, R. 4. [P 501 C 1]

A presentation of an appeal amounts to "acting" and not "pleading"; an appeal presented by a pleader appearing on behalf of another pleader engaged by a party, without a document as required by O. 3, R. 4 being executed in his favour cannot, therefore, be said to have been properly presented: 1930 All 112; 1932 Lah 373 and 1926 Rang 215, Foll. [P 501 C 1]

Tirath Ram for *Darbari Lal*—for Appellant.

M. L. Puri—for Respondent.

Judgment.—In the appeal before me Mr. K. L. Gauba is the appellant. He engaged Mr. Darbari Lal as his Advocate for filing the appeal and duly executed a power of attorney in his favour. The memorandum of appeal presented in this Court is not signed by Mr. Darbari Lal, Advocate, but by one Mr. Duni Chand, Advocate, for Mr. Darbari Lal, Advocate.

Mr. Mukand Lal Puri, the learned counsel for the respondent, has taken a preliminary objection that there is no proper appeal before this Court, inasmuch as the appeal was not presented by a duly authorized person. He further developed his argument by urging that Mr. Darbari Lal had been duly appointed as an Advocate and he alone could present this appeal; in other words, Mr. Darbari Lal alone could 'act' by filing the appeal and that Mr. Duni Chand in the absence of any power of attorney in his favour could only 'plead' and not 'act.' He has referred me to 4 Rang 249 (1), as an authority in support of the proposition that the presentation of an appeal amounts to 'acting' and not 'pleading.' This rule of law is well understood and a clear distinction is recognised in forensic parlance between 'pleading' and 'acting.' It has been held in 1932 Lah 373 (2), that a pleader who appears on behalf of another pleader engaged by a party, can appear for the latter pleader only "to plead" on behalf of the party, but he has no power "to act" on his behalf without a document in writing being executed in his favour in the manner prescribed by O. 3, R. 4, Civil P. C. This proposition of law is perfectly correct and I have no hesitation in following it. The result, therefore, is that the present appeal was not properly presented; in other words, there is no proper appeal before me: 121 I C 546 (3). The preliminary objection prevails and the appeal is accordingly dismissed with costs.

R.M./R.K.

Appeal dismissed.

1. In the Matter of filing Powers by an Advocate, 1926 Rang 215=98 I C 15=4 Rang 249.
2. Amir Shah v. Abdul Aziz, 1932 Lah 373=136 I C 712=13 Lah 775=33 P L R 388.
3. Mohammad Qamar Shah Khan v. Mohammad Salamat Ali Khan, 1930 All 112=121 I C 546=1930 A L J 894.

A. I. R. 1936 Lahore 501

BHIDE, J.

Mt. Fatima—Plaintiff—Appellant.

v.

Jalal Din—Defendant—Respondent.

Misc. Second Appeal No. 2207 of 1935,
Decided on 18th February 1936, from
order of Dist. Judge, Jhelum, D/- 30th
August 1935.

**Mahomedan Law—Marriage—Dissolution
of—Suit for dissolution because of husband's
impotency—Suit should be adjourned for one**

year to ascertain if the defect can be remedied.

A suit for dissolution of a Mahomedan marriage on the ground of impotency of the husband should be adjourned for a period of one year in order to ascertain whether the defect of impotency in the husband is removeable, because, if during the period of one year for which the case is adjourned the defect in the husband is removed the husband gets the substantial right of maintaining the marriage tie: 1925 All 24, Foll. [P 501 C 2; P 502 C 1]

Ghulam Rasul—for Appellant.*S. D. Kitchlu and Inder Dev*—for Respondent.

Judgment.—This is a suit by a Mohammaden lady for cancellation of her marriage on the ground of the impotency of her husband. The trial Court decreed the suit. On appeal the learned District Judge agreed with the findings of fact of the trial Court but held that in view of the law as laid down in para. 239 of Mulla's Mohammadan Law the suit should have been adjourned for a year in order to ascertain whether the defect of impotency in the respondent was removable. He accordingly set aside the decree of the trial Court and remanded the case with the direction that the case should be adjourned for a year for the above purpose and then disposed of in accordance with the law as stated in para. 239 of Mulla's Mohammadan Law. From this decision the present appeal has been preferred on behalf of the plaintiff. The learned counsel for the appellant contended that the law was not correctly laid down in para. 239 of Mulla's Mohammadan Law which had been relied on by the District Judge and that in accordance with the law as stated in Wilson's Mohammadan Law, Edn. 6, at p. 149, the Court should have granted a decree nisi and then adjourned the case for a year for ascertaining whether the defect was removable. In my opinion the law, as laid down in Wilson's Mohammadan Law to which the learned counsel referred, is by no means clear on the point. All that is mentioned therein is that 'the divorce must remain suspended for a year after decree in order that it may be ascertained whether the defect is removable.' It is not clear what sort of decree is intended to be passed in the first instance. It is true that a decree nisi was passed in similar circumstances in 47 All 243 (1), but there is no discussion in that ruling as to the

1. Mahomed Ibrahim v. Altafan, 1925 All 24=83 I C 27=47 All 243=22 A L J 1045.

appropriate decree to be passed in such cases. In 21 Bom 77 (2) only an interlocutory order was apparently passed in the first instance adjourning the further hearing of the suit for one year. The rule of law, as stated in para. 239 of Mulla's Mohammadan Law, is in accord with the law as stated in Ameer Ali's Mohammadan Law, Vol. II, Edn. 5, p. 531, and I see no reason to hold that it is not correct.

The learned counsel for the appellant further argued that the rule stated in para. 239 of Mulla's Mohammadan Law is only a rule of procedure and is not binding on British Courts. This argument does not appear to me to be sound. Because, if during the period of one year for which the case is adjourned the defect in the husband is removed, the husband gets the substantial right of maintaining the marriage tie. I note that this argument was advanced by counsel in 47 All 243 (1) also but was not accepted by the Court. The learned counsel urged in the end that the learned District Judge had no justification for re-opening the whole case, but as far as I can see the learned District Judge has not ordered the whole case to be re-opened. The questions of fact have all been decided already and the case has been remanded only for being adjourned for a year in order to ascertain whether the defect in the defendant was removable. I may note for the sake of clearness that no other point is to be gone into now after the remand. The learned counsel for the respondent also conceded this. In this respect of the question, the order passed was practically equivalent to a decree nisi. I am of opinion that the order passed by the learned District Judge was in accordance with law. I dismiss the appeal, but in view of all the circumstances I leave the parties to bear their costs in this Court.

B.D./R.K.

Appeal dismissed.

2. A. v. B., (1897) 21 Bom 77.

A. I. R. 1936 Lahore 502

BHIDE, J.

Abdullah—Petitioner.

v.

Shankar Das and another — Opposite Parties.

Civil Revn. No. 900 and Appeal No. 1507 of 1935, Decided on 13th December 1935, from order of Dist. Judge, Lahore, D/- 15th June 1935.

Provincial Insolvency Act (1920), Ss. 4, 68, 75 — Receiver in insolvency mortgaging to creditor, occupancy rights belonging to insolvent after his discharge — Insolvency Judge setting aside mortgage, holding that Receiver had become *functus officio* — District Judge on appeal, although holding that act of Receiver was *ultra vires*, setting aside order of Insolvency Judge, holding insolvent's appeal to be barred by time—Second appeal held incompetent—Application by insolvent held fell under S. 68 and as such S. 4 held inapplicable — High Court, however, held entitled to interfere in revision under S. 75 — Act of receiver being *ultra vires* and mortgage being without sanction of Court, mortgage held liable to be set aside.

During certain insolvency proceedings the official receiver, after the discharge of insolvent, mortgaged certain occupancy rights under S. 6. Punjab Tenancy Act, belonging to the insolvent to a creditor. The Insolvency Judge, on appeal by the insolvent, set aside the mortgage holding that the Receiver had become *functus officio* after the discharge of the insolvent. The District Judge, on appeal, held that the act of the Receiver was *ultra vires* not because he was *functus officio* but because the occupancy right under S. 6, Punjab Tenancy Act, could not vest in him, in view of provisions of S. 28 (5), Provincial Insolvency Act, and the Official Receiver was incompetent to mortgage them, but he set aside the order of the insolvency Judge, holding that insolvent's appeal to insolvency Court was barred by time leaving the insolvent to resort to any other legal remedy to have the mortgage set aside:

Held: that a second appeal was not competent. The application made by the insolvent for setting aside the act of the receiver fell within the scope of S. 68 and as such S. 4 which was subject to the other provisions of the Act could not be held to be applicable. But the High Court could interfere in revision under S. 75. The act of the official receiver was clearly *ultra vires* as the occupancy rights never vested in him and could not be mortgaged by him. The mortgage could not be valid without sanction of Court and as no sanction had been given it was illegal and liable to be set aside.

[P 503 C 1]

*R. L. Anand 1—*for Petitioner.*R. L. Anand 2—*for Opposite Parties.

Order.—A preliminary point has been raised in this case that no second appeal is competent. The material facts are briefly as follows: During the insolvency proceedings out of which this appeal arises, after the discharge of the insolvent Abdullah, the Official Receiver, mortgaged certain occupancy rights under S. 6 Punjab Tenancy Act belonging to the insolvent, in favour of a creditor named Shankar Das. The discharged insolvent appealed to the Insolvency Judge from the Receiver's order and the Insolvency Judge thereupon set aside the mortgage.

holding that the Official Receiver had become functus officio after the discharge of the insolvent. From this order an appeal was preferred to the learned District Judge who held that the act of the Official Receiver was ultra vires not because he had become functus officio but because the occupancy rights under S. 6, Punjab Tenancy Act, could not vest in the Official Receiver in view of the provisions of S. 28 (5), Prov. Insol. Act, and the Official Receiver was, therefore, incompetent to mortgage the same. He, however, held that the insolvent's appeal to the Insolvency Judge was barred by time inasmuch as it was presented more than twenty-one days after the date of the order of the Receiver. He, therefore, set aside the order of the Insolvency Judge leaving the insolvent to resort to any other remedy that might be open to him to have the mortgage set aside. It is from this decision that a second appeal has been preferred.

It seems to me that the objection of the learned counsel for the respondent that a second appeal is not competent is correct. The learned counsel for the appellant urged that a second appeal is competent because the order of the insolvency Judge in this case fell within the purview of S. 4, Prov. Insol. Act, but this contention does not appear to be correct. An application had been made by the insolvent for setting aside an act of the Receiver and the application clearly fell within the scope of S. 68, Prov. Insol. Act. In such circumstances S. 4, of the Act which is subject to the other provisions of the Act, could not, in my opinion, be held to be applicable.

However, although a second appeal is not competent, this Court has ample power to interfere in revision under S. 75, Prov. Insol. Act. In the present instance, as pointed out above, the act of the Official Receiver was clearly ultra vires, as the occupancy rights under S. 6 had never vested in him and could not be mortgaged by him. The mortgage could not, moreover, be valid without sanction of the Court—vide S. 59, Prov. Insol. Act, and no such sanction had been given by the Court. In the circumstances, the mortgage was clearly illegal and must be set aside. I, therefore, treat the second appeal as a peti-

tion for revision and set aside the mortgage. The mortgagee is alleged to have paid Rs. 1,000 as consideration for the mortgage. If this payment has been made as alleged, he will, of course, be equitably entitled to get a refund of this amount. In view of all the circumstances I leave the parties to bear their costs throughout.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Lahore 503

BHIDE, J.

Jahan Khan—Plaintiff—Appellant.

v.

Ditta and others—Defendants—Respondents.

Second Appeal No. 1981 of 1935, Decided on 18th February 1936, from decree of Dist. Judge, Jhelum, D/- 29th August 1935.

Pre-emption — Limitation — Suit by one pre-emptor claiming superior right against another—Art. 120, Limitation Act, applies.

Where one pre-emptor files a suit against another claiming that he has a superior right of pre-emption and that a decree obtained by such other pre-emptor is based on fraud, it is Art. 120, Limitation Act, that is applicable : 31 P R 1913 (FB), Foll.; 32 All 340 and 1915 All 114, *Disting.* [P 504 C 1,2]

Indar Dev for Achhru Ram—for Appellant.

Autar Narain Gujral—for Respondents.

Judgment.—There were three rival suits for pre-emption with respect to a sale of certain land dated 21st February 1933, by one Dhumman in favour of Muhammad Bakhsh. The first suit was by Ahmad Khan and was instituted on 4th October 1933 at Jhelum; the second suit was by Ditta and was instituted on 21st February 1934 at Jhelum; the third suit was by Jahan Khan, and was instituted on 21st February 1934 at Chakwal where the land in suit was situated. The first two suits were tried together, the plaintiffs being impleaded in each other's cases. Jahan Khan was however not impleaded in these cases nor were the first two plaintiffs impleaded in the suit by Jahan Khan. In the first two suits a decree was passed in favour of Ditta on payment of the full consideration of Rs. 1,200 as stated in the sale deed. Ditta took out execution and obtained

possession in pursuance of the decree on 27th July 1934. In the meantime Jahan Khan had also obtained a decree at Chakwal on 19th July 1934 but this decree was on payment of Rs. 650 only, which was alleged by Jahan Khan to be the real consideration. Jahan Khan then instituted the suit out of which the present appeal arises on 31st August 1934 for possession of the land as against Ditta, the rival pre-emptor. The suit was dismissed by the trial Court and the decision was affirmed on appeal by the learned District Judge. Jahan Khan has now preferred a second appeal.

The learned District Judge has dismissed the suit on the finding that the plaintiff had failed to prove that the decree was obtained by Ditta by fraud. He has referred to the application of the plaintiff dated 31st January 1935 in which he stated that this was not a suit for pre-emption and should not be treated as such. This application appears to me to have been misconstrued. What the plaintiff apparently meant was that this was not an ordinary suit for pre-emption but was by one pre-emptor against another. The learned District Judge was of opinion that the suit was obviously out of time, and therefore the plaintiff had based his suit on fraud. I am unable to agree with this view. The learned counsel for the appellant contends that the suit was within time and the learned District Judge was in error in thinking that the suit was based merely on the ground of fraud. The plaintiff no doubt alleged that Ditta had obtained his decree by fraud, as he had not impleaded him in the suit. But the plaintiff also relied in support of his claim on the fact that he had a superior right of pre-emption. The fact that the plaintiff has a superior right is not now disputed. If therefore his suit was within time there was no reason why his claim should not have been decreed. The main point for consideration in this appeal therefore is whether the plaintiff's suit was within time. As regards this point, the learned counsel for the appellant contended that Art. 120, Lim. Act, applied, while the learned counsel for the respondent contended that S. 30, Punjab Pre-emption Act, governed the case. In support of the latter contention, the learned counsel for the respondent referred to the remarks at p. 586 of the Punjab Pre-

emption Act by Sir Shadi Lal, 28 I C 691 (1) and 32 All 340 (2).

The remarks at p. 586 referred to by the learned counsel for the respondent are no doubt in his favour, but this view of the author seems to be in conflict with that taken by the Punjab Chief Court in the Full Bench decision 31 P R 1913 (3). The two rulings on which the learned counsel for the respondent relies do not appear to be helpful as the facts therein are distinguishable. In 28 I C 691 (1), the preferential claimant had not obtained any decree within the period of limitation as in this case, but sued for the first time to enforce his right of pre-emption after the expiry of the period provided in Art. 10, Lim. Act. In 32 All 340 (2) the decision merely was that a suit by a rival pre-emptor was maintainable even after another pre-emptor had obtained a decree. The suit was within limitation and there was no occasion for discussion of the point raised in the present case. In my opinion the reasoning adopted by the Full Bench in 31 P R 1913 (3) is applicable to the present case and the present suit is therefore governed by Art. 120, Lim. Act, and is within time. The fact that the plaintiff has a superior right of pre-emption is not now disputed as stated above. The only other point which requires decision is whether the plaintiff is entitled to a decree on payment of Rs. 650 only or on payment of Rs. 1,200. This matter has not been decided by the learned District Judge and the case must therefore be remanded for this purpose. I accept the appeal and remand the case to the learned District Judge for re decision in the light of the above remarks. Stamp on appeal to be refunded. Costs will follow final decision.

B.D./R.K.

Appeal accepted.

1. Mehdi Hasan v. Bacha Pande, 1915 All 114= 28 I C 691=13 A L J 383.
2. Raj Narain Rai v. Durga Pande (1910) 32 All 340=5 I C 527.
3. Karam Das v. Ali Mahomed, (1913) 31 P R 1913=18 I C 70.

*** A. I. R. 1936 Lahore 504**

ADDISON AND ABDUL RASHID, JJ.

Hari Singh—Defendant—Appellant.

v.

Pritam Singh—Plaintiff—Respondent.

First Appeal No. 1044 of 1935, Decided on 18th December 1935, from preliminary decree of Sub-Judge, 1st Class, Lahore, D/- 27th May 1935.

(a) **Hindu Law — Partition — Amount claimed should be shown to be existing asset.**

In a suit for partition of joint Hindu family property any amount that is claimed should be first shown to be an existing asset of the joint family. [P 506 C 1,2]

*(b) **Hindu Law—Partition—Minor member instituting suit for partition—Severance of status takes place when decree is passed—Rendition of accounts should be from date of preliminary decree.**

Institution of a suit by a minor member through his next friend for partition of joint family property has not the same effect as the institution of similar suit by an adult member of the family, that is to say the mere institution of a suit does not effect a separation of the family but separation only takes place when the suit is decreed. In such cases the defendant is liable to render accounts to the plaintiff only from the date of the passing of the preliminary decree: 1920 *All* 116 (F.B), *Foll.*; 1926 *Sind* 216 and 1918 *Mad* 379, *Rel. on*; 1927 *Mad* 801 and 1925 *Mad* 717, *Ref.* [P 507 C 1]

Dina Nath Bhasin and *M. L. Puri*—for Appellant.

Hazara Singh—for Respondent.

Abdul Rashid, J. — The following pedigree-table will be helpful in understanding the facts of this case :

NATH SINGH.

Wadhawa Singh	Teja Singh = Mt. Jamna Devi	
Hari Singh, Defendant.	Pritam Singh, Plaintiff.	

Natha Singh, the common ancestor of the parties to the present litigation, was a Mahant of Gurdwara Chhewin Padshahi situate at Lahore. Wadhawa Singh, the elder son of Natha Singh, died during the lifetime of his father and Teja Singh succeeded his father as the Mahant of the Gurdwara. After the death of Teja Singh in 1917 Hari Singh defendant became the Mahant. Mt. Jamna Devi and Pritam Singh plaintiff continued to reside with Hari Singh defendant in a house contiguous to the Gurdwara. It appears that, in November 1920, the Akalis took possession of this Gurdwara and ejected the defendant. This gave rise to a great deal of civil and criminal litigation. In 1925 the Sikh Gurdwaras Act came into force and Gurdwara Chhewin Padshahi was declared to be a Sikh Gurdwara. Thereafter litigation between Hari Singh and Pritam Singh on one side, and the Sikh Gurdwaras Prabandhak Committee and the Managing Committee of Lahore Gurdwaras on the other com-

menced in the Gurdwara Tribunal. The Managing Committee of Lahore Gurdwaras filed an appeal against the decision of the Gurdwaras Tribunal in the High Court which resulted in a compromise being effected between the parties on 1st April 1931. By means of this compromise some immoveable property was awarded to Gurdwara Chhewin Padshahi, while one house and a number of shops were declared to be the property of Hari Singh and Pritam Singh, respondents. The Managing Committee of Lahore Gurdwaras also had to pay Rs. 2,000 within a month and an additional sum of Rs. 1,500 within three months to the respondents.

The suit out of which the present appeal has arisen was instituted by Pritam Singh minor under the guardianship of his mother Mt. Jamna Devi on 10th June 1933, for partition of moveable and immoveable property belonging to the joint Hindu family consisting of the plaintiff and the defendant and for rendition of accounts from 1st April 1931. The main reliefs asked for by the plaintiff were that he should be awarded possession of one-half of the immoveable property by means of partition, that he should be given a decree for Rs. 1,750 being one-half of the amount received by the defendant from the Gurdwara Committee and that the defendant should render account of all the income of the immoveable property from 1st April 1931. It was pleaded on behalf of the defendant, inter alia, that he was the karta of the joint Hindu family, consisting of the plaintiff and himself, that he was not liable to render accounts, that partition of the joint family property was not for the benefit of the minor plaintiff and that he was entitled to apply the sum of Rs. 3,500 received under the compromise towards the liquidation of the debts incurred for the purposes of meeting the expenses of the litigation.

The trial Court held that the plaintiff and the defendant constituted a joint Hindu family, that the defendant was the karta of the family, and that in the absence of any proof of fraudulent or improper conversion by the manager he was not liable to render accounts to the plaintiff for the period prior to the passing of a preliminary decree for partition in favour of the plaintiff. It was also

held that the partition of the joint family property would be for the benefit of the minor. On these findings a preliminary decree was granted to the plaintiff for possession by partition of one-half of the immoveable property detailed in the plaint and for Rs. 1,750 being one-half of Rs. 3,500 received by the defendant under the compromise dated 1st April 1931. Against this decision the defendant has preferred an appeal to this Court mainly on the ground that the lower Court had erred in giving the plaintiff a decree for Rs. 1,750. On the other hand the plaintiff has preferred cross-objections to this Court against the dismissal of his suit for rendition of accounts.

It appears to us to be amply established on the present record that the defendant had spent a great deal of money in carrying on prolonged litigation with the Akalis and the Sikh Gurdwaras Prabandhak Committee from November 1920 to April 1931. The defendant had been meeting the expenses of the litigation by raising loans and mortgaging the joint family property. The sum of Rs. 2,000 received by the defendant from the Gurdwara Committee on 30th April 1931 was spent in paying the mortgage debt and the interest thereon due to Mehta Bishan Das, appeal writer. There is nothing on the record to show that the sum of Rs. 2,000 received from the Gurdwara Committee in April 1931 constituted existing assets in the hands of Hari Singh defendant, the karta of the joint family, at the date of the institution of the suit on 10th June 1933, or on the date of the passing of the preliminary decree for partition on 27th May 1935. The plaintiff's mother Mt. Jamna Devi admitted that the defendant had carried on prolonged litigation with the Akalis and that he had been spending money on that litigation. She also admitted that she and her son Pritam Singh had been living with the defendant in the same house and that the defendant had been supporting them. In these circumstances and in view of the finding of the lower Court that no fraud or misappropriation on the part of the defendant had been established, it was incumbent on the plaintiff to prove that Rupees 2,000 received from the Gurdwara Committee constituted existing assets at the time of the passing of the preliminary

decree in his favour before he could claim one-half of this sum as his property.

The sum of Rs. 1,500 received under the compromise was lying in the Court of the Senior Subordinate Judge, Lahore, on 27th May 1935, when a preliminary decree was passed in favour of the plaintiff. He was, however, not entitled to this sum until the debts incurred by the defendant for carrying on litigation against the Gurdwara Committee had been entirely wiped off. It appears from the statement of the plaintiff that he borrowed Rs. 1,000 on 9th March 1922 from Pandit Walaiti Ram for the purposes of the litigation and this sum together with interest at As. 14 per cent per mensem is still due to Walaiti Ram. The repayment of this loan will cost the defendant more than Rs. 1,500. The plaintiff was, therefore, not entitled to Rs. 750 out of this sum. Mr. Mukand Lal Puri, on behalf of the defendant-appellant, however, made a statement to the effect that he was prepared that the plaintiff-respondent may be granted a decree for Rs. 500 out of this sum.

It was strenuously contended by the learned counsel for the respondent that a decree for rendition of accounts ought to be awarded to the plaintiff from the date of the institution of the suit and not only from the date of the passing of the preliminary decree. Reliance was placed in this connexion on 1927 Mad 801 (1) and 48 Mad 465 (2). It was held in these rulings that a suit by a minor for partition, if it ends in a decree for partition, has the effect of creating a division of estate from the date of the plaint. On the other hand it was laid down by a Division Bench of the Madras High Court in 41 Mad 442 (3) that the rule that the institution of a suit for partition of joint family property effects a severance of the joint status is not applicable to a suit instituted on behalf of a minor, for in such a suit it is for the Court to determine whether a decree for partition will be beneficial to the minor. A Full Bench of the Allahabad High Court held in 42

1. Sri Ranga Thathachariar v. Srinivasa Thathachariar, 1927 Mad 801=104 I C 472=50 Mad 866=53 M L J 189.
2. Krishnaswami Thevan v. Pulukamppa Thevan, 1925 Mad 717=88 I C 424=48 Mad 465=48 M L J 354.
3. Chelimi Chetty v. Subhanna, 1918 Mad 379=42 I C 860=41 Mad 442=34 M L J 213.

All 461 (4) that the institution of a suit by a minor member through his next friend for partition of joint family property has not the same effect as the institution of a similar suit by an adult member of the family, that is to say the mere institution of a suit does not effect a separation of the family but separation only takes place when the suit is decreed. This ruling was followed in 1926 Sind 216 (5). We are in respectful agreement with the opinion expressed by the Full Bench of the Allahabad High Court and hold that the defendant is liable to render accounts to the plaintiff only from the date of the passing of the preliminary decree.

In view of the findings given above and the admission made by Mr. Mukand Lal Puri on behalf of the appellant we accept the appeal in so far as to reduce the decretal amount awarded to the plaintiff from Rs. 1,750 to Rs. 500. The decree for partition of immoveable property awarded by the trial Court is confirmed. We also accept the cross-objections, and award the plaintiff a decree for rendition of accounts against the defendant with effect from the passing of the preliminary decree for partition, that is to say, 27th May 1935. The parties shall bear their own costs throughout.

B.D./R.K.

Decree modified.

4. *Lalta Prasad v. Shiam Singh*, 1920 All 116 = 58 IC 667 = 42 All 461 = 18 A L J 503 (FB).
 5. *Jethanand Udhovdas v. Kewalram*, 1926 Sind 216 = 97 I C 505.

A. I. R. 1936 Lahore 507

CURRIE, J.

Bahali and another—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1447 of 1935, Decided on 16th January 1936, from order of Sess. Judge, Amritsar, D/- 24th July 1935.

Criminal P. C. (1898), Ss. 235 and 439—Joint trial under S. 457 and S. 324 read with S. 34, Penal Code, is illegal and void.

Two offences under S. 457 and S. 324 read with S. 34, Penal Code, committed on different dates cannot possibly be considered to be part of one and the same transaction and their joint trial is not mere irregularity but an illegality, and the Court can set aside the conviction in revision: 25 Mad 61, Rel. on; 5 P R 1906 (Cr), *Dsting.*

[P 507 C 2]

Ram Chand Manchanda—for Petitioners.

Jhanda Singh for Govt. Advocate—for the Crown.

Order.—The petitioners were convicted in one trial on a charge of burglary committed on 2nd February 1935, and secondly on a charge under S. 324 read with S. 34, Penal Code, for an offence committed on 6th February 1935. They were sentenced to a year's rigorous imprisonment and Rs. 50 fine each under S. 324/34, Penal Code, to run concurrently with the sentences imposed upon them under S. 457, Penal Code, which were three years in the case of Bahali, a previous convict, and two years in the case of Massu. The present petition was apparently admitted for hearing on the ground that the trial was illegal and void. As regards its illegality there can be no doubt, as the two offences cannot possibly be considered to be part of one and the same transaction and their joint trial was not a mere irregularity but was an illegality: vide 25 Mad 61 (1). This is in fact conceded by the learned counsel who appeared for the Crown. Mr. Jhanda Singh however urges that this being a revision, interference is discretionary. He refers to 5 P R 1906 (Cr) (2), in which that view was taken. But the circumstances of that case were distinctly peculiar and are not on all-fours with those of the present case. In the present case I think that the trial must be held to have been illegal and the convictions are therefore void and must be set aside. The petitioners will be retried according to law. This will not, of course, prevent the Crown from withdrawing either or both of the prosecutions, if it thinks fit. For the present the petitioners will be transferred to the judicial lock-up. To that extent the petition is accepted.

M.D./R.K. *Petition partly accepted.*

1. *Subramania v. King-Emperor*, (1902) 25 Mad 61 = 28 I A 257 = 2 Weir 712 = 8 Sar 160 (P C).
 2. *Ala Dya v. King-Emperor*, (1906) 5 P R 1906 (Cr.)

A. I. R. 1936 Lahore 508

JAI LAL, J.

Basanti Devi and another—Decree-holders—Appellants.

v.

Official Receiver—Judgment-debtor—Respondent.

Misc. First Appeal No. 1797 of 1935, Decided on 9th January 1936, from order of Sub-Judge, First Class, Lahore, D/-13th July 1935.

(a) Execution—Agent competent to execute decree—Agent can remove objections to execution in both appellate and execution Court.

Where an agent of the decree-holder is competent to execute the decree, he is competent to remove any obstruction that may have been placed to the execution of the decree. He is entitled to have any objection to execution removed either in the executing Court or in the appellate Court. [P 508 C 2]

(b) Execution — Property attached before judgment—Suit compromised and compromise decree passed—Compromise provided that property should remain under attachment till payment was made—Such compromise held created no lien or charge on property.

On the institution of a suit the property of the defendant was attached before judgment. Later on a written deed of compromise was filed in Court whereby the defendant undertook to pay certain amount by a certain date to the plaintiff in full satisfaction of the claim and in default undertook to pay the whole of the amount claimed in the suit with costs and future interest. It was further provided that the land of the defendant which had already been attached shall be considered to remain attached till the whole of the amount under the decree is paid to the plaintiffs. A decree was passed by the Court in terms of the compromise. In the meantime defendant was adjudicated an insolvent. A default having been made by defendant in the payment as agreed to by him an application was made by plaintiff for execution of the decree and a prayer was made that the land which had been attached before judgment and which was still under attachment be sold to satisfy the decree. It was asserted that the decree-holders had a lien on that land by virtue of the condition in the compromise that the same shall remain under attachment till the satisfaction of the decree:

Held: that it would be straining the language used by the parties to hold that by providing that the property should remain under attachment they intended that the decree-holder should have a lien or a charge on the property: 1914 *All* 187; 1929 *Oudh* 539 and 32 *Bom* 286, *Disting.* [P 510 C 1]

(c) Evidence — Secondary evidence—Oral evidence to explain document, when admissible.

Evidence is certainly admissible to explain in what manner the language used is related to existing facts; but that is only if such relation does not appear from the document itself. In a case where there is no such ambiguity which

needs explanation and the terms of the document are quite clear, evidence to explain the terms of the deed should be disallowed: 22 *All* 149 (P C), *Rel. on.* [P 509 C 1, 2]

(d) Deed—Construction—Intention should be gathered from deed itself.

Whether a document creates a charge on immoveable property is in every case a question of intention which is to be gathered from the document itself. [P 509 C 2]

Dev Raj Sawhney—for Appellants.

Darbari Lal—for Respondent.

Judgment.—Mt. Basanti Devi and Mt. Kishan Piari appeal against an order passed by the Subordinate Judge, First Class, Lahore, declining to execute their decree against Ghulam Rasul. A preliminary objection is taken on behalf of the respondent that the appeal has not been properly filed. It has been filed by Mr. Dev Raj Sawhney, Advocate, under the instructions of one Chandu Lal, who held a power-of-attorney from Mt. Basanti Devi and Mt. Kishan Piari to institute and to prosecute the suit against Ghulam Rasul on their behalf and also to execute the decree. It is conceded that Chandu Lal was competent to execute the decree and also to engage a counsel for that purpose; but it is contended that Chandu Lal was not competent to appeal from an order refusing to execute the decree. In my opinion there is no force in this objection. Chandu Lal was competent to execute the decree and was therefore competent to remove any obstruction that may have been placed to the execution of the decree. Objection by the Official Receiver in this case was an obstruction to the execution of the decree and he was entitled to have it removed both in the executing Court and in the appellate Court. I therefore overrule the preliminary objection. The facts which have led to this appeal are these: A suit for recovery of money was filed by Mt. Basanti Devi and Mt. Kishan Piari against Ghulam Rasul. The amount claimed was more than Rs. 9,000. On the institution of the suit the property of the defendant was attached before judgment.

On 25th October 1933, a written deed of compromise was filed in Court whereby the defendant undertook to pay Rs. 9,000 by 25th April 1934 to the plaintiff in full satisfaction of their claim and in default undertook to pay the whole of the amount claimed in the suit with costs and future interest. It was further provided that the land of the

defendant which had already been attached shall be considered to remain under attachment till the whole amount due under the decree is paid to the plaintiffs. A decree was passed by the Court in terms of the compromise. It is now alleged that on an application made in June 1934, the decree which was passed on the compromise was registered. In the meantime Ghulam Rasul had made an application to be adjudicated an insolvent and he was so adjudicated. A default having been made by Ghulam Rasul in the payment of Rs. 9,000 as agreed to by him an application was made by Mt. Basanti Devi and Mt. Kishan Piari for execution of the decree and a prayer was made that the land which had been attached before judgment and which was still under attachment be sold to satisfy the decree. It was asserted that the decree-holders had a lien on that land by virtue of the condition in the compromise that the same shall remain under attachment till the satisfaction of the decree. A notice was issued to the Official Receiver in whom the property of the judgment-debtor Ghulam Rasul had vested owing to his having been adjudicated an insolvent. The Official Receiver denied the claim of the decree-holders to be considered as secured creditors and this question was decided against the decree-holders by the Subordinate Judge First Class.

On this appeal two questions are raised by Mr. Dev Raj Sawhney for the appellants. One is that the view of the learned Subordinate Judge that there was no lien or charge of the appellants is erroneous and that permission should have been granted to the decree-holders to lead evidence to show that the condition in the deed of compromise that the land attached shall remain under attachment till the satisfaction of the decree was intended to create a charge on the land in favour of the decree-holders in respect of the decretal amount. With regard to the second objection, the respondent's counsel cites 22 All 149 (1) and other cases in which it has been held that where the terms of a document are clear and unambiguous, no oral evidence can be given to explain them. The evidence is certainly admissible to explain in what

manner the language used is related to existing facts but that is only if such relation does not appear from the document itself. In the present case there is no such ambiguity which needs explanation. The terms of the document are quite clear and the only question before me is whether they create a charge in favour of the decree-holders as claimed by them. In my opinion, therefore, the Subordinate Judge has rightly refused to record evidence to explain the terms of the deed of compromise. Now, with regard to the first objection, the learned counsel for the appellants relies upon 36 All 201 (2) in which the debtor had undertaken by a bond that till the payment of the amount due under it he shall not alienate by sale mortgage gift or otherwise specified immoveable property. It was held the expression used created a charge and one learned Judge held that it created a mortgage. In 121 I C 81 (3) the Chief Court of Oudh held that in a deed of compromise filed in Court on which a money decree was passed, a condition that till the satisfaction of the decree the judgment-debtor shall not alienate his specified immoveable property created a charge on such property.

To the same effect is 32 Bom 386 (4). In that case having regard to the terms of the deed the learned Judges felt no doubt that the property was intended to remain as security for payment of the loan. It is, therefore, in every case a question of intention which is to be gathered from the document itself. Now, in the present case, all that the parties have stated is that till the satisfaction of the decree the property shall be deemed to remain under attachment. It is no doubt true that the effect of attachment is that the judgment-debtor is not permitted to alienate the property so as to defeat the claim of the decree-holder to sell it in execution of the decree. It must be remembered that the property had been attached before judgment and the law is that where property has been attached before judgment and a decree is subsequently passed, it shall not be

1. Balkishen Das v. W. F. Legge, (1900) 22 All 149=27 I A 58=7 Sar 601 (P O).

2. Jwahir Mal v. Indumati, 1914 All 187=22 I C 973=36 All 201=12 A L J 290.

3. Narain Das v. Murlidhar, 1929 Oudh 539=121 I C 61=6 O W N 903.

4. Janardhana v. Anant, (1908) 32 Bom 386=10 Bom L R 575.

necessary to re-attach it in order to enable the decree-holder to sell it in execution of his decree. If the decree-holder chooses not to proceed against the property, then the attachment has no effect and does not invalidate any alienation thereof by the judgment-debtor. In the present case the execution of the decree had been deferred for six months according to the compromise and it was in order to retain the attachment before judgment effective that this condition was entered in the deed of compromise. In my opinion, it will be straining the language used by the parties to hold that by providing that the property shall remain under attachment they intended that the decree-holder shall have a lien or a charge on the property. No such expressions are used in this case as have been used in the reported cases cited by the appellants' counsel and it is not possible to hold that the parties intended by merely keeping the property under attachment that it should be charged with the payment of the decretal amount. The expressions used read in the light of the circumstances which are apparent on the record leave no doubt that in the present case there was no question of a charge in the contemplation of the parties when they entered into the compromise. The effect of attachment at the instance of a decree-holder, where the judgment-debtor has been adjudicated an insolvent, is dealt with in S. 52, Provincial Insolvency Act, which provides that any money realised in execution of a decree under such circumstances must go to the Official Receiver to be distributed among the creditors subject to the charge of the decree-holders, in whose decree the sale has taken place, in respect of their costs. This was held in 42 Cal 72 (5) and 1923 Lah 261 (6) and also in 57 Cal 122 (7). An attachment does not create a charge in favour of the attaching creditor under such circumstances. In my opinion, therefore, the view of the learned Subordinate Judge in this case that there was no charge in favour of the appellants is correct and I dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

5. Raghunath Das v. Sundar Das, 1914 P C 129 = 24 I C 304 = 41 I A 251 = 42 Cal 72 (P C).
6. Ram Bhaj Datta v. Ram Das, 1923 Lah 261 = 69 I C 720 = 3 Lah 414.
7. Haran Chandra v. Joychand, 1929 Cal 524 = 123 I C 737 = 57 Cal 122.

A. I. R. 1936 Lahore 510

ADDISON AND ABDUL RASHID, JJ.
Hitkari Brothers—Assesseees.

v.

Commissioner of Income-tax—Respondent.

Civil Ref. No. 60 of 1935, Decided on 10th February 1936, from order of Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore, D/- 2nd October 1935.

Income-tax—Firm accruing income as firm changing into company on day of assessment—Profits should be calculated as that of firm—Rate should be as that of company.

A firm was converted into a company in March 1934. There was no de facto change. The converted company took over the business of the firm as a going concern. For the year 1933-34, which was the relevant account year for the assessment in dispute (1934-35), the status of the assesseees was of a firm, but it was changed into that of a company on the first day of the assessment year 1934-35. The question was whether the Income-tax Officer was justified in assessing the assesseees at the rates applicable to a company and at the same time computing the income as that of a firm :

Held: that S. 26 (2) Income-tax Act obviously meant that the company which succeeded the firm was liable to pay tax as if it had received the whole of the profits for the previous year when the status was that of a firm. The assessment however being on a company, it would be the rate applicable to the company that must apply: 1928 P C 1, *Rel. on.* [P 511 C 1]

Nawal Kishore—for Assesseees.

Jagan Nath Aggarwal—for Respondent.

Addison, J.—This reference by the Commissioner of Income-tax, Punjab, is concerned with the 1934-35 assessment of Hitkari Brothers of Jhelum. The Commissioner has stated that the assesseees did not specify the contentions of law which should be referred and he himself summarised them in two questions. He then proceeded to refer the first question and to hold that no question of law arose in the second, and therefore he did not refer it to this Court. The question referred is as follows: Was the Income-tax Officer justified in assessing the petitioners at the rates applicable to a company and at the same time computing the income as that of a firm? Since the time this firm was first assessed, the status of the assesseees had been that of a firm with three partners in equal shares. On 24th March 1934 the firm was converted into a company and was registered under the Companies Act, the

subscribed capital being Rs. 45,000. There was no substantial change resulting therefrom as no outside share-holder was admitted. Shares were allotted to the partners equally. The company thus formed took over the business of the firm as a going concern on 1st April 1934. For the year 1933-34, which is the relevant account year for the assessment in dispute (1934-35), the status of the assessee was of a firm, but it was changed into that of a company on the first day of the assessment year 1934-35. What the assessee is objecting to is that they are being made to pay the tax on the income of the firm at the rate applicable to a company. The point they took was that if the profits were to be computed as if no change had occurred they should be allowed to derive the other benefits of being a firm, such as registration. As pointed out by the Commissioner, however, the case falls within the ambit of S. 26 (2) which runs as follows:

Where, at the time of making an assessment under S. 23 it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding as if he had been carrying on the business, profession or vocation through out the previous year, and as if he had received the whole of the profits for that year.

This section obviously means that the company which succeeded the firm is liable to pay tax as if it had received the whole of the profits for the previous year when the status was that of a firm. The assessment however being on a company it would be the rate applicable to the company that must apply. This was so held by their Lordships of the Privy Council in 52 Bom. 123 (1). We therefore answer the question referred in the affirmative and direct that the assessee pay the costs of the Commissioner of Income-tax.

B.D./R.K.

Reference answered.

1. Commissioner of Income-tax Bombay v. Western India Turf Club Ltd., 1928 P O 1 = 106 I O 642 = 55 I A 14 = 52 Bom 123 (P O).

A. I. R. 1936 Lahore 511

ADDISION AND ABDUL RASHID, JJ.

(Bakhshi) Ghazanfar Ali—Appellant.

v.

(Bakhshi) Muzaffar Ali—Respondent.

Second Appeal No. 1547 of 1935, Decided on 22nd January 1936, from decree of District Judge, Jhelum, D/- 11-7-1935.

Transfer of Property Act (1882), Ss. 51, 63, 108—Rule of law that whatever is affixed to land becomes part of it does not apply in India—Two brothers owning land in equal shares—One of them building house and planting garden over portion, entirely at his own expense—Other brother cannot claim it.

The rule of the English law to the effect that whatever is affixed to the land becomes a part thereof has no applicability in India in view of the provisions of Ss. 51, 63 and 108. [P 512 C 1]

Where, therefore, one of two brothers owning certain land in equal shares, builds a house and plants a garden on a portion of it entirely at his own expense, the other brother is not entitled to claim a share in the house and the garden and cannot claim a declaration that the house and the garden are not the exclusive properties of the other brother: 26 Bom 1 and 21 All 496, Foll.; 33 Cal 1119, Disting.

[P 511 C 2; P 512 C 2]

Barkat Ali and Muhammad Amin—for Appellant.

S. N. Bali—for Respondent.

Abdul Rashid, J.—This appeal arises out of an action brought by Muzaffar Ali against his brother Ghazanfar Ali for a declaration to the effect that the orchard planted and the houses built on 6 kanals 15 marlas of land bearing khasra Nos. 49 and 56 were not the exclusive property of the defendant. The case of the plaintiff was that the houses were built and the garden planted during the life time of the father of the parties, and that the entire expenses relating thereto were incurred by their father. The father of the parties died in 1927. In 1928 Ghazanfar Ali, defendant, applied for partition. He claimed that he alone had planted the garden and built the kothas at his own expense and that, therefore, the area containing the garden and the kothas should be awarded to him by means of partition. The Revenue Officer after an enquiry held that the garden was planted and the kothas were built by Ghazanfar Ali about 30 years before the death of his father and that since then he had been in exclusive possession thereof. He, therefore, held that in partition Ghazanfar Ali's possession should not be disturbed. It was in view of this finding that the plaintiff instituted the suit which has given rise to the present appeal. It may be mentioned that the 6 kanals 15 marlas of land containing the garden and the kothas in dispute is part of a bigger holding consisting of about 136 kanals 19 marlas, which admittedly belong to the two brothers in equal shares. The trial Court held that

it had been established that Ghazanfar Ali, defendant, had incurred the entire expenses in connection with the planting of the garden and the building of the kothas. It was further held that Ghazanfar Ali had been in possession of the garden and the kothas during the lifetime of his father and that the father used to pay a visit to the garden occasionally and sometimes used to occupy the house.

On these findings the plaintiff's suit was dismissed. The plaintiff preferred an appeal to the learned District Judge. The learned District Judge also held that it had been established that the garden and the houses were built by the defendant at his own expense. A finding was also given that the buildings were constructed by the defendant with the connivance or acquiescence of his father. The learned District Judge was, however, of the opinion that as the land which contains the garden and the houses belonged to the father, the garden and the houses became his property in view of the maxim *quicquid inaedificatur solo, solo cedit*. He, therefore, accepted the appeal and granted the plaintiff the declaration prayed for in the plaint. Against this decision the defendant has preferred an appeal to this Court. The learned counsel for the appellant contended that the rule of English Law to the effect that whatever is affixed to the land becomes a part thereof has no applicability in India, and that in view of the finding of fact given by the learned District Judge the respondent's suit ought to have been dismissed. Reference was made in this connection to 26 Bom. 1 (1), 21 All. 496 (2), and a large number of other rulings which it is unnecessary to quote. It is well settled that the above mentioned principle of English Law has no applicability in India in view of the provisions of Ss. 51, 63 and 108, T. P. Act.

The Calcutta ruling, 33 Cal. 1119 (3), relied upon by the learned District Judge, is of no assistance in the present case. That ruling concerns a joint Hindu family which was governed by the Dayabhaga school, and it was held therein

that if a member of the family throws his own property into the common hotch-potch he cannot thereafter claim the property to be his own exclusively. The learned District Judge has given no finding on the question of possession. It is, however, clear from the judgment of the trial Court that the appellant has been in possession of the houses and the garden for about 30 years. It is further clear from the findings of the lower appellate Court that the entire expenses with respect to the houses and the garden were borne by the appellant. In view of these findings we are of the opinion that the respondent's suit was rightly dismissed by the trial Court. We, therefore, accept this appeal, set aside the judgment and the decree of the lower appellate Court and restore that of the trial Court dismissing the suit. The respondent will pay the costs of the appellant throughout.

R.M./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 512

BHIDE, J.

Gopal Singh—Defendant — Appellant.
v.Rao Baldev Singh—Plaintiff and others
—Defendants—Respondents.

Second Appeal No. 1307 of 1935, Decided on 11th December 1935, from order of Dist. Judge, Ambala, D/- 2nd July 1935.

(a) *Lis Pendens*—Sale during proceedings for ejectment—Doctrine of *lis pendens* applies—Involuntary sale makes no difference.

Where during the pendency of the proceedings for ejectment the sale takes place, the principle of *lis pendens*, laid down in S. 52, T. P. Act, will apply to it. It does not matter whether the sale was voluntary or not: 1933 Lah 10 and 171, *Rel. on.* [P 513 C 2]

(b) Punjab Tenancy Act (16 of 1887), S. 77 (h)—Suit for ejectment of occupancy tenant should be tried by revenue Court—Suit tried by civil Courts without prejudicing the parties—Decree should be registered as that of a Collector.

Under S. 77 (h), Punjab Tenancy Act, a suit to dispossess a transferee of an occupancy tenancy is cognizable by a revenue Court, but where a suit has been tried on merits in good faith by the civil Courts, and none of the parties has been prejudiced, the decrees should be registered as decrees of Collector. [P 513 C 2; P 514 C 1]

M. C. Sud for Nanak Chand and Nanak Chand—for Appellant.

Shamair Chand and Qabul Chand—for Respondents.

1. Secy. of State v. Charlesworth Pilling & Co., (1902) 26 Bom 1=28 I A 121 (P C).

2. Beni Ram v. Kundan Lal, (1899) 21 All 496 =26 I A 58 (P C).

3. Dharam Das v. Amulya Dhan, (1906) 33 Cal 1119=3 C L J 616=10 C W N 768.

Judgment.—The material facts giving rise to this second appeal are as follows:

The plaintiff Rao Baldev Singh was the landlord of the 25 bighas 8 biswas of the land in suit, while Bakhtwar Singh, defendant 2, was its occupancy tenant. The plaintiff obtained a decree for Rs. 12-12-0 on account of arrears of rent for 16 bighas 15 biswas out of this land on 10th March 1932. This decree remained unsatisfied. Plaintiff applied for ejectment of Bakhtwar Singh on 22nd December 1933 and the Revenue Officer passed an order of ejectment on 10th February 1934. In the meantime one Alakh Ram, who had obtained a decree against Bakhtwar Singh, got the whole of the occupancy land attached in execution of his decree on 6th March 1933 and the land was sold to Gopal Singh, defendant 1, by public auction on 11th January 1934. The sale was confirmed on 26th February 1934. No notice as regards the sale of the occupancy rights was given to the plaintiff landlord as required by S. 55, Punjab Tenancy Act. On 10th December 1934 the plaintiff instituted the present suit for possession of the whole occupancy holding, against Gopal Singh and Bakhtwar Singh. The trial Court dismissed the suit, but on appeal the learned District Judge granted a decree for possession in respect of 16 bighas 15 biswas of land, from which Bakhtwar Singh had been ordered by the Revenue Officer to be ejected and a declaratory decree in respect of the remaining land to the effect that the sale thereof in favour of Gopal Singh will not affect plaintiff's rights. The plaintiff was granted a mere declaration because the land was in possession of certain mortgagees and plaintiff was not entitled to present possession. From this decision Gopal Singh has preferred a second appeal.

The main contentions put forward in this appeal are: (1) that Gopal Singh had become an occupancy tenant of the land in dispute by auction sale before the order of ejectment (of which he was given notice) was passed against Bakhtwar Singh and hence that order was of no effect as against him; (2) the sale in favour of the appellant could only be challenged in a revenue Court according to S. 60, Punjab Tenancy Act, and could not be attacked in the present suit. As regards the first point it is true that the occupancy land was sold to the appellant

Gopal Singh on 11th January 1934, but before that sale the plaintiff had already applied to the Revenue Officer on 22nd December 1933 for ejectment of Bakhtwar Singh owing to his failure to satisfy the decree for arrears of rent. It was during the pendency of these proceedings for ejectment that the sale in favour of the appellant took place, and hence it seems to me that the principle of *lis pendens* laid down in S. 2, T. P. Act, will apply to it. The sale was not a voluntary one, but this does not seem to make any difference: see 1933 Lah 10 (1) and 1933 Lah 171 (2). The learned counsel for the appellant merely urged that attachment had taken place before the application for ejectment was made to the Revenue Officer, but this seems immaterial, as the attachment did not create any rights and could not affect the order of ejectment. By virtue of S. 57, Punjab Tenancy Act, also the sale to Gopal Singh was subject to all the liabilities of Bakhtwar Singh. It is true that no notice was given to Gopal Singh during the ejectment proceedings, but it does not appear that any such notice was legally necessary. It must be noted that the sale in favour of the appellant had not even been confirmed on that date. If he wanted to protect his interests in anticipation of the confirmation of the sale, he should have paid the arrears of rent through Bakhtwar Singh.

The fact that no notice of the sale in favour of the appellant was given to plaintiff as required by S. 55, Punjab Tenancy Act, was not disputed. But it was urged that the plaintiff could only challenge the validity of the sale by appropriate proceedings in a revenue Court according to S. 60, Punjab Tenancy Act. The question of jurisdiction was however not raised in the Courts below. Under S. 77, Cl. (h), Punjab Tenancy Act, a suit to dispossess a transferee of an occupancy tenancy is cognizable by a revenue Court; but the present suit has been tried on merits in good faith by the Court below and I do not see that either party has been prejudiced. I therefore accept the appeal only to the extent of directing under S. 100, Punjab Tenancy Act, that

1. *Mulh Raj v. Nanak*, 1933 Lah 10=140 I C 584=34 P L R 468.

2. *Gulam Mahomed v. Sansar Ohand*, 1933 Lah 171=141 I C 448=34 P L R 581.

the decrees of the learned Sub-Judge and District Judge be registered as decrees of Assistant Collector, 1st grade, and the Collector respectively. In other respects the appeal is dismissed. The parties will bear their own costs in this Court.

B.D./R.K. *Appeal partly accepted.*

A. I. R. 1936 Lahore 514

ADDISON AND ABDUL RASHID, JJ.

Kanhaya Lal—Defendant—Appellant.
v.

(*Firm*) *Devi Dayal-Brij Lal*—Plaintiffs
and *others*—Defendants—Respondents.

First Appeal No. 536 of 1935, Decided on 3rd December 1935, from decree of Senior Sub-Judge, First Class, Sargodha, D/- 14th December 1934.

(a) **Hindu Law—Joint family — Ancestral business—Business not heritable asset—It is not ancestral business—Contractual partnership may be joint family property—Such partnership will not be governed by Hindu law but by provisions of Contract Act.**

Coparcenary, with all its incidents, is a creation of Hindu law, and if a business is not a heritable asset, it cannot be regarded as the ancestral business of the joint Hindu family. A contractual partnership may be joint Hindu family property, but such partnership will not be governed by the provisions of Hindu law relating to coparcenary property. It is possible for an uncle and a nephew to possess joint family property by throwing all their property into a common fund but it is not possible for an uncle and nephew to start business jointly and to give to it the character of an ancestral joint Hindu family business by their own act. Such business would merely be a contractual partnership and could be governed by the provisions of the Contract Act.

[P 517 C 1,2 ; P 518 C 1]

(b) **Hindu Law—Joint family — Presumption of jointness — Presumption varies in each case—It becomes weaker and weaker as one goes away from founder of family.**

The strength of presumption that a Hindu joint family continues to be joint varies in each case. The presumption is stronger in the case of brothers, than in the case of cousins and the further one goes from the founder of the family the presumption becomes weaker and weaker. In case of second and third cousins, the presumption of jointness practically disappears: 1929 P C 8, *Foll.* [P 517 C 2]

(c) **Partnership—Firm is not person—One firm cannot become partner in another firm.**

A partnership firm is not a person, but is merely a collective name of the individuals who are members of the partnership, and as such one firm cannot become partner in another firm: 1935 Lah 896, *Ref.* [P 518 C 2]

(d) **Hindu Law—Joint family—Managing member entering into partnership with**

stranger—Other members of family as unit do not become partners but only those who enter into partnership — Partnership is governed by Contract Act.

Where a managing member of a joint family enters into a partnership with a stranger, the other members of the family do not ipso-facto become partners in the business so as to clothe them with all the rights and obligations of a partner, as defined by the Contract Act. In such a case the family, as a unit, does not become a partner, but only such of its members as, in fact, enter into a contractual relation with the stranger: Such a partnership will be governed by the Contract Act: 1934 P C 192, *Foll.*

[P 518 C 2]

(e) **Limitation Act (1908), Art. 106—Partnership dissolved by death of partner—Suit against son for debts due from deceased partner is governed by Art. 106.**

Where a partnership is dissolved on the death of a partner, and it is sought to make the sons of the partner liable for debts due from him as a member of the partnership, a suit for recovery of the debts is governed by Art. 106, Limitation Act, and must be instituted within three years of the death of the partner. [P 519 C 2]

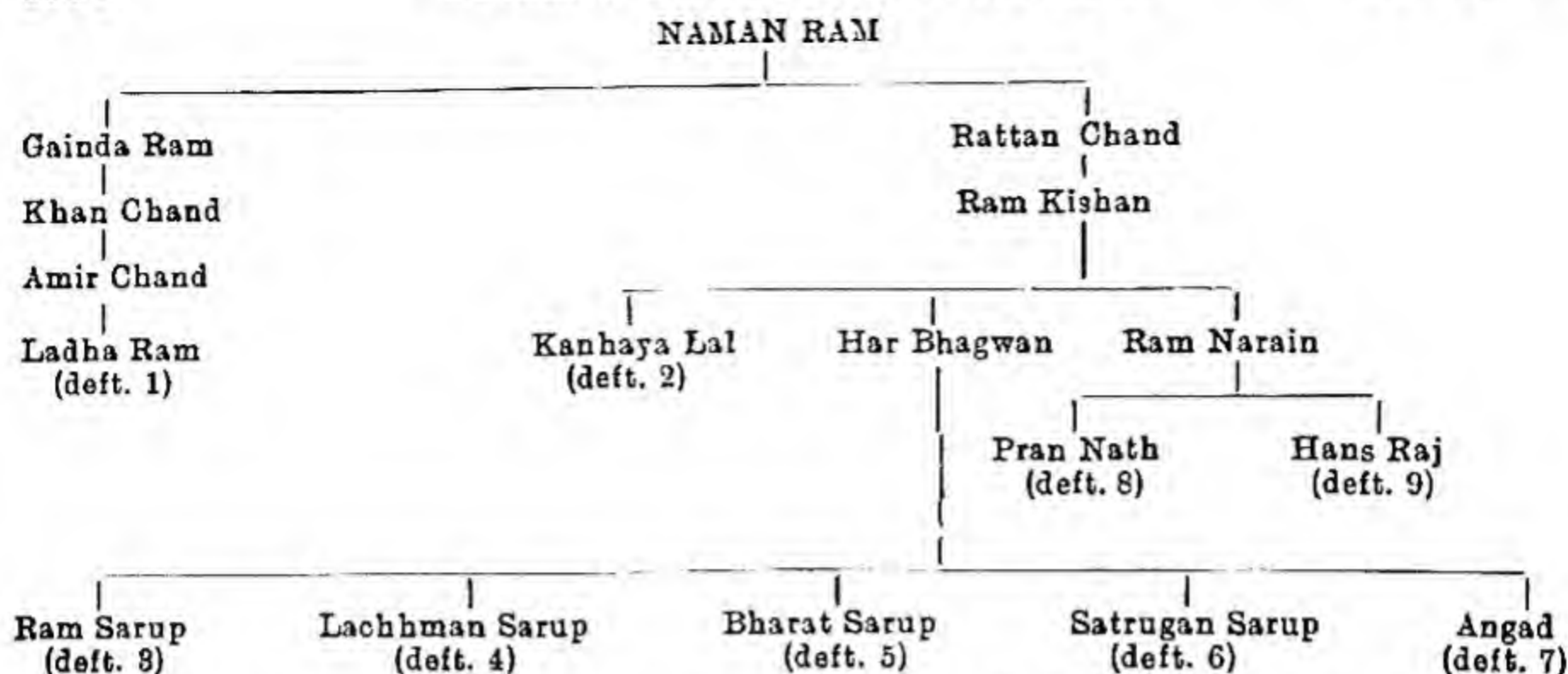
J. G. Sethi and M. L. Sethi—for Appellant.

Mehr Chand Mahajan, J. L. Kapur, Qabul Chand, Shamair Chand, Achhru Ram, Amar Nath Chona and Ram Lal Anand I—for Respondents.

Judgment.—The following pedigree-table will be helpful in understanding the facts of this case:

(See page 515)

This appeal has arisen out of a suit for recovery of Rs. 6,628-1-0 instituted by the firm *Devi Dayal Brij Lal*, carrying on business at Sargodha, against the firm *Ram Narain-Ladha Ram*. *Ladha Ram* as well as all the descendants of *Ram Kishen* were impleaded as defendants on the ground that the firm *Ram Narain-Ladha Ram* situated at Sargodha was a branch of the joint Hindu family firm *Ram Kishen-Ladha Ram* carrying on business at Tankiwala. One *Narsingh Das*, who was admittedly a stranger to this family, was impleaded as defendant 10 as he was a partner in the firm *Ram Narain-Ladha Ram*. The case of the plaintiffs was that *Ladha Ram*, defendant 1, and *Ram Kishen*, father of defendant 2 and grand-father of defendants 3 to 9, were members of a joint Hindu family, that this family had an ancestral business at *Takianwala* which was started by *Rattan Chand* and *Khan Chand*, that after the death of *Rattan Chand* his only son *Ram Kishen* took his place and that



the business has continued up to the present day as an ancestral business of the joint Hindu family of Naman Ram. The plaintiff firm started dealings with Ram Narain-Ladha Ram in the year 1924 through Narsingh Das who was one of the partners of the latter firm. The last balance was executed by Narsingh Das on behalf of the firm Ram-Narain-Ladha Ram on 4th October 1930 for Rs. 8,544-10-6. Two transactions took place after the execution of the balance and the amount due to the plaintiff on 19th May 1933 was Rs. 4,943-1-0, on account of principal, and Rs. 1,685, on account of interest. A decree for Rupees 6,628-1-0 was therefore claimed against the defendant firm, as well as against Ladha Ram, all the descendants of Ram-Kishan and Narsingh Das.

Narsingh Das, defendant 10, confessed judgment, and Ladha Ram, defendant 1 did not attend, and proceedings were ex parte against him. Pran Nath and Hans Raj, the sons of Ram Narain, pleaded that though their father Ram Narain was a partner in the firm Ram Narain-Ladha Ram, it was not a joint family business but a contractual partnership, that the partnership dissolved on the death of their father, and that as they had not joined the partnership they were not liable. They also pleaded that the suit was barred by limitation as it was brought more than three years after the death of their father. Ram-Narain, Kanhaya Lal and the sons of Har Bhagwan pleaded that the business at Tankiwala was not a joint Hindu family business but a contractual partnership. The partners in the Tankiwala firm were Ram-Kishan and Ladha Ram in equal shares.

It was further pleaded that the firm Ram-Narain-Ladha Ram at Sargodha was a separate concern altogether and had no connexion with the Tankiwala firm though the firm at Tankiwala had lent money to Ram Narain-Ladha Ram, that in 1922 the sons of Ram Kishan had effected a partition amongst themselves, and it was agreed that the debts due to the Tankiwala firm by the firm Ram Narain-Ladha Ram of Sargodha were to be discharged by Ram Narain alone who was separate from his brothers Kanhaya Lal and Har Bhagwan. Kanhaya Lal and Har Bhagwan remained partners along with Ladha Ram in the Tankiwala firm, the name of which was changed to Kanhaya Lal-Ladha Ram. It was stated by Kanhaya Lal and the sons of Har Bhagwan that they were never partners in the firm Ram Narain-Ladha Ram, and that they are therefore not liable for the debt incurred by that firm.

The trial Court held that the firm Ram Kishan-Ladha Ram, the name of which was later on changed to Kanhaya Lal-Ladha Ram, was not a joint Hindu family ancestral business, but that it was a contractual partnership. It was further found by the trial Court that the Sargodha firm was a branch of the Tankiwala firm, that there had been a separation of the joint Hindu family in 1922, and that thereafter the Sargodha firm consisted only of three partners, namely, Ram Narain, Ladha Ram and Narsingh Das. It was also held that Kanhaya Lal had joined this firm after the death of Ram Narain. On these findings the trial Court awarded the plaintiffs a decree for Rs. 6,628-1-0 with costs against the firm Ram Narain Ladha

Ram and against Ladha Ram, defendant 1, Kanhaya Lal, defendant 2, and Narsingh Das, defendant 10. Against this decision of the trial Court the plaintiffs have preferred an appeal to this Court and the sole prayer in this appeal is that the plaintiffs' suit should be decreed against all the defendants. Kanhaya Lal, defendant 2, has also preferred an appeal on the ground that he is no way responsible for the liabilities of the firm Ram Narain-Ladha Ram and that the suit should have been dismissed as against him. Both these appeals can be conveniently disposed of by one judgment. It would be convenient in this judgment to designate the firm Ram Narain-Ladha Ram as the Sargodha firm and the firms Ram Kishen-Ladha Ram and Kanhaya Lal-Ladha Ram as the Tankiwala firm.

It was contended by Mr. Sethi on behalf of the plaintiffs that Rattan Chand and Khan Chand were members of a joint Hindu family as was clear from the fact that one and a half kanals of agricultural land was jointly owned by them. As these two persons were carrying on money-lending business, one-and-a-half kanals of land must be held to be the property of the joint firm. On the death of Rattan Chand the firm Khan Chand-Rattan Chand at Tankiwala was named Ram Kishen-Khan Chand, Ram Kishen being the only son of Rattan Chand. When Khan Chand died the business came to be known as Amir Chand-Ram Kishen, Amir Chand having taken the place of his father Khan Chand. On the death of Amir Chand, Ladha Ram succeeded and the firm was known as Ram Kishen-Ladha Ram and, on the death of Ram Kishen in the year 1914, the firm was named Kanhaya Lal-Ladha Ram. It was maintained by the learned counsel that the firm alluded to above continued to carry on business at Tankiwala and that there was a presumption, therefore, that the Tankiwala firm was the ancestral business of all the descendants of Naman Ram. The learned counsel also contended that the following facts clearly establish the ancestral nature of the business at Tankiwala:

1. Ladha Ram had admitted in his statement, dated 25th July 1934, that Rattan Chand and Gainsa Ram were real brothers and that they were joint. 2. At the deaths of Rattan Chand, Khan Chand, Amir Chand and Ram Kishen no accounts

were taken and the joint family business was not discontinued. As soon as the father died, his son or sons began taking part in the business at Tankiwala. 3. A great deal of property was purchased with the funds of the Tankiwala shop and this property continues to be joint up to now. 4. Mortgagee rights were acquired in the name of different members of the family and all these rights have been shown in the books of the firm as the property of the firm. 5. The income of the entire immoveable property belonging to this family was credited towards the funds of the shop in the accounts. 6. A joint khata of the branch of Rattan Chand had been maintained in the books of the firm up to date and the different sums of money sent by Har Bhagwan and Ram Sarup to Tankiwala were credited in the khata of Rattan Chand. 7. The income of the entire property belonging to the family of Naman Ram as well as the firms at Tankiwala and Sargodha was jointly assessed to income tax.

The learned counsel contended that most of the facts alluded to above had been established on the present record from the statement of Kanhaya Lal himself and that the conclusion was, therefore, irresistible, that all the defendants had been carrying on a joint family business which had descended from Naman Ram. It was urged that the Sargodha firm was opened in the year 1911 with the funds of the Tankiwala firm and that the Tankiwala firm owned three-fourths share in the Sargodha firm and that one-fourth share was allotted to Narsingh Das, defendant 10, as he was managing the Sargodha firm on behalf of the other partners. On behalf of the defendants it was contended that the mere fact that Rattan Chand and Khan Chand owned one and a half kanals of agricultural land jointly did not show that they were members of a joint Hindu family firm. It was open to the uncle and the nephew to acquire property jointly or to carry on business jointly. The business started by the uncle and nephew, however, would merely be a contractual partnership and would be governed by the provisions of the Indian Contract Act. By starting a business jointly the uncle and the nephew could not convert a contractual partnership into a joint Hindu family ancestral business by their own act. Reference may be made in this connection to para. 234

of Mulla's Hindu Law which runs as follows:

In Hindu Law a business is a distinct heritable asset. Where a Hindu dies leaving a business, it descends like other heritable property to his heirs. If he dies leaving male issue, it descends to them. In the hands of the male issue it becomes joint family business, and the firm which consists of the male issue becomes a joint family firm. The joint ownership so created between the male issue is not an ordinary partnership arising out of a contract, but a family partnership created by the operation of law. Therefore, the rights and liabilities of the coparceners constituting the family firm are not to be determined by exclusive reference to the provisions of the Indian Contract Act, 1872, relating to the partnerships, but must be considered also with regard to the general rules of Hindu Law which regulate the transactions of joint families.

In the present case the firm at Tankiwala could not be regarded as a heritable asset which had descended to Rattan Chand and Khan Chand from the common ancestor Naman Ram. There is no evidence to the effect that Naman Ram owned any property and though it is stated by Ladha Ram that Rattan Chand and Gaiinda Ram were joint it is nowhere asserted that at that time they were carrying on any business. The first indication of the fact that some members of this family were carrying on any business is provided by the fact that Rattan Chand and Khan Chand owned $1\frac{1}{2}$ kanals of agricultural land jointly and that they were carrying on moneylending business. In these circumstances, it cannot be held that the firm at Tankiwala was a heritable asset which descended to the branches of Ram Kishen and Ladha Ram from Naman Ram.

The ruling—121 I C 431 (1)—relied upon by Mr. Sethi on behalf of the plaintiffs merely lays down that among Hindus, in the absence of any clear and cogent evidence of partition, the presumption is that an uncle and his nephew are joint. This ruling merely deals with immoveable property held by an uncle and a nephew jointly and the question of ancestral business of a joint Hindu family has not been considered in this ruling. Coparcenary, with all its incidents, is a creation of Hindu law and if a business is not a heritable asset descended from the common ancestor it cannot be regarded as the ancestral business of a Hindu joint family. The following

1. Phullo v. Indar, (1980) 121 I C 431.

observations from a judgment of their Lordships of the Privy Council, reported in 49 Cal 560 (2), may be reproduced in extenso:

The distinction between an ancestral business and one started like the present after the death of the ancestor as a source of partnership relations is patent. In the one case, these relations result by operation of law from a succession on the death of an ancestor to an established business, with its benefits and its obligations. In the other they rest ultimately on contractual arrangement between the parties.

A contractual partnership may be joint Hindu family property, but such partnership will not be governed by the provisions of Hindu law relating to coparcenary property. It is possible for an uncle and a nephew to possess joint family property by throwing all their property into the common fund, but it is not possible for an uncle and a nephew to start business jointly and then give to it the character of an ancestral joint Hindu family business. The Sargodha firm was started in 1911. Admittedly, a stranger was made one of the partners in this firm. The debts which form the basis of the present suit were contracted by the Sargodha firm between the years 1922 and 1930. During that period Ladha Ram and Ram Narain are alleged to have been carrying on the Sargodha firm on behalf of the Tankiwala firm. We have therefore to see whether the two branches of the family of Naman Ram were joint between 1922 and 1930, or whether a disruption had taken place before 1924. It was held in 53 Bom 213 (3), by their Lordships of the Privy Council that :

The strength of the presumption that a Hindu joint family continues to be joint necessarily varies in each case. The presumption is stronger in the case of brothers than in the case of cousins, and the further one goes from the founder of the family the presumption becomes weaker and weaker.

There is therefore no presumption that Ram Narain, Har Bhagwan and Kanhaya Lal on the one side, and Ladha Ram on the other, were joint in the year 1922. In the case of second or third cousins, the presumption of jointness practically disappears. There is nothing to prevent brothers and cousins joining in a contractual partnership and if they do so, the firm will be governed by the provi-

2. Sanyasi Charan v. Krishnadhan Banerjee, 1922 P O 237=67 I O 124=49 I A 108=49 Cal 560 (P O).

8. Yellappa Ramappa v. Tipanna, 1929 P O 8=114 I O 13=56 I A 13=53 Bom 213 (P O).

sions of the Contract Act and will not be subject to the provisions of Hindu law.

A general partition of the family was reported to the Patwari by Ladha Ram on 16th June 1927, and a mutation was entered in his name of a certain area at village Mango Kalan. Kanhaya Lal has also deposed that there was a partition of different properties in the year 1922. This evidence has been accepted by the trial Court and we see no reason to reject the statement of Kanhaya Lal as untrue. The entries in the bahis regarding the tambols also provide a strong indication of the fact that the two branches of this family had separated before the year 1922. In fact, the tambol entries seem to show that first of all there was a separation between Ram Kishen on the one side and Ladha Ram on the other, and some years later, there was a separation between the descendants of Ram Kishen, namely Ram Narain, Har Bhagwan and Kanhaya Lal inter se. The fact that the Tankiwala firm had been making payments on behalf of the sons of Ram Narain and Har Bhagwan or receiving deposits from them even after the year 1922 does not show that there had been no separation between the two branches of the family. These entries are explainable on the ground that the Tankiwala firm and the Sargodha firm had been acting as bankers of each other, and after receiving money from third parties had been crediting it to the person or the firm concerned.

As far as joint assessment of income-tax is concerned, the amount of tax paid on behalf of the Sargodha firm has been debited to the account of the Sargodha firm in the bahis of the Tankiwala firm. The indications of jointness relied upon by Mr. Sethi on behalf of the plaintiffs are, therefore, consistent with jointness as well as separation. We are therefore of the opinion that the lower Court was correct in holding that the Tankiwala firm is not a joint Hindu family concern and that there had been a disruption of the joint Hindu family before 1924. The next question for consideration is, whether the Sargodha firm was a branch of the Tankiwala firm or whether it was an independent business started by Ram Narain Ladha Ram and Narsingh Das. Reliance was placed on behalf of the plaintiffs on an entry in the surh bahi of the Tankiwala firm marked as Ex. D-57.

This entry shows that Rs. 7,000 were advanced to Ladha Ram and Ram Narain for starting the Sargodha firm. The concluding words of the entry are :

Three shares belong to the firm Bhai Ram Kishen Ladha Ram Chichras at Tankiwala and the fourth share in profits and losses is given to Narsingh Das Gorowara.

It was urged by Mr. Sethi that this entry conclusively showed that it was the firm at Tankiwala that started the Sargodha firm and allowed Narsinghdas one-fourth share in this new firm. It was maintained that the joint Hindu family business at Tankiwala, or all the living members of the family of Naman Ram, became partners in the Sargodha firm in virtue of their ownership of the Tankiwala firm. In our opinion, the entries in the bahi do not necessarily lead to this conclusion. The opening words of the entry show that Rs. 7,000 were debited to Ladha Ram and Ram Narain and not to the Sargodha firm. Moreover, we find in the khata bahi that this sum of Rs. 7,000 was lent to Ram Narain and Ladha Ram for the purposes of the Sargodha firm, and it was debited to the account of these two individuals. Ram Kishen, the father of Ram Narain, was alive in 1911, and this amount of Rs. 7,000 is not debited to Ram Kishen. It appears, therefore, that this money was advanced to Ram Narain and Ladha Ram by the Tankiwala firm as a loan. It is well-settled that a firm cannot become a partner in another firm. In 1935 Lah 896 (4), it was held that a partnership firm is not a person but is merely a collective name for the individuals who are members of the partnership and as such cannot be a partner in another firm. It was also held in 1934 P C 192 (5), that :

Where a managing member of a joint family enters into a partnership with a stranger, the other members of the family do not ipso facto become partners in the business so as to clothe them with all the rights and obligations of a partner, as defined by Contract Act. In such a case the family, as a unit, does not become a partner, but only such of its members as, in fact, enter into a contractual relation with the stranger: such a partnership will be governed by the Contract Act.

In the present case a stranger was admittedly a partner in the Sargodha firm, and as the Tankiwala firm has been

4. Shiv Narain & Sons v. Commr. of Income Tax, 1935 Lah 896=160 I C 155.

5. Pichappa Chettiar v. Chockalingam Chettiar, 1934 P C 192=150 I C 802 (P C).

held to be a contractual partnership, it cannot be said that the Tankiwala firm became a partner in the Sargodha firm. Exs. B and C, printed at p. 85 and 95 respectively, of Vol. 3 of the paper book, show that there were only three partners of the Sargodha firm, namely Ladha Ram, Narsingh Das and Ram Narain. The statements separately show the profit and loss account of each of the partners of the firm. On 18th November 1922 a letter was written by the partners and the proprietors of the firm of Ram Narain-Ladha Ram to the Manager of the Punjab National Bank authorizing Narsingh Das as one of the partners to sign and negotiate hundis, bills, etc., on behalf of the firm. This letter is signed by Ladha Ram and Narain Das, and they are described as the partners and proprietors of the firm Ram Narain-Ladha Ram. Another letter of similar description was written to the Manager, Punjab National Bank, on 1st July 1928, and therein Ram Narain, Ladha Ram, and Narsingh Das are described as "all the partners and proprietors of the firm Ram Narain-Ladha Ram." A copy of the assessment order for the year 1928-29 with respect to the Tankiwala firm shows that it was represented to the income-tax authorities that the firm Ram Narain-Ladha Ram was a separate entity and that the firm had been constituted by means of a regular partnership deed executed on 21st January 1929. We therefore hold that the Sargodha firm was an independent business concern and was not a branch of the Tankiwala firm.

The next question for consideration is whether Kanhaya Lal was a partner in the Sargodha firm. Kanhaya Lal has denied on oath that he ever joined the Sargodha firm. Some evidence has been produced on behalf of the plaintiffs to show that Kanhaya Lal sometimes used to sit at the Sargodha shop. This evidence is very vague and inconclusive and does not show that Kanhaya Lal was a partner of the Sargodha firm. Ladha Ram and Narsingh Das are trying to rope in Kanhaya Lal and all other members of the family of Naman Ram as they cannot escape liability themselves and it is to their interest to get a decree passed against all the descendants of Naman Ram. The letters addressed by Ladha Ram and Narsingh Das to the Manager of the Punjab National Bank, referred to

above, conclusively prove that Kanhaya Lal was not a member of the Sargodha firm. In these circumstances, it appears to us to be unnecessary to deal with the oral evidence relating to the participation of Kanhaya Lal in the management of the Sargodha firm. Suffice it to say that there is not a single satisfactory witness on whom reliance may be placed for the purpose of holding that Kanhaya Lal was a partner in the Sargodha firm. Ram Narain was a partner in the Sargodha firm till his death on 7th February 1930. On his death the partnership dissolved, and in order to make his sons liable for the debts due from Ram Narain as a member of the partnership, a suit ought to have been instituted within three years of the death of Ram Narain. The trial Court is, therefore, right in holding that the present suit against Pran Nath and Hans Raj is barred under Art. 106, Lim. Act.

As it has been held that the Sargodha firm was not a branch of the Tankiwala firm and that Ram Narain, Ladha Ram and Narsingh Das were the only partners in the Sargodha firm, no liability attaches to the sons of Har Bhagwan so far as the debts of the Sargodha firm are concerned. On the findings given above, no other question arises in the present appeal. For the reasons given above we dismiss the plaintiffs' appeal (Civil Appeal 536 of 1935) with costs in favour of defendants 3 to 8. We accept the appeal of Kanhaya Lal (Civil Appeal 206 of 1935), set aside the judgment and decree of the trial Court, so far as he is concerned, and dismiss the plaintiffs' suit as against him. As between the plaintiffs and Kanhaya Lal the parties will bear their own costs throughout.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Lahore 519

JAI LAL, J.

Balmokand—Petitioner.

v.

Ram Saran Das and others—Decree-holders—Opposite Parties.

Civil Revn. No. 420 of 1935, Decided on 10th December 1935, from order of Senior Sub-Judge Delhi, D/- 7th May 1935.

(a) Rateable Distribution — Two persons having decrees against same man attaching same property in different Courts—Execution proceedings transferred to same Court

—One can claim rateable distribution in the assets realized by other.

A had obtained a decree against X in the Court of Subordinate Judge, 2nd class. B had obtained a decree against X in the Court of Subordinate Judge, 1st class. Both had attached the same property in execution in the respective Courts. A got his execution proceeding transferred to the Court of 1st class where B's execution was proceeding. The property was sold in execution of B's decree and A claimed rateable distribution:

Held: that by virtue of S. 63 read with S. 73, Civil P. C., A, as soon as his proceedings were transferred, was entitled to claim share in the assets realised in that Court in the execution of B's decree, without any further application for execution in such Court: 1933 *Mad* 627; 1933 *All* 563; 1935 *Bom* 176 and 1934 *Cal* 559, *Foll.* [P 521 C 1]

(b) Execution—Abatement—O. 22, Rr. 3, 4 and 8 are not applicable to execution proceedings.

As to the abatement of an execution application, it is clear from O. 22, R. 12 that the provisions of Rr. 3, 4 and 8 of O. 22 do not apply to proceedings in execution of a decree.

[P 521 C 1]

Bhagwat Dayal—for Petitioner.

Nawal Kishore and Fakir Chand Mital—for Opposite Parties.

Order.—The petitioner Balmokand had a decree for money against Pandit Kesho Nath. This decree was passed by a Subordinate Judge of the second class. The respondents Ram Saran Das and others also had obtained a personal decree against the same judgment-debtor, but in the Court of the Sub-Judge first class. Both the decree-holders attached the same house in execution of their respective decrees and in the Courts which had passed them. It is not, however, known which of the attachments took place first, but this question is immaterial for the purposes of the present case. The petitioner then applied to the Sub-Judge, second class, to transfer the execution proceedings to the Sub-Judge, first class, as the property had been attached by the latter in the respondents' decree as well. This application was apparently made under S. 63, Civil P. C. The property was ultimately sold by the Sub-Judge, first class, who held that the entire sale proceeds should go to the respondents and that the petitioner was not entitled to a rateable share because he had not got his decree transferred to his Court; presumably he meant under S. 39, Civil P. C., and had not made an application for execution in the prescribed form in his Court. Another ground was that when the execution proceedings were pending

in his Court the judgment-debtor Kesho Nath had died and it was only the respondents who had applied for the substitution of his legal representatives and the petitioner had not done so. It appears however that the petitioner did make an application to bring on the record the legal representatives of the judgment-debtor but not the right persons.

On this petition it is urged that by virtue of S. 63 read with S. 73, Civil P. C., no fresh application for execution was necessary to be made to the Sub-Judge, first class; and secondly, that the law relating to abatement of suits in the absence of substitution of legal representatives does not apply to proceedings in execution of decrees. In my opinion both these contentions have force. The learned Subordinate Judge has relied upon 1928 *Mad* 496 (1) in support of his views, but the later judgment of the Madras High Court in 1933 *Mad* 627 (2) has taken the opposite view and the Allahabad High Court in 55 *All* 622 (3), the Bombay High Court in 59 *Bom* 310 (4) and the Calcutta High Court in 61 *Cal* 240 (5), have expressed the opinion that, in circumstances as in this case, no fresh application for execution or even for grant of a rateable share is necessary to be made in the Court in which the assets are held. S. 63 provides that where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property, and shall determine any claim thereto and any objection to the attachment thereof, shall be the Court of highest grade, or where there is no difference in grade between such Courts, the Court under whose decree the property was first attached. It is clear that in the present case the Court of the Sub-Judge, first class, was the proper Court to deal with matters mentioned in S. 63; and the cases cited above

1. Nanjunda Chettiar v. Nalla Kampan Chettiar, 1928 *Mad* 496=109 I C 404=55 M L J 120.
2. Ademma v. Venkata Subbayya, 1933 *Mad* 627=144 I C 923=56 *Mad* 632=65 M L J 137.
3. Sarjoo Ram Sahu v. Partap Narain, 1933 *All* 563=146 I C 575=55 *All* 622=1933 A L J 921.
4. Dhirandra Roy Krishna Rao v. Virbhadrappa, 1935 *Bom* 176=159 I C 505=59 *Bom* 310=37 *Bom* L R 78.
5. Gourgopal De v. Kamalkalika Dutta, 1934 *Cal* 559=152 I C 69=61 *Cal* 240.

the question of rateable distribution of assets is a matter which falls within the jurisdiction of the Sub-Judge, second class, to the first class, the petitioner held a rateable share in the assets as determined by the Sub-Judge, first

class, on abatement of the application, made on O. 22, R. 12 that the provisions of Order 3, 4 and 8 of O. 22 do not apply to proceedings in execution of a decree, therefore, that the petitioner was entitled to a rateable share in the assets in the present case and the order of the Sub-Judge, first class, was clearly wrong. I set the order aside and send the case back to the learned Judge with directions to distribute the assets between the two decree-holders rateably. The petitioner will have his costs of these proceedings against the respondents.

B.D./R.K.

Order set aside.

A. I. R. 1936 Lahore 521

ADDISON AND ABDUL RASHID, JJ.
Simla Banking and Industrial Co. Ltd.—Decree-holder—Petitioner.

v.

Dittu Mal Hardial and others—Judgment debtors and others — Opposite parties.

Civil Revn. No. 94 of 1934, Decided on 15th January 1936, from order of Sub-Judge, 1st Class, Lahore, D/- 1st November 1933.

Civil P. C. (1908), S 115 and O. 21, R. 52—Custody Court has jurisdiction to decide question of priority—No revision lies even if decision is erroneous in law especially where aggrieved party has remedy of suit.

Where the custody Court decided that certain person is not entitled to any priority, no revision is competent even if the decision is erroneous in law as the custody Court has jurisdiction to decide such question. Further the petitioner has remedy to file a regular suit: 19 Cal 286; 16 Bom 577; 1917 Cal 13 and 1930 Bom 451, Rel. on; 1921 Mad 218, Disting. [P 523 Q 1]

Badri Das—for Petitioner.

Kishori Lal—for Opposite Parties.

Abdul Rashid, J.—On 8th January 1927 Karam Chand, one of the partners in the firm Dittu Mal Hardial, instituted a suit for dissolution of partnership against his brothers Khushal Chand and Dharam Pal and his mother Mt. Sham Devi. On 27th March 1933, Mr. Harnam Singh, Subordinate Judge, 1st Class,

Lahore, passed a final decree dissolving the partnership. It was stated in the decree sheet that the plaintiff Karam Chand is given a decree for Rs. 25,081.2 1½ and costs against Khushal Chand, and that a sum of Rs. 41,487.0.5 is also recoverable by Dharam Pal, defendant, from Khushal Chand. The Receiver Lala Hari Chand was directed to pay annas 4 in the rupee to all the creditors of the firm and the balance was to be deposited by the receiver in Court, and was payable from time to time to the creditors of the firm pro rata. In pursuance of the decree notices were sent to all the creditors. On 26th April 1933 an application was presented by the Simla Banking and Industrial Company Limited in the Court of Sardar Harnam Singh, stating that the applicant had obtained a decree against the firm Dittu Mal Hardial for about Rs. 10,000, that the applicant's decree was being executed in the Court of the Senior Subordinate Judge at Lahore, that the money belonging to the firm Dittu Mal Hardial in the hands of Lala Hari Chand, receiver, had been attached by the order of the Senior Subordinate Judge dated 26th September 1928, and that the applicant was therefore entitled to priority over the other attaching creditors who had got the amounts of their decrees attached after the attachment in the execution of the decree of the applicant.

It was prayed that the Court may be pleased to suspend the distribution of the assets of the firm Dittu Mal Hardial, and that the decretal amount due to the applicant may be paid before the dues of all other creditors whose attachments were later in date or who had not effected any attachments at all. This application was dismissed by the learned Subordinate Judge on the ground that the award of a decree or the effecting of an attachment did not place the decree-holder on any better footing than the other creditors of the firm whose debts had been ascertained. Against that decision the decree-holder, the Simla Banking and Industrial Co. Ltd., has preferred the present petition for revision to this Court. It was contended by Mr. Badri Das on behalf of the petitioner that as funds belonging to the firm Dittu Mal Hardial in the hands of the receiver had been attached by the order of the Senior Subordinate Judge, dated 26th Septem-

ber 1928, at the instance of the petitioner, the petitioner was entitled to priority over all other creditors. Reliance was placed in this connexion on a Single Bench ruling of the Bombay High Court, reported as 106 I C 113 (1), where it was held that it had been the practice of the Bombay High Court on the original side to make a charging order whenever execution was sought against assets in the hands of a receiver appointed by the Court in a partnership action. The petitioner obtaining such a charging order was entitled to rank in priority to all other creditors who had not obtained charging orders or who were not otherwise attaching creditors.

The learned counsel also relied on 44 Mad 100 (2), and contended that where property in the hands of the custody Court is the subject of several attachments in execution of several decrees, the custody Court must award priority to the first attaching creditor in point of time. If the other decree-holders want to share in the rateable distribution, they must apply in time to the attaching Court. It was urged that the power conferred on the custody Court by the proviso to O. 21, R. 52, Civil P. C., to determine claims to priority etc., did not entitle the custody Court itself to distribute the assets rateably among the attaching decree-holders. According to the learned counsel any attachment order issued under the provisions of the Civil Procedure Code had the same effect as a charging order and such an order took effect from the date of the making of the application for execution or at the latest from the date when the attaching Court issued the order for the attachment of the property lying in the custody Court. On behalf of the respondent it was contended that all the creditors of the firm Dittu Mal Hardial were entitled to pro rata distribution and that the attaching creditors were not entitled to any priority. Reliance was placed in this connexion on 16 Bom 577 (3), where it was held that where a fund, such as the assets of a partnership, is in the hands of the Court

through its officer, the receiver, one out of the whole body of the creditors against the fund will not be allowed to gain priority over the remainder by the expedient of attaching the moneys in the hands of the receiver. Such an attachment is an interference with the Court's possession through its officer, the receiver, and may not therefore be made without the Court's leave being first obtained, which will not be granted except on such terms as will ensure equality between the creditors.

In 44 Cal 1072 (4), it was held that where a fund in Court has been attached by several creditors of the judgment-debtor, none of the attaching creditors is entitled to preferential treatment by reason of the priority of his attachment, as the attachments create no charge or lien upon the fund, so long as the fund is in the custody of the Court. In 54 Bom 667 (5), the Full Bench ruling of the Madras High Court, reported as 44 Mad 100 (2), was fully discussed and it was pointed out that in the Madras case the Court was dealing with money standing to the credit of a minor in an original side suit, that the money there belonged to the minor absolutely subject to his attaining the age of 21, and there was no question of the Court administering the fund or of the appointment of a receiver or anything of that nature. The Madras case is therefore not of any great assistance in the present case. O. 21, R. 52, Civil P. C., lays down that where the property to be attached is in the custody of any Court, the attachment shall be made by a notice to such Court, provided that any question of title or priority arising between the decree-holder and any other person not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court. It appears to us that the provisions of O. 21, R. 52 are applicable to the present case, but it is unnecessary to give a considered opinion on this point, as this petition must be dismissed on another ground.

1. Kesserbai v. Kaku Vallabdas Raoji, 1927 Bom 394=106 I C 113=29 Bom L R 665.

2. Visvanadhan Chetti v. Arunachalam Chetti, 1921 Mad 218=60 I C 302=44 Mad 100 (F B).

3. J. Khan v. Ali Mahomed Haji Umer, (1892) 16 Bom 577.

4. Thakur Das Moti Lal v. Joseph Iskendar, 1917 Cal 13=41 I C 516=25 C L J 595=21 C W N 887=44 Cal 1072.

5. Rukhiabai v. Vadilal Purshotamdas & Co., 1930 Bom 451=127 I C 481=54 Bom 667=32 Bom L R 850.

The custody Court having decided that the petitioner is not entitled to priority by virtue of his attachment, it is open to the petitioner to file a regular suit to establish his priority, vide 19 Cal 286 (6). Before the petitioner can succeed in this Court it must be held that the custody Court has exercised jurisdiction not vested in it by law, or has failed to exercise jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity. In our opinion no question of jurisdiction or of the illegal or improper exercise of jurisdiction arises in the present petition. The most that can be said on behalf of the petitioner is that the decision of the custody Court is erroneous in law. It is apparent that no revision can be entertained by this Court under S. 115, Civil P. C., simply because the judgment of the lower Court is erroneous on a question of law. The custody Court had jurisdiction to decide the question of priority, and whether the decision is right or wrong, it cannot be said that the lower Court had acted with material irregularity in the exercise of jurisdiction. For the reasons given above, we dismiss this petition for revision but leave the parties to bear their own costs in this Court.

K.S./R.K.

Petition dismissed.

6. Tikun Singh v. Sheoram Singh, (1892) 19 Cal 286.

A. I. R. 1936 Lahore 523

AGHA HAIDAR, J.

Kalyan Singh—Petitioner.

v.

K. S. Verma—Decree-holder—Auction-purchaser and others—Judgment-debtors—Opposite Parties.

Civil Revn. No. 656 of 1935, Decided on 26th February 1936, from decision of Sub-Judge, 1st Class, Rohtak, D/- 22nd June 1934.

Lahore High Court Rules, Vol. 1, Ch. 12-L, Para. 20—Execution sale—Commission of auctioneer — Sale set aside—Commission must be refunded.

So long as an auction sale is set aside either under provisions of Civil P. C., or under any compromise between the parties or otherwise, under the rules as framed by the Lahore High Court in Vol. 1, Ch. 12-L, para. 20, the auctioneer is bound to return his commission. The rule is hard, but it is very clear and so must be followed.

[P 524 O 1]

Fikar Chand Mital—for Petitioner.

Krishna Swarup—for Opposite Parties.

Order.—This application in revision raises a novel question. The opposite party obtained a money decree and in execution of the same put certain property to sale. He himself purchased the property for a sum of Rs. 6,300. Afterwards a declaratory suit was brought by one Mt. Punni claiming the property as her own under the provisions of O. 21, R. 63, Civil P. C. The suit was compromised on 16th October 1933. As a result of that compromise the auction-purchaser, who was a party to Mt. Punni's suit, made an application, dated the 15th December 1933, in which he stated that he had obtained a sum of Rs. 4,000 from the judgment-debtor in full satisfaction of his debt and that the property which had been attached and put to sale may be released from the consequences of attachment and sale, since he had admitted the claim for a declaration brought by Mt. Punni. This application seems to have been dismissed for default and the parties have been unable to invite my attention to any order of the Court either granting or rejecting this application on merits. When the sale took place the auctioneer was paid a sum of Rupees 256-8-0 as his commission by the decree-holder. The decree-holder has now made an application for the refund of the commission paid to the auctioneer on the ground that in consequence of the decree based upon compromise, the sale had been set aside. The auctioneer has contended that no refund should be allowed inasmuch as the decree was the result of the compromise and the sale had been set aside otherwise than on account of irregularity in publishing and conducting the sale or for defect in the judgment-debtor's title. Under the Rules and Orders of this Court, Vol. 1, Ch. 12-L, para. 20, the following rule has been framed:

The Court auctioneers will not be entitled to any remuneration for conducting a sale which is ultimately set aside but the expenses actually incurred by them on the sale may be recovered from the decree-holder if no deposit for the purpose has already been made by him and paid to them.

There is no formal order setting aside the sale or refusing to set aside the sale in pursuance of the application made by the decree-holder auction-purchaser on 15th December 1933, but the position

seems to have been accepted by the auctioneer's learned counsel in this Court that the sale must be taken to have been set aside. The Court below on a construction of this rule has held that the decree-holder was entitled to get the refund. The auctioneer has come up to this Court in revision. It is argued on his behalf that the intention of the rule quoted above was to cover cases which fell under O. 21, Rr. 89, 90 and 91, Civil P. C., and that if parties long after the sale had taken place chose to settle their differences and give up their right under the sale the auctioneer should not be made to refund the commission. The rule framed by this Court, however, does not make any such exception. Personally I feel inclined to the view that the rule as framed was contemplating the setting aside of a sale under any of the provisions of the Code noted above; but the language used in the rule is clear and does not make any distinction, so long as the sale is set aside. The case is a hard one, but the rule as it stands is quite clear and there is no justification in reading into it any qualifying words or expressions. After all, this is an application in revision under S. 115, Civil P. C., and I do not think that I can interfere with the order of the Court below even assuming that it is based upon an erroneous interpretation of the rule. The application is dismissed, but under the circumstances I make no order as to costs.

B.D./R.K. *Application dismissed.*

* A. I. R. 1936 Lahore 524

TEK CHAND AND DALIP SINGH, JJ.

Jawahar Mal—Defendant—Appellant.
v.

Punjab National Bank, Ltd. Sargodha
Plaintiff and others—Defendants—Respondents.

First Appeal No. 1386 of 1931, Decided on 3rd January 1936, from the decree of Sub-Judge, 1st Class, Sargodha, D/- 30th July 1931.

* (a) Civil P. C. (1908), O. 21, R. 63—Declaratory suit—Right claimed in property in dispute and not title thereto is to be established—Suit by decree-holder claiming right to attach property—Suit by objector claiming release from attachment—In either case title to property in dispute is not to be proved.

Rule 63 lays down that where a claim or an objection is preferred under the preceding rules of O. 21 the party against whom an order

is made may institute a suit to establish "the right which he claims to the property in dispute." Obviously these words do not mean that the plaintiff has to establish his ownership of the property in dispute. All that he is required to do is to establish "the right which he claims to the property in dispute." If the suit has been instituted by the decree-holder, against whom an order has been passed under R. 60 releasing the property from attachment, the right which he claims in the suit is the right to have the property attached in execution of the decree against his judgment-debtor. If, on the other hand, the plaintiff is the objector, who has been unsuccessful in the objection proceedings before the executing Court, the right which he claims in the suit is the right to have the property in dispute released from attachment, it not being the property of the judgment-debtor. It will be seen, that in either case it is not necessary for the plaintiff to establish his own "title" in the property in question, but what he has to establish is, in the first case, the claim to have the property attached, and in the other to have it released from attachment: 15 Cal 674 and 3 C L J 381, *Foll.* [P 527 C 1]

* (b) Civil P. C. (1908), O. 21, R. 63—Person getting declaration for release of goods from attachment—Suit for damages for wrongful attachment—Plaintiff need not show mala fide of defendant in resisting such suit—Goods sold under Court's order—Difference in price due to fall of selling rate can be claimed by way of damage—Such person also need not prove his ownership to property in dispute—Possession is good as against wrong doer.

A person, whose goods have been attached, and who in a claim suit under O. 21, R. 63 has succeeded in getting a declaration that the goods be released from attachment, in order to entitle him to the full indemnity for the wrongful attachment, is not bound to allege and prove that the defendant had resisted his objection maliciously or without probable cause. If the goods had been sold under the Court's order, the difference in the market value of goods at the time of their attachment and their price when they were sold, the selling price having fallen intermediately, must be added to the damages. Such person need not prove his ownership to the property. It is sufficient if he proves that such property was in his custody because possession is always good as against the wrongdoer 17 Cal 436 (P C), *Foll.*; *In re Winkfield* (1902) P 42 and *Jeffries v. G. W. Ry. Co.*, 25 L J (Q B) 107, *Rel.* [P 528 C 1, 2] on.

Achhru Ram and Bhagwat Dayal—
for Appellant.

Badri Das and S. L. Puri—for
Respondent (Plaintiff).

Tek Chand, J.—This judgment will dispose of Civil Appeal No. 1386 of 1931 and Civil Appeal No. 1786 of 1932, which arise out of two suits between the same parties and relating to the same transaction.

On 11th December 1929, Jawahar Mal, defendant 1, obtained a money-decree against Tara Chand, defendant 2, and in execution of that decree 167 bales of pressed cotton and 32 boras of loose cotton lying in the premises of a factory, known as Jawahar Mal Tara Chand Factory at Sargodha, were attached on 20th December 1929. The Punjab National Bank (plaintiff) objected that the aforesaid bales and boras of cotton were not the property of the judgment-debtor Tara Chand, but belonged to Jawanda Mal, defendant 3, who had hypothecated them, along with other goods, to the Bank, and, therefore, they were not liable to attachment in execution of the decree against Tara Chand. The executing Court dismissed the objection without going into the merits, as the Bank had failed to produce certain documents on the date fixed.

On 28th April 1930 the Bank instituted a suit under O. 21, R. 63, Civil P. C., for a declaration to the effect that 167 bales of cotton and 35 boras of loose cotton were not liable to attachment and sale in execution of the decree obtained by Jawahar Mal against Tara Chand. It is now admitted that the number of boras of loose cotton attached was 32 and not 35, as stated in the plaint, and the Bank has limited this part of its claim to 32.

Jawahar Mal resisted the suit alleging that the attached cotton belonged to Tara Chand. During the pendency of this suit, the bales and the boras were sold by the Official Receiver under orders of the Court and Rs. 7,777.15-0 realized and kept in deposit for payment to the successful party in the suit.

On 4th December 1930 the Bank instituted another suit for recovery of Rs. 12,711.10-9 as damages caused by the alleged wrongful attachment and sale of the aforesaid goods.

The trial Judge decreed both suits and Jawahar Mal has preferred two appeals: (1) Civil Appeal 1886 of 1931 against the decree in the suit granting the plaintiff Bank the declaration prayed for under O. 21, R. 63, and (2) Civil Appeal 1786 of 1932 against the decree for Rupees 12,711.10-9 passed in favour of the Bank against Jawahar Mal in the suit for damages. It will be convenient to deal first with the declaratory suit.

It is clear from the evidence that

Jawanda Mal took on lease a factory, known as Ganesh Cotton Factory, Sargodha, from its owner Rai Bahadur Kidar Nath for the cotton season 1928-29 (November 1928 to October 1929), and on 27th November 1928 he executed a "cash credit bond" in favour of the Punjab National Bank whereby the Bank permitted him to draw up to a limit of Rs. 1,40,000 on the security of the "stock of kapas and cotton seeds stored and to be stored in the Ganesh Cotton Factory's godown in the control and possession of the Bank through its godown-keeper. It is also in evidence that the Bank appointed a godown-keeper, who took over charge of the stock in the godown, and submitted daily returns of the quantity in hand and its approximate value to the local branch of the Bank, as well as the Head Office at Lahore. On the expiry of Jawanda Mal's lease of the Ganesh Cotton Factory, the proprietor, Rai Bahadur Kidar Nath, leased it to Sardar Harbel Singh (P. W. 13) for the season 1929-30. Harbel Singh required the godowns for his own use, and asked Jawanda Mal and the Bank to remove Jawanda Mal's cotton, which was lying in one of the godowns, to some other place. Accordingly Jawanda Mal arranged to take on hire a godown in another factory, known as "Jawahar Mal Tara Chand Factory," which was situated close by and was not working at the time. The case for the Bank is that on 28th November 1929 the cotton in dispute, i. e. the 167 pressed bales and 32 boras, were removed from the Ganesh Cotton Factory to the godown in Jawahar Mal Tara Chand Factory, that the locks of the Bank were placed thereon, and the godown-keeper remained in control as before.

Jawahar Mal denied these allegations, and averred that the bales and boras belonged to Tara Chand. The trial Court found for the Bank on this point. Before us Mr. Achhru Ram for the appellant has assailed this finding, but after hearing him at length and examining the record, I have no doubt that his contention is without force. The evidence on the point appears to me to be conclusive in favour of the Bank. The factum of the removal of the bales and loose cotton is proved by Harbel Singh (P. W. 13), the lessee of the Ganesh Cotton Factory, who is an entirely disinterested witness,

by Gobind Mal (P. W. 3) and Muhammad Ismail (P. W. 4) who carted the bales, and by the Bank Manager, Shivan Ditta Mal (P. W. 15). This oral testimony is supported by the bahis of Muhammad Ismail and other documents duly proved at the trial. Ex. P. 14-A is the report of the Local Manager of the Bank to the Head Office at Lahore, definitely stating that 167 bales of cotton had been removed from Jawanda Mal's Factory to Jawahar Mal-Tara Chand Factory. Then there is the correspondence between the Bank and the local agent of the New India Insurance Company Limited, and the correspondence between the latter and the Head Office of the Insurance Company at Calcutta in respect of the insurance of these bales of cotton. The cotton was already insured when it was stored in the "Ganesh Cotton Factory," but on its removal to "Jawahar Mal-Tara Chand's Factory" it became necessary to renew the policy in order to cover the risk at the premises of the latter factory. The local Bank Manager moved the insurance agent to have this done, and on the latter's report the Head Office of the Insurance Company agreed to cover the risk on payment of additional premium, which was duly done by the Bank.

At the time of the attachment it was found that every one of the 167 bales attached bore the mark "P. 62," which has been proved to be the mark affixed on bales pressed in the Ganesh Cotton Factory. As already stated, the factory was worked by Jawanda Mal at the time. Out of these 167 bales, 72 bales had affixed on them the 'Raj' brand which, according to the evidence, was the brand of the cotton belonging to Jawanda Mal. The contesting defendant led no evidence to rebut this overwhelming testimony. I, therefore hold, in agreement with the lower Court, that it has been established that 167 bales and 32 boras of loose cotton in dispute were removed from the Ganesh Cotton Factory to Jawahar Mal-Tara Chand Factory on 28th November 1929, and that they were in possession of the Bank at the time of their attachment in execution of the decree obtained by Jawahar Mal against Tara Chand. Mr. Achhru Ram, however, contends that the Bank has failed to prove that all the 167 bales belonged to Jawanda Mal. He points out, that, though this

was alleged in the plaint it was admitted on behalf of the plaintiff in the course of the trial that 42 bales of white cotton and 29 bales of yellow cotton (or 71 bales in all) belonged to Jawanda Mal, and that it was alleged that 82 bales of white cotton were the property of Messrs. Amir Chand-Makhan Mal who had pawned them with Jawanda Mal, and the remaining 14 bales belonged to Lorind Chand-Lachhman Das who had got them pressed in Jawahar Mal's factory and had left them with him for safe custody. He urges that the finding of the lower Court, upholding the alleged pawn of 82 bales, was not supported by evidence. It was further stated that the alleged pawner, Amir Chand, was the sister's husband of Tara Chand, and that Lorind Chand was his friend and that these persons were acting benami for Tara Chand. He further argued that, even on the finding of the Court below, Jawanda Mal's title being proved in 71 bales only, he could get the declaration asked for in respect of these bales alone and that the suit qua the rest should have been dismissed. On the question of fact I agree with the learned counsel that the Bank has failed to establish that the 82 bales, belonging to Makhan Mal-Amir Chand had been pawned with Jawanda Mal. Mr. Badri Das has referred us to the evidence bearing on the point, but this evidence is of the vaguest possible kind, and the extracts from the account of Makhan Mal-Amir Chand with Jawanda Mal, which have been placed on the record, do not establish the existence of a pawn. At the same time there is no proof whatever that Amir Chand and Lorind Chand were holding these bales benami for Tara Chand. The defendant-appellant has entirely failed to prove that Tara Chand had any title in these 96 bales and this was ultimately admitted by Mr. Achhru Ram. The position, therefore, is that Tara Chand's title has not been established; Jawanda Mal has been proved to be the bailee of the 82 bales belonging to Makhan Mal-Amir Chand and 14 bales belonging to Lorind Chand-Lachhman Das, and he had delivered possession of these 96 bales, along with 71 bales and 32 boras of his own, to the plaintiff Bank, and placed them in charge of the Bank's godown-keeper. Mr. Achhru Ram argues that on this finding the plaintiff is entitled

to get a declaration under O. 21, R. 63 in respect of 71 bales and 32 boras only, and not in respect of the remaining 96 bales which Jawanda Mal had no right to hypothecate with the Bank.

Rule 63 lays down that where a claim or an objection is preferred (under the preceding rules of that O. 21) the party against whom an order is made may institute a suit to establish "the right which he claims to the property in dispute." Obviously these words do not mean that the plaintiff has to establish his ownership of the property in dispute. All that he is required to do is to establish "the right which he claims to the property in dispute". Now what is the right which the plaintiff in such a suit claims to the property in dispute? It is clear that if the suit has been instituted by the decree-holder, against whom an order has been passed under R. 60 releasing the property from attachment, the right which he claims in the suit is the right to have the property attached in execution of the decree against his judgment-debtor. If, on the other hand, the plaintiff is the objector, who has been unsuccessful in the objection proceedings before the executing Court, the right which he claims in the suit is the right to have the property in dispute released from attachment, it not being the property of the judgment-debtor. It will be seen in either case that it is not necessary for the plaintiff to establish his own "title" in the property in question, but what he has to establish is, in the first case, the claim to have the property attached, and in the other, to have it released from attachment. In this connexion reference may be made to 15 Cal 674 (1), at p. 679, where the corresponding provision (S. 283) in the Code of 1882 was under consideration, and it was held that the suit referred to in that section was a suit

to establish the right which is claimed to the property in suit, that is to say, the right which is claimed in those proceedings, being on the one hand the right to have the property attached and sold in execution, and on the other the right to have it released from attachment. The words of the section are not 'the right to the property' meaning the title to the property, but 'the right which he claims to the property' which, we take it, means 'the right which is claimed in that proceeding in respect of the property'; that is, as we have said, the right to have it sold, or the right to have it released

from attachment. That it is so is clear, we think, from the fact that the decree-holder has no right or title in the property attached, and could not sue to establish any such right. What he claims and what he may sue to establish is the right to have the property declared to be liable to attachment and sale in execution of his decree.

The same view was taken by another Bench of the Calcutta Court in 3 C L J 381 (2), at p. 383. I would, therefore, repel the contention that it was necessary for the plaintiff Bank in this case to establish either that all the bales in question belonged to Jawanda Mal or that he had the right to pawn them with the Bank. There is no question, that on the evidence the Bank has succeeded in proving that it was in possession of the entire quantity of cotton in dispute, and that it was taken from its possession by the bailiff, who attached it in execution of the decree obtained by Jawahar Mal against Tara Chand. It has also been established that these bales and boras had been "stored" in the godown of Jawanda Mal Factory and as such were covered by the "cash credit agreement", executed by Jawanda Mal in favour of the Bank. It has further been proved that the goods did not belong to the judgment-debtor, Tara Chand. There is also the significant circumstance that both Amir Chand and Lorind Chand, when examined in the case, did not raise any objection to the Bank's right to have their bales released from attachment. On these facts there is no doubt that Jawahar Mal had no right to attach these goods in execution of his decree against Tara Chand. They were wrongly seized from the possession of the Bank on the erroneous assumption that they were Tara Chand's property and the Bank has established "the right which it claimed to the property in dispute", i. e. the right to have it released from attachment in the aforesaid decree. I, therefore, hold that this suit was rightly decreed and that the defendant's appeal must fail. I would accordingly dismiss Civil Appeal No. 1386 of 1931 with costs. Coming now to the appeal (Civil Appeal No. 1786 of 1932) in the suit for damages for wrongful attachment of the cotton in question i. e. 167 bales of pressed cotton and 32 boras of loose cotton, the relevant facts are that after the attachment the goods

1. Kedar Nath v. Rakhal Das, (1888) 15 Cal 674.

2. Morshia Baraval v. Elahi Bux Khan, (1906) 3 O L J 381.

were handed over to the Official Receiver of Sargodha, and under orders of the Court were sold by him by public auction. After defraying the expenses of the auction a sum of Rs 7,777-15-0 was realised, which was eventually paid to the plaintiff Bank. After deducting this amount the Bank brought a suit for recovery of Rs. 12,711-10-9 as damages, being the difference between the market price on the date of attachment and the price realized, and interest thereon calculated as follows :

Cost of goods according to the market rate prevailing on 20th December 1929	Rs. 18,976-2-3
Interest on the above sum, at 8 1/4 per cent per annum, with monthly rests from the date of attachment to the date of institution of suit...	1,438-7-6
Insurance fee	75-0-0
Total.	20,489-9-9

Less amount realised from the

Official Receiver	7,777-15-0
Balance sued for	12,711-10-9

In the Court below the defendant Jawahar Mal had pleaded that a suit for damages on the facts alleged in the plaint was not maintainable, as it had not been alleged or proved that the defendant in having the goods attached had acted in bad faith or maliciously, but his counsel Mr. Achhru Ram admitted before us that there was no force in this plea. This matter is concluded by the decision of their Lordships of the Privy Council in 17 Cal 436 (3). It was held there that a person, whose goods have been attached, and who in a claim suit under S. 283 of the Code of 1882 (O. 21, R. 63 of the Code of 1908) has succeeded in getting a declaration that the goods be released from attachment, can maintain a suit for damages for wrongful attachment, and in order to entitle him to the full indemnity for the wrongful attachment, he is not bound to allege and prove that the defendant had resisted his objection maliciously or without probable cause. It was further ruled that, if the goods had been sold under the Court's order, the difference in the market value of the goods at the time of their attachment and their price when

they were sold, the selling price having fallen intermediately, must be added to the damages. Mr. Achhru Ram urged, however, that in the case before us such damages could be granted only in respect of the quantity of cotton which had been proved to be the property of Jawanda Mal, namely 42 bales of white cotton and 29 bales of yellow cotton, and that no damages could be claimed or granted on the 82 bales of Makhan Mal-Amir Chand and 14 bales of Lorind Chand-Lachhman Das, in regard to which Jawanda Mal or the Bank has not been damaged, neither of them being the owner, but merely a gratuitous bailee thereof. The learned counsel further contended that the trial Judge had not calculated the rate correctly, and that no interest on damages should have been allowed.

After hearing counsel at length, I have no hesitation in overruling the first contention. Granting that Jawanda Mal was the gratuitous bailee of 96 bales on behalf of Makhan Mal-Amir Chand and Lorind Chand-Lachhman Das respectively, and that the Bank, being in possession on behalf of Jawanda Mal, had no higher title in these bales than Jawanda Mal himself, the bank is entitled to recover damages for their wrongful seizure from its possession and the measure of damages is the full value of the goods. In England the leading case on the subject is 1902 P 42 (4), where (at pages 54-55), after a review of the authorities, the Master of the Rolls, Sir Charles Collins, held that the principle was well established that "possession is good against a wrongdoer, and that the latter cannot set up the *jus tertii* unless he claims under it", and that "this principle applied in actions of trover and trespass at the suit of a possessor". This conclusion is based on the fundamental rule that as between possessor and a wrongdoer the presumption of law is, in the words of Lord Campbell in 25 L J Q B 107 (5), that the person who has possession has the property. In that case he says the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself is a wrongdoer and cannot defend himself by shewing that there was title in some third person, for against a wrongdoer possession is title. . . .

4. *In re Winkfield*, 1902 P 42.

5. *Jeffries v. G. W. Ry co.* (1856) 25 L J Q B 107=5 El & Bl 802=4 W R 201=2 Jur N S 230.

3. *Kissorimohun Roy v. Harsukh Das*, (1890) 17 Cal 436=17 I A 17=5 Sar 472 (PC).

Therefore, it is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all; and, therefore, as between those two parties full damages have to be paid without any further inquiry. The extent of the liability of the finder to the true owner not being relevant to the discussion between him and the wrongdoer, the facts which would ascertain it would not have been admissible in evidence and therefore the right of the finder to recover full damages cannot be made to depend upon the extent of his liability over to the true owner. To hold otherwise would, it seems to me, be in effect to permit a wrongdoer to set up a *jus tertii* under which he cannot claim.

He then went on to say (p. 60) that :

Where the chattel has been converted or damaged it is to be deemed to be the chattel of the possessor and no other, and therefore its loss or deterioration is his loss, and to him, if he demands it, it must be recouped. His obligation to account to the bailor is really not ad rem in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed. There is no inconsistency between the two positions: the one is the complement of the other. As between bailee and stranger possession gives, title that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest, he has received to the use of his bailor.

This decision was approved by their Lordships of the Privy Council in (1914) A C 197 (6) at p. 210: see also a discussion on this point in Halsbury's Laws of England, Edn. 2, Vol. I, p. 776, para. 1268, Clerk and Lindell Law of Torts, Edn. 8, p. 253 and S. Ramaswamy Iyer's Law of Torts, p. 159. In India the principle underlying this decision has received statutory recognition in S. 180. Contract Act, where it is laid down that:

If a third person wrongfully deprives the bailees of the use or possession of the goods bailed and does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

6. Eastern Construction Co. Ltd. v. National Trust Co. Ltd., (1914) A C 197=83 L J P C 122=110 L T 921.

In S. 181 it is further enacted that :

Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

It is thus clear that the plaintiff Bank has not only a *locus standi* to sue for recovery of damages for the loss caused in respect of the entire quantity of cotton in dispute, but the true measure of damages is the full value of the goods, assessed according to the market rate prevailing at the time of the attachment.

The next question for consideration is whether the rate, at which damages have been calculated by the lower Court is correct. It will be convenient to discuss this part of the case separately in regard to the various kinds of cotton :

(a) With regard to white pressed and baled cotton the plaintiff claimed, and the lower Court allowed, Rs. 24 per maund as the rate prevailing on 20th December 1929, which was the date of the attachment. The evidence on the record, however, shows that this was the rate of a special quality of cotton, described as 'T. Valez-Archy' (in Exhibit P. W. 2-1) which is an extract from the books of P. W. 2, Behari Lal. But there is nothing on the record to indicate that the cotton in question was of this quality. It appears from Ex. P. W. 2-1 that there were other qualities of cotton which were sold at Rs. 28 and Rs. 27-8-0 per maund, at Karachi, and it is common ground between the parties that the Karachi rate is higher than the rate at Sargodha by Rs. 4-12-0 per maund. In the absence of any evidence as to the exact quality of the cotton in question, there seems no reason why the plaintiff Bank should be allowed a rate higher than the lowest prevailing in the market. This was Rs. 27-8-0 at Karachi, and therefore Rs. 22-12-0 at Sargodha. The lower Court has thus allowed Rs. 1-4-0 per maund in excess of the proper market rate of white pressed and baled cotton. Admittedly, the weight of this cotton was 649 maunds. The plaintiff, therefore, has been allowed Rs. 811 in excess on this account and the decretal amount must be reduced accordingly.

(b) The second item is of 29 bales of yellow cotton weighing 121 maunds and 10 seers. The plaintiff alleged, and the lower Court found, that the market rate of this kind of cotton on the date of

attachment was Rs. 11 per maund. At the auction conducted by the Official Receiver these bales were sold at Rs. 5 per maund and fetched Rs. 608-10-9 only. The lower Court accordingly allowed the plaintiff Rs. 725 as damages on this account. There is, however, no satisfactory evidence on the record that the market rate of yellow pressed and baled cotton on or about 20th December 1929 was Rs. 11 or thereabouts. Mr. Badri Das admitted that his client had not led any evidence directly bearing on this point. He relied upon the rate mentioned in the "Daily return" for 20th December 1929, submitted by the godown-keeper to the Head Office of the Bank showing the stock in hand on that date and its value. There is, however, no evidence that the rate given by the godown-keeper represented the actual market rate of this type of cotton at Sargodha on that date. It must, therefore, be held that the plaintiff has failed to establish any damages under this head, and that the sum of Rs. 725 has been erroneously allowed by the lower Court.

(c) The third item is of 49 maunds and 22 seers of loose cotton, which was found in 32 boras. The plaintiff alleged that the market value of this cotton was Rs. 396-6-3, calculated at Rs. 8 per maund, which, it was alleged, was the rate prevailing on 20th December 1929. At the auction sale these boras fetched Rs. 126 in all. The plaintiff accordingly claimed the balance, Rs. 270-6-3, and the lower Court has allowed this sum. There is, however, not a scintilla of evidence on the record to show that Rs. 8 per maund was the market rate of this kind of cotton at Sargodha on the date of the attachment, and this is frankly conceded by Mr. Badri Das. I would accordingly disallow Rs. 270-6-3 which has been wrongly decreed under this head.

The trial Judge has allowed the plaintiff Bank the sum of Rs. 1,438 as interest on the amount of damages as assessed by him, calculated at $8\frac{1}{2}$ per cent. per annum with monthly rests from the date of attachment to the date of the institution of the suit. In my opinion this sum also was erroneously allowed. It is settled law that in the absence of special circumstances interest cannot be allowed on unliquidated damages. No special circumstances have been shown to exist in

the present case, which would justify a departure from this well established rule. I would accordingly disallow this sum of Rs. 1,438. Lastly there is the item of Rs. 75 which the Bank had paid to the Insurance Co. as premium for re-insuring the goods on their removal from the "Ganesh Cotton Factory" to "Jawahar Mal-Tara Chand's Factory." This, however, had been done long before the date of the attachment. As stated already, the measure of damages is the difference between the market rate and the price realised at the auction. This being so, there was no justification whatever for making the contesting defendant Jawahar Mal pay the plaintiff the additional sum of Rs. 75. Therefore, this item also must be held to have been wrongly allowed. The total of the items held to have been wrongly decreed by the lower Court is as follows:

	Rs.	a.	p.
Excess allowed as damages on 649 maunds of white pressed and baled cotton	811	0	0
Ditto on 121 maunds 10 seers of yellow pressed and baled cotton	725	0	0
Ditto on loose cotton in boras	270	6	3
Interest	1,438	0	0
Insurance-fee	75	0	0
Total	3,319	6	3

Deducting this sum from Rupees 12,711-10-3, decreed by the lower Court, the plaintiff is entitled to a decree for Rs. 9,392-4-0. The result, therefore, is that Civil Appeal No. 1786 of 1932 is accepted to this extent: that in lieu of the decree passed by the lower Court a decree should be passed in favour of the plaintiff Bank for Rs. 9,392-4-0 against Jawahar Mal, defendant 1, with proportionate costs in the trial Court, and I would order accordingly. Having regard to all the circumstances, I would leave the parties to bear their own costs of this appeal in this Court.

Dalip Singh, J.—I agree.

B.D./R.K.

Order accordingly.

A. I. R. 1936 Lahore 530

AGHA HAIDAR, J.

Ishar Das—Defendant—Appellant.

Ganpat Rai and others—Plaintiffs—Respondents.

Second Appeal No. 1848 of 1935, Decided on 6th February 1936, from decree of Senior Sub-Judge, Gujrat, D/- 19-6-35.

Civil P. C. (1908), O. 21, R. 103—*A* succeeding in getting his title proved as against *C*—*B* mortgagee from *C* while *C* was in wrongful possession—In execution of decree by *A* against *C*, *B* resisting execution—*A* bringing suit against *B* under O. 21, R. 103—*B* not showing adverse possession for 12 years—*A* held entitled to decree for possession.

A suit brought by *A* against *B* under O. 21, R. 103, was resisted by *B* relying on his mortgage rights which he had obtained from one *C* who, while in wrongful possession of the property, had mortgaged it to *B*. In a previous suit between *A* and *C*, *A* had obtained a decree against *C* wherein *A*'s title to property was affirmed:

Held: that *A* being owner and his claim being founded upon title, and further *B* having failed to prove his adverse and proprietary possession for a period of more than 12 years which he had pleaded, *A* was entitled to a decree for possession: 1935 Lah 475 (F B), *Disting.*; 1916 P C 21, *Rel. on.* [P 532 C 1, 2]

Achhru Ram and Indar Dev Dua—for Appellant.

Harbhajan Das for Amar Nath Monga—for Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for possession of a shop. Both the Courts below have decreed the plaintiff's claim. The defendant has come up to this Court in second appeal. The defendant Ishar Das is a pleader. He obtained a mortgage of the shop in dispute from one Har Dayal who had acted as his clerk for some time. The mortgage was a possessory one and is dated 4th November 1926. On 8th May 1930 the plaintiffs brought a suit against Har Dayal for possession of the shop, alleging that the plaintiffs had been forcibly dispossessed inasmuch as the defendant Har Dayal had broken open the doors and removed the locks of the shop in question. Har Dayal raised the plea that the plaintiffs had failed to prove their possession within 12 years prior to the institution of the suit and therefore their suit ought to be dismissed as time barred. This contention found favour with the two Courts below and the plaintiff's suit was dismissed. The plaintiffs came up to this Court and a learned Judge held in substance that as the plaintiffs had been able to prove their title, it was not necessary for them to prove that they were dispossessed or had discontinued possession within 12 years of the suit. He accordingly remanded the case to the Courts below to give a fresh decision after making an enquiry as to whether Har Dayal had succeeded in

proving adverse possession for more than 12 years. On 25th August 1932 the plaintiffs' suit was decreed. The plaintiffs proceeded to obtain possession in execution of the decree which they had obtained against Har Dayal. Thereupon the present defendant, Ishar Das intervened and raised the objection that he was in possession of the shop on his own independent title as a mortgagee from Har Dayal and that the plaintiffs could not dispossess him. The plaintiffs were thus driven to bring the present suit under the provisions of O. 21, R. 103, Civil P. C., on 26th July 1934. Both the Courts below have decreed the plaintiffs' claim. The defendant Ishar Das has come up to this Court in second appeal.

Counsel for the appellant has argued that the case of the plaintiffs falls under Art. 142, Lim. Act, and that the matter is concluded in his favour in view of the recent Full Bench decision of this Court, mentioned below. Having regard to the question raised by the learned counsel in this Court it is necessary to examine the pleadings in some detail. The plaintiffs came into Court and in the forefront of their plaint alleged that they were the owners of the shop in dispute. In para. 2 they give the history of the previous litigation and as a part of that history they stated that, as the shop was in a dilapidated condition they proceeded to repair it and thereupon Har Dayal broke open the lock in an unlawful manner and forcibly obtained possession.

It was further alleged that at the time of the institution of the previous suit the plaintiffs were not aware of the mortgage held by the defendant and that in any event as Har Dayal was not the owner of the shop and had taken only unlawful possession of the same he had no right to mortgage it to the defendant. The rest of the allegations are not important for the purpose of the appeal and the plaint concludes with the ordinary prayer for possession. In his written statement the defendant—Mr. Ishar Das, pleader—did not admit the contents of para. 2 of the plaint and pleaded that Har Dayal had never broken the plaintiffs' lock on the shop and that his possession had existed since the time of his father for more than 12 years, that the said Har Dayal mortgaged the shop with possession to the defendant and that since the date of his mortgage the defendant has been in pos-

session. Para. 6 of the written statement lays down quite tersely that the possession of the defendant and Har Dayal was proprietary and adverse for a period of more than 12 years. It would thus appear from the trend of the pleadings in the case that while the plaintiffs came into Court mainly on the allegation of their title and ownership and referred to the tortious acts of Har Dayal in breaking the lock of the plaintiffs' shop as a part of the history of the case, they nowhere stated that their possession had discontinued or they had been dispossessed by the defendant. Now the findings of the Courts below are clear and specific that the plaintiffs are the owners of the shop and that the defendant has failed to prove his proprietary and adverse possession for a period of more than 12 years prior to the institution of the suit.

Mr. Achhru Ram, the learned counsel for the defendant appellant, strongly relied upon the recent Full Bench decision of this Court reported as 16 Lah 142 (1). In that judgment the learned Judge who delivered the judgment of the Court was clearly of opinion that on a reading of the plaint in the case before him there could not be any manner of doubt that the plaintiff had come into Court on the allegation that he had been dispossessed. Such is not the case here. Even assuming for the sake of argument that Har Dayal had broken the locks somewhere in the year 1930 and his action was wrongful, the fact remains that the plaintiffs were the owners and prior to that date the title must be deemed to have been in the plaintiffs. In any event the mortgage in defendant's favour is of the year 1926. Under these circumstances the Full Bench decision of this Court has no application to the present case in view of the allegations contained in the pleadings of the parties. The findings of the Court below as already mentioned are that the plaintiffs were the owners, and that the lower Court was right on a consideration of the pleadings that the claim of the plaintiffs was not based on dispossession or discontinuance of possession as required by Art. 142, Lim. Act. This being so we are thrown back upon the principle enunciated in the recent Privy Council decision in 39

Mad 617 (2). The result therefore is that the plaintiffs being the owners and their claim being founded upon title, and further the defendant having failed to prove his adverse and proprietary possession for a period of more than 12 years which he had pleaded, the plaintiffs were entitled to a decree for possession.

A point was raised by Mr. Achhru Ram on behalf of the appellant that the Court below has found that a sum of Rs. 100 was spent by Ishar Das, the mortgagee, in executing some improvements in the shop. But we must remember that the defendant had no business whatsoever to spend money on other peoples' property on the strength of a shadowy if not shady transaction. Furthermore the defendant has on his own showing been in possession and must be taken to have enjoyed the usufruct of the shop for a certain number of years. He would be liable to pay mesne profits to the rightful owner. The equities of the case are against the defendant and, in my opinion, having regard to all the facts and circumstances the Court below was justified in not allowing the defendant to be reimbursed for the improvements which he had made in the shop. Apparently the whole thing was a "deal" between the pleader and his ex-clerk and is devoid of all merit. The appeal fails and is dismissed with costs.

B.D./R.K.

Appeal dismissed.

2. Secy. of State v. Chilli Kani Rama Rao,
1916 P C 21=35 I C 902=43 I A 192=39
Mad 617 (P C).

A. I. R. 1936 Lahore 532

JAI LAL, J.

Muhammad Akbar and another—Objectors—Appellants.

v.

Harbans Singh and others—Decree-holders and another—Judgment-debtor—Respondents.

Misc. First Appeal No. 1734 of 1935, Decided on 18th December 1935, from decree of Senior Sub-Judge, Rawalpindi, D/- 12th August 1935.

Civil P. C. (1908), S. 60, Proviso (c)—Agriculturist—Main source of income not proved to be agriculture—Land not situated near house in dispute—Area of land owned not proved—Judgment-debtor not agriculturist within the meaning of S. 60, Proviso (c).

The meaning of the word 'agriculturist' in S. 60, Proviso (c), Civil P. C., must be strictly

Behari Lal v. Narain Das, 1935 Lah 475=157 I O 686=16 Lah 442=37 P L R 743 (F B).

construed. Where it has not been established that the judgment-debtor's main source of income is agriculture, and their land is not situated near the house in dispute, nor do they prove what the area of the land owned by them is, it is impossible to hold that they are agriculturists, in spite of the fact that they are members of an agricultural tribe within the meaning of S. 60, Proviso (c): 1927 Lah 810; 1926 Mad 350 and 12 Bom 363, *Rel. on.*

[P 533 C 2]

B. I. Ali Khan—for Appellant.

Manohar Lal—for Respondents.

Jai Lal, J.—In execution of a money decree against the appellant their share in a house, which is described as a serai and which is situated in the town of Rawalpindi, has been attached. An objection has been raised by the appellants that as they are agriculturists the house, or rather their share in the house, cannot, be attached in execution of the decree. They relied on S. 60, Proviso (c), which exempts from attachment

houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him.

By virtue of an amendment of the Civil Procedure Code by the Punjab Legislative Council the words "occupied by him" have been substituted by the words "not let out on rent to others or left vacant for a period of a year or more." The Senior Subordinate Judge has held that most of the rooms in the house in dispute are let out to tenants. He has also held that the appellants are not agriculturists within the meaning of that term as used in Proviso (c), S. 60, Civil P. C. It has been established from the evidence on the record that the appellants own some land, but it has not been proved what the area of that land is. It is conceded that the appellants do not cultivate the land themselves but they get it cultivated by servants. It has also been proved that they do contractors' work and also that, in a portion of the property in dispute there is a shop which is occupied by them in which they sell flour and grain. The question is whether, under the circumstances, the appellants can claim to be agriculturists. In my opinion, not. It was held by Addison, J. in 1927 Lah 810 (1) that the burden is upon the judgment-debtor to establish facts clearly to bring his case within the exemptions contained in S. 60 and that the judgment-debtor

has to prove that he is an agriculturist not only in name but in the strict sense of the term. In 49 Mad 227 (2), a Division Bench of the Madras High Court held that the word "agriculturist" must be interpreted in a strict sense, and cited with approval the observation of West, J. in 12 Bom 363 (3) that:

It was for agriculturists in the strictest sense and for an agriculturist in that sole character that the protection of S. 266 (c), Civil P. C., was intended.

The learned Judges held that a large landed proprietor, even though his sole income is from land, is not an agriculturist within the meaning of Cl. (c), S. 60, Civil P. C. In the present case it has not been established even that the appellants' main source of income is agriculture. Their land is not situated near the house in dispute. It is situated in another village called Dhamial where they have got a residential house if not more house than one. They have not proved what the area of the land owned by them is. Under the circumstances in my opinion it is impossible to hold that they are agriculturists, in spite of the fact as alleged by them that they are members of an agricultural tribe, within the meaning of S. 60 (c), Civil P. C. The learned Senior Subordinate Judge has reached the correct conclusion and I dismiss this appeal with costs.

M.D./R.K.

Appeal dismissed.

2. Muthuvenkatarama Reddiar v. Official Receiver, South Arcot, 1926 Mad 350=92 I C 398=49 Mad 227=50 M L J 90.
3. Jivan Bhaga v. Hira Bhaiji, (1888) 12 Bom 363.

* * A. I. R. 1936 Lahore 533

FULL BENCH

YOUNG, C. J., ADDISON AND MONROE, JJ.

Mt. Niamat—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 964 of 1935, Decided on 14th January 1936, from order of Sess. Judge, Shahpur, D/- 25th July 1935.

* * Criminal Trial—Evidence—Sessions trial—Evidence not produced in trying Magistrate's Court can be produced in Sessions Court—Witnesses not examined in trying Magistrate's Court cannot be bound down to appear and give evidence in Sessions Court—Summary of evidence proposed to be tendered in Sessions Court should be given to Court and accused before commencement of Sessions trial: 15 Lah 331=1984 Lah 667=152 I C 678, *Overruled.*

1. Bute Shah v. Guranditta, 1927 Lah 810=100 I C 104.

The general effect of a consideration of Sections 208 (1), 208 (3), 209, 210, 211, 213, 216, 217, 219, 286 and 540, Criminal P. C., is that prosecution is at liberty to examine the witnesses in the Sessions Court which it has not produced in the Court of the Committing Magistrate, but that only those witnesses so examined in the Committing Magistrate's Court can be bound down to attend in the Sessions Court. The prosecution in the Sessions Court, if the witnesses are not examined in the Court of the Committing Magistrate, has to depend upon such witnesses being willing to give evidence without being bound down to appear, or upon being able to persuade the Court to act under S. 540 and summon such a witness. But in accordance with the practice of the English Courts a summary of the evidence proposed to be called by the prosecution should be given to the Sessions Court and the accused before the trial, if a witness has not been called in the Committing Magistrate's Court. There is no provision in the Procedure Code making this course compulsory, but in fairness to the accused, it should be followed: 1 P R 1889 (Cr); 1933 All 690; 1930 Sind 99 and 1931 Bom 517, *Rel. on*; 15 Lah 331=1934 Lah 667=152 I C 673, *Overruled*. [P 537 C 1, 2]

B. R. Puri and Zahur-ud-Din Nagashbandi—for Appellant.

Ram Lal—for the Crown.

Judgment.—Mt. Niamat and Mohammad were charged with the murder of one Allah Ditta in the Court of the learned Sessions Judge of Sargodha. The learned Sessions Judge found both the accused guilty, sentenced Mt. Niamat to death and Mohammad to transportation for life. Both the convicts appeal and we have also to consider the question of confirmation of the death sentence on the female appellant.

The prosecution alleges that Mt. Niamat and Mohammad were lovers and that they conspired together and murdered the husband of the female appellant, Allah Ditta, by administering arsenic to him.

At the hearing of the appeal before a Bench of this Court counsel for the accused raised an important preliminary point, namely that the expert evidence relating to a thumb-mark of the appellant Mohammad on the register of a vendor of arsenic was inadmissible in evidence in that this evidence had not been produced in the Committing Magistrate's Court. The Bench of this Court, in view of conflicting decisions in this and in other High Courts, referred the whole case to a Full Bench.

We will consider first the point of law raised. This question has been considered

by a Bench of this Court in 15 Lah 331 (1). That Bench decided that evidence in order to be admissible in the Sessions Court must be produced in the Committing Magistrate's Court. On the other hand, a Division Bench of this Court in 1 P R 1889 (Cr) (2), one of the Judges being Sir Meredyth Plowden, held that it was not necessary to produce all the evidence in the Committing Magistrate's Court and that evidence not so produced was admissible at the hearing in the Sessions Court. 55 All 1040 (3), the well-known Meerut Conspiracy case, was heard by a Bench of the Allahabad High Court of which one of us was a member. That Bench held, in agreement with the decision in 1 P R 1889 (Cr) (2) that evidence not produced in the Committing Magistrate's Court was admissible in the Sessions Court. The following authorities also decided this point of law in the same way as in 55 All 1040 (3) and 1 P R 1889 (Cr) (2): 120 I C 520 (4) and 134 I C 1230 (5). We have not been referred to any authority agreeing with the decision in 15 Lah 331 (1). The balance of authority, therefore, appears to be in favour of the proposition that the evidence in the Sessions Court is not confined to evidence produced in the Committing Magistrate's Court.

The question of the relevancy of evidence is dealt with in S. 5, Evidence Act, which is as follows:

Evidence may be given in any suit for proving of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

It would appear, therefore, to be clear that an objection to relevant evidence being admissible in any trial must depend upon the existence of some special law prohibiting such evidence to be used. It will, therefore, be upon counsel for the appellants in this case to show conclusively that the evidence objected to is

1. Sher Bahadur v. Emperor, 1934 Lah 667=152 I C 673=36 Cr L J 169=15 Lah 331.
2. Khan Mohammad v. The Empress, (1889) 1 P R 1889 Cr.
3. Emperor v. Jhabwala, 1933 All 690=1933 Cr C 1202=145 I C 481=34 Cr L J 967=1933 A L J 799=55 All 1040.
4. Nur Khan v. Emperor, 1930 Sind 99=1930 Cr C 282=120 I C 520=31 Cr L J 117=24 S L R 96.
5. Bhat v. Emperor, 1931 Bom 517=1931 Cr C 949=134 I C 1230=33 Cr L J 68=33 Bom L R 1192.

prohibited by law from being produced in the Sessions Court.

Counsel for the appellants has referred us to Chap. 18 Criminal P. C. The relevant Sections are Ss. 208 (1) and (3), 209, 210, 211, 216, 217 and 219. Ss. 540, 291, and 286 have also to be examined. Chap. 18 deals with the procedure in committal proceedings before the Committing Magistrate.

Section 208 (1) and (3) provides:

(1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complaint (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or on behalf of the accused, or as may be called for by the Magistrate.

(3) If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness, or the production of any document or thing, the Magistrate shall issue such process, unless, for reasons to be recorded, he seems it unnecessary to do so.

The important words in S. 208 (1) are:

The Magistrate shall . . . take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or on behalf of the accused, or as may be called for by the Magistrate.

The plain wording of this sub-section clearly cannot be taken in support of the proposition argued by counsel. It is in the discretion of the prosecution to call such evidence as it wishes. There is nothing here to indicate that all the evidence on which the prosecution proposes to rely in the Sessions Court must be called. Sub-s. (3) provides the method for compelling the attendance of witnesses in the Committing Magistrate's Court that is, sub-s. (1) provides for evidence from willing witnesses and sub-s. (3) from unwilling witnesses. A consideration of sub-s. (3) appears to show clearly that it is unnecessary to produce all the evidence in the Court of the Committing Magistrate. The Magistrate may be asked to issue process to compel the attendance of a witness in his Court, but only if he deems it necessary to do so, e. g. the Magistrate may consider that the prosecution has established a *prima facie* case and it is unnecessary to call further evidence. It is clear that some of the evidence which a Magistrate thinks to be unnecessary in his Court may be necessary and relevant evidence. If the contention of counsel for the appellants is correct the mere fact that the Magistrate thought such evidence unnecessary for

his Court would bar the production of this evidence in the Sessions Court. Sub-s. (3) clearly contemplates no such result. There is nothing in S. 208 (1) or (3) which at any rate makes the production of all evidence necessary in the Magistrate's Court.

Section 209 is as follows:—

(1) When the evidence referred to in S. 208, sub-ss. (1) and (3) has been taken and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

This section is only important as showing that the evidence recorded is the evidence alluded to in S. 208 (1) and (3).

Section 210 gives power to the Magistrate "upon such evidence being taken" and on his being satisfied that there are sufficient grounds for committing the accused for trial, to frame a charge. "Such evidence" refers back to the evidence indicated in S. 208 (1) and (3). So far then there is nothing in any of these Sections indicating a positive rule of law that all evidence must be produced in the Committing Magistrate's Court.

Section 211, which is as follows, is relied upon by the learned counsel as indicating that the accused is bound by the list of witnesses which he is required to give after the charge is framed and that therefore the prosecution should be similarly bound:—

(1) The accused shall be required at once to give in, orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

(2) The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time; and where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial.

This contention in our opinion is wholly untenable. The purpose of S. 211 is merely that the executive authorities should be able to compel the attendance of such witnesses as the accused wished.

to be summoned in order that when the trial of the case comes on in the Sessions Court the case may be heard from day to day and no time should be wasted. That the section does not bear the construction contended for by learned counsel is clear from sub-s. (2) which gives the Magistrate authority to take any further list of witnesses subsequently at any time.

That the accused is not confined to witnesses indicated in any list is clear from consideration of S. 291 which enacts that the accused shall be allowed to examine any witness in the Sessions Court not previously named by him if such witness is in attendance. Ss. 211 and 291, read together, clearly show that if the accused has willing witnesses at the Sessions Court he can be allowed to produce them, but if he requires the Court to issue process for compelling attendance he is confined to those witnesses whose names he has previously included in his list of witnesses.

Section 213 provides for committal of the accused for trial. There is nothing in this section dealing with the point under consideration.

Section 216 clearly shows that it is unnecessary for the accused at any rate to produce all his witnesses before the Magistrate, but it has no real bearing upon the point before us:

The section is:

When the accused has given in any list of witnesses under S. 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list, as have not appeared before himself, to appear before the Court to which the accused has been committed.

Section 217 (1) deals with the procedure for binding down witnesses who appear before the Committing Magistrate in order that they should appear in the Court of Session. The words "whose attendance before the Court of Session or High Court is necessary and who appear before the Magistrate" are important. These words indicate that only those witnesses who appear before the Magistrate can be bound down to appear before the Sessions Court. It also, in our opinion, clearly shows that witnesses who do not appear before the Magistrate can appear before the Court of Session, the only disadvantage to the prosecution being that they cannot be bound down so to appear.

Section 219, deals with the power of the Committing Magistrate to examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over to give evidence in the Sessions Court:

It is:

(1) The Committing Magistrate or, in the absence of such Magistrate, any other Magistrate empowered by or under S. 206, may, if he thinks fit, summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence.

(2) Such examination shall, if possible, be taken in the presence of the accused and, where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall be given to the accused free of cost.

Sub-section (2) is important as it indicates that such examination shall, if possible, be taken in the presence of the accused. The examination can, therefore, it is clear be taken when the accused is not present. The words in section 219 (1) "may, if he thinks fit, summon and examine supplementary witnesses" show that if the contention of counsel for the appellants is correct the Magistrate would have complete power to bar evidence being called in the Sessions Court as he might not think fit to summon and examine such supplementary witnesses.

These are all the relevant Sections of Chap. 18. We have invited counsel to refer us to anything in any of these sections which establishes the point for which he contends. He is unable to point to any provision of law in any of these sections which expressly prohibits the calling of evidence in the Sessions Court which has not been produced in the Court of the Committing Magistrate. On the other hand, we are of opinion that a general consideration of all the sections clearly indicates that the law contemplates the calling of evidence in the Sessions Court which has not been produced before the Committing Magistrate.

The trial in the Court of Sessions is dealt with in Chap. 23. S. 286 is as follows:

(1) When the jurors or assessors have been chosen the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused. (2) The prosecutor shall then examine his witnesses.

This Section in no way restricts the power of the prosecution with regard to

witnesses to be called. Indeed in S. 286 (1) the prosecutor has to state by what evidence he expects to prove the guilt of the accused. If the evidence before the Court was confined to the evidence called before the Magistrate, it would be wholly unnecessary for the prosecutor to make any opening in the case as to the evidence he proposed to call. If there was a restriction intended by law to be placed upon the prosecution such as is contended for, this is the place where we would expect it to appear. S. 286 (2) also clearly places no restriction upon counsel for the prosecution. The words are "shall examine his witnesses," not "shall examine such witnesses as were called in the Court of the Committing Magistrate."

Section 289 (1) does not either in any way indicate a limitation as to the witnesses to be called. S. 291 is wholly irrelevant. S. 540 of the Code gives the Court power to call and examine any witness in attendance. This does not limit the right of the Court to call only such evidence as has been called in the Court of the Committing Magistrate. This clause indicates, therefore, that the Court, at any rate, has a right to call a witness in favour of the prosecution although he has not been examined in the Court of the Committing Magistrate. The theory of counsel for the defence is that the intention of Chap. 18 is that no witness can be called in the Sessions Court who has not been examined in the Court of the Committing Magistrate. This section, at any rate, clearly shows that this is not so.

The general effect in our opinion of a consideration of these sections of the Code of Criminal Procedure is that the prosecution is at liberty to examine witnesses in the Sessions Court which it has not produced in the Court of the Committing Magistrate, but that only those witnesses so examined in the Committing Magistrate's Court can be bound down to attend in the Sessions Court. The prosecution in the Sessions Court, if the witnesses are not examined in the Court of the Committing Magistrate, has to depend upon such witnesses being willing to give evidence without being bound down to appear, or upon being able to persuade the Court to act under S. 540 and summon such a witness. It has been argued by counsel for the ap-

pellants that it would be unfair to the accused not to examine all witnesses in the Committing Magistrate's Court. This argument has really nothing to do with the point of law which we are discussing, but we point out that the chalan gives a list of witnesses relied upon by the Crown and also indicates the effect of the evidence to be called.

Counsel further referred us to S. 347 of the Code as this section was alluded to in 55 All 1040 (3). We agree with counsel's view that this section has no relevance to the point under discussion. It merely refers the Magistrate to the sections we have already considered in Chap. 18. We think that, in accordance with the practice of the English Courts, a summary of the evidence proposed to be called should be given to the Sessions Court and the accused before the trial, if a witness has not been called in the Committing Magistrate's Court. There is no provision in the Criminal Procedure Code making this course compulsory, but we think that, in fairness to the accused, it should be followed. We answer the point of law referred to us as follows: That the prosecution is not debarred from producing in the Sessions Court evidence which has not been produced in the Committing Magistrate's Court.

With regard to the merits it has not been disputed by counsel for the defence that Mt. Niamat and Mohammad were lovers and, therefore, they had a strong motive to murder the husband of Mt. Niamat. It has been conclusively proved that Mohammad, on 28th February 1935, purchased two tolas of arsenic from Nazir Hussain who identified Mohammad. Ex. P. A., which is the poison register of Nazir Hussain, also establishes that Mohammad purchased the arsenic under a false name. His thumb-print upon the register has been proved. It is clear that if the arsenic had been purchased for any proper purpose it would have been unnecessary to give a false name. On the 12th of March it is alleged that the arsenic was administered. It is an undoubted fact that on the 13th Allah Ditta died. He was buried, but as a result of the first information report filed by one Punan Khan, who admitted that he was an enemy of Mohammad, the body was disinterred and the viscera of the deceased was sent for examination to the Chemical Examiner together with

the chadar which he was wearing. Arsenic was discovered in every organ examined by the Chemical Examiner and also upon the chadar. On the 15th Mt. Niamat, it is alleged, confessed to an Honorary Magistrate and a Zaildar that she had administered arsenic at the instance of Mohammad. She took the Honorary Magistrate and the Zaildar to her house and produced to them a packet containing 7 mashas of white arsenic and also a mortar and pestle which had been found by the Chemical Examiner to have white arsenic adherent to them. On the 16th Mahammad is alleged to have confessed to the Honorary Magistrate and the Zaildar, that is on the first day he was arrested. He also produced a packet containing 9 mashas of arsenic from his house.

We are satisfied that the evidence of the Zaildar and the Honorary Magistrate is true and can be relied upon. Mahammad also pointed out the shop of Nazir Hussain from which he had purchased the arsenic. Out of two tolas bought on the 28th of February there remains only, therefore, 16 mashas of arsenic. This would appear to show that 8 mashas had been used. This, combined with the fact that arsenic was discovered in every organ of the body of the deceased, in the dried excreta and vomit, and in the unused churi, which was discovered at the instance of the woman herself, indicates conclusively that very much more than a fatal dose of arsenic must have been administered.

It is, therefore, proved beyond doubt that a strong motive existed for both these accused to murder Allah Ditta. The purchase of arsenic by Mahammad under a false name has been proved. Apart from the confessions there was clearly opportunity to administer this arsenic and it has been proved beyond doubt that Allah Ditta died of arsenic poisoning. In addition we have the confessions of both the accused which we believe to be voluntary. On this evidence the Court below was clearly justified in recording a verdict of guilty.

On the question of the death sentence imposed upon Mt. Niamat we are of opinion that we are entitled to set it aside and sentence her instead to transportation for life. Mt. Niamat is a kamin: her lover Mohammad was a member of the proprietary body of the village and

she would clearly be under his influence. On this ground, therefore, we consider the alteration in sentence justified. Further Mohammad has been sentenced only to transportation for life although he clearly took a leading part in the murder and it would be wholly illogical to sentence the weaker accused, who was clearly under the influence of Mohammad, to death. It is difficult to understand why Mohammad was not sentenced to death. The learned Judge himself in his order says "the action of the accused was cold blooded and brutal and they both deserve the maximum penalty provided by law." It seems curious, in view of this observation, which is wholly justified, that the learned Judge proceeded to sentence Mohammad to transportation for life.

Except, therefore, for the alteration of the sentence passed upon Mt. Niamat, we dismiss both the appeals.

B.D./R.K. *Appeals dismissed.*

A. I. R. 1936 Lahore 538

AGHA HAIDAR, J.

(Firm) Gulab Singh-Johri Mal—Plaintiffs—Petitioners.

v.

Messrs. Dharmpal-Dalip Singh and another—Defendants—Opposite Parties.

Civil Revn. No. 473 of 1935, Decided on 9th January 1936, from order of Addl. Sub-Judge, First Class, Delhi, D/- 14th April 1935.

Arbitration—No revision lies from an order superseding arbitration.

Reference to arbitration is a branch or ramification of main suit which will have to be disposed of subsequently, whatever the result of the reference may be, and that order superseding the reference to arbitration is not open to revision: *Case law discussed.* [P 540 O 1]

Nawal Kishore and Bhagwat Dayal—for Petitioners.

Shamair Chand, Mehr Chand Mahajan, Joti Sarup, Qabul Chand and Parkash Chandra—for Opposite Parties.

Order.—On 29th July 1932, the plaintiff-firm, through Benarsi Das, brought a suit against the defendant-firm through Makhan Lal, etc., for a perpetual injunction restraining the defendant from using their trade-mark and copying the get-up of a certain article of merchandise called Zafrani Benarsi Patti. During the pendency of the suit the matter was re-

ferred to the arbitration of Rai Bahadur Ram Kishore on 28th March 1933. This reference fell through as the defendant did not pay the fee of the arbitrator as ordered by the Court. On 7th August 1933, another application was made for reference to the arbitration of the same gentleman. This application was signed on behalf of the plaintiff by Benarsi Das and for the defendant by Dharam Pal and Makhan Mal and Mr. Radhka Narain "pleader for Dharam Pal Dalip Singh." On 8th August 1933 the case was formally referred to the arbitration of Rai Bahadur Ram Kishore. Proceedings went on in a leisurely manner before the arbitrator uptill 8th July 1934, by which time the plaintiffs had produced all their evidence and closed their case, and the defendant had produced four witnesses. On 16th July 1934, however, Kidar Nath made an application to the Court that he was one of the partners of the defendant firm and had not joined in the deed of reference and that, therefore, the reference was invalid and must be superseded. On the same date Mr. Radhka Narain pleader appeared and asked the Court to supersede the reference because he did not hold any power-of-attorney from the defendant firm. The position taken by Mr. Radhka Narain is difficult to understand, but it does not affect the real matter now in dispute between the parties and may be left at that.

Benarsi Das on behalf of the plaintiff raised an objection that Kidar Nath was not a partner of the defendant-firm. It is important to note here that Benarsi Das denied the factum of Kidar Nath's membership in the firm and did not take his stand upon the plea that the Court could not at that stage supersede the reference to arbitration at the instance of Kidar Nath. Two further pleas were also put forward on behalf of the plaintiff, namely, that Kidar Nath had acquiesced in the reference to arbitration and that there was a usage or custom of trade which empowered one of the partners to submit a dispute relating to the business of the firm to arbitration. All the three points were decided against the plaintiff by the trial Court who made an order superseding the reference. The plaintiff has come to this Court in revision. A preliminary objection was taken on behalf of the respondent that no revision lay in view of a recent decision of a Divi-

sion Bench of this Court in 14 Lah 715 (1). The learned Counsel for the applicant relied upon 51 All 1010 (2). In that case also a preliminary objection was taken on the strength of a Full Bench decision reported in 43 All 564 (3), and it was argued that no revision lay as the order superseding the reference was only an interlocutory order and, therefore, not open to revision in view of the said Full Bench decision. The learned Judges, however, observed that:

The Full Bench decision is an authority only for the proposition that no revision lies from a finding recorded by the trial Court on one or more issues out of several that are before it for disposal.

They further observed that an order superseding the reference to arbitration amounted to an order deciding a "case" as contemplated by S. 115, Civil P. C., and as, such an order was not appealable, it was at least open to revision. The learned Judges followed an earlier decision of the Allahabad High Court in 36 All 354 (4). In that case it was held that, apart from the specific provisions contained in paras. 5, 8 and 15, Sch. 2, Civil P. C., the Court had inherent power to set aside the award but that such power should be exercised cautiously and sparingly and only when it was obvious that the ends of justice would not be met if the award is allowed to stand. It was further held that the High Court could interfere in revision if the inherent jurisdiction of the Court is exercised wrongly and with material irregularity. The matter again came up before the Allahabad High Court in 53 All 1006 (5), and the learned Judges, in view of certain decision of the Allahabad High Court including the Full Bench case noted above, came to the conclusion that:

No revision lies from an order setting aside an award and the decision of the question whether the award is valid or not does not amount to a 'case decided' within the meaning of S. 115, Civil P. C.

I may point out that in 47 All 121 (6), it was held by a Division Bench that

1. Ram Sarup v. Moban Lal, 1933 Lah 692=143 I C 809=14 Lah 715=34 P L R 651.
2. Bhola Nath v. Raghunath Das-Mithan Lal, 1929 All 743=122 I C 685=51 All 1010=1929 A L J 918.
3. Budhu Lal v. Mewa Ram, 1921 All 1=63 I C 15=43 All 564=19 A L J 558 (F B).
4. Chaturbhuj v. Raghubar Dayal, 1914 All 814=23 I C 758=36 All 354=12 A L J 529.
5. Risal Singh v. Faqira Singh, 1932 All 452=136 I C 568=53 All 1006=1931 A L J 842.
6. Muhammad Fakhrud-din v. Rahim-ul-lah Shah 1925 All 458=85 I C 502=47 All 121.

no application for revision would lie from an order setting aside an award. In the same volume in 47 All 916 (7) it was held that :

No revision lies against an order superseding an award made in a pending suit and directing the suit to proceed on the merits.

It would thus appear that with the solitary exception of the case reported in 51 All 1010 (2), the trend of recent decisions in the Allahabad High Court is against the entertainability of a revision against an order superseding an award. I would rely upon the Full Bench decision reported in 5 Lah 288 (8). The learned Judges in construing the provisions of S. 115, Civil P. C., arrived at the conclusion that the word "case" was not synonymous with "suit", and while every "suit" was a "case" it could not be said that every "case" was a suit. The word "case" was held to be more a comprehensive expression and included not only a suit but other proceedings which cannot be described as a suit. On a careful consideration of the Full Bench decision I am of opinion that the reference to arbitration is a branch or ramification of the main suit which will have to be disposed of subsequently, whatever the result of the reference may be, and that the order making the reference to arbitration is in the nature of an interlocutory order and as such is not open to revision. This view was accepted in 14 Lah 715 (1), in which the relevant case-law, including the decisions of the Allahabad High Court and the Lahore High Court, were considered and the ratio decidendi of that decision is that the arbitration proceedings taken in the course of a pending suit were an integral part of the suit or a branch of the same and were not separate "cases" distinct from the main suit and, therefore, not open to revision according to the Full Bench decision in 5 Lah 288 (8). This being so, I hold that no revision lies. Furthermore, in view of the law as laid down in 36 All 354 (4), cited by the Counsel for the applicant himself, the order of the Court below superseding the award was one made in the exercise of its inherent power and in the interests of justice and this Court cannot interfere with

it in revision. Mr. Nawal Kishore proceeded to discuss the evidence in order to show that Kidar Nath was not a member in the defendant-firm. But in revision this could not be allowed as the finding of the Court below on the point is one of fact and cannot be re-opened by this Court in revision on a consideration of the evidence on the record. No other point was argued. The result, therefore, is that this application is dismissed with costs.

M.D./R.K. *Application dismissed.*

A. I. R. 1936 Lahore 540

BHIDE AND CURRIE, JJ.

Sohan Singh—Plaintiff—Appellant.
v.

Mt. Naraini and others—Defendants—Respondents.

Second Appeal No. 1889 of 1934, Decided on 6th December 1935, from decree of Addl. Dist. Judge, Lahore, D/- 16th July 1934.

(a) Custom (Punjab) — Succession—Maini Khattris of Kasur Tahsil, Lahore District, are governed by custom and not by Hindu Law.

Maini Khattris in the Kasur Tahsil of the Lahore District are governed by custom in the matter of succession to sonless proprietors and not by Hindu Law: 1934 Lah 580, Ref.

[P 543 C 1]

(b) Custom (Punjab)—Burden of proof—Person alleging to be governed by particular custom must prove—He must also prove particular custom.

It lies on the person asserting that he is ruled in regard to a particular matter by custom to prove that he is so governed and not by personal law, and further to prove what the particular custom is.

[P 542 C 1]

(c) Custom (Punjab)—Proof—Custom can be proved by general evidence given by members of family or tribe—Proof of special instances is not necessary.

Custom can be properly proved by general evidence given by the members of the family or tribe without proof of special instances: 1925 P C 267 and 1928 P.C 294, Rel. on.

[P 542 C 2]

M. C. Mahajan, Daulat Ram and Yashpal Gandhi—for Appellant.

J. N. Aggarwal and Asa Ram Aggarwal—for Respondents.

Currie, J.—This judgment will dispose of second appeals Nos. 1889, 1890 and 1891 of 1934. The parties are Maini Khattris owning land in village Kotli Rai Abu Bakar and holding occupancy rights in village Raja Jang, both villages being in the Kasur Tehsil of the Lahore Dis-

7. Rudra Prasad Pande v. Mathura Prasad Pande, 1925 All 566=89 I C 173=47 All 916=23 A L J 656.

8. Lal Chand-Mangal Sen v. Behari Lal-Mehr-Chand, 1924 Lah 425=84 I C 259=5 Lah 288.

trict. The property concerned is the estate of one Mangal Singh. Mangal Singh died in 1904 and the property passed to his sons Santa Singh and Hukam Singh. On the death of Santa Singh the whole of the property went to Hukam Singh, and on 20th March 1910, on the death of Hukam Singh, half the property went to Mt. Naraini, the mother of Santa Singh, and half to Mt. Nihal Devi, the widow of Hukam Singh. On 10th January 1914, these two ladies made a gift of 101 Kanals and 18 Marlas to Mt. Gurdevi, the daughter of Hukam Singh, by way of dower, and on 15th August 1914 they mortgaged 173 Kanals 3 Marlas to one Maghi Mal. Finally, on 11th December 1928, after the death of Mt. Nihal Devi, Mt. Naraini mortgaged 325 Kanals 5 Marlas for Rs. 10,000. On 19th October 1929, Sohan Singh, the present appellant, a grandson of Deva Singh, the brother of Mangal Singh, instituted three suits contesting these alienations. The trial Court held that the parties were governed by Customary Law. Accordingly, the learned Subordinate Judge granted Sohan Singh a declaration to the effect that the gift was invalid. The suit relating to the first mortgage was dismissed, the trial Court holding that the alienation was for consideration and valid necessity. In the case of the second mortgage for Rs. 10,000 the plaintiff was granted a decree to the effect that it should only affect his reversionary rights to the extent of Rs. 2,200. Both parties appealed.

The learned District Judge held that the parties were governed by Hindu Law and that in view of the Hindu Law of Inheritance (Amendment) Act 2 of 1929, the daughter and sisters of Hukam Singh would be preferred as heirs to Sohan Singh, who having a very remote right of reversion would have no locus standi. He accordingly dismissed the suits. At the same time he recorded findings to the effect that if the parties had been governed by custom, the mortgages had not been effected for valid necessity. The learned District Judge granted a certificate for appeal regarding the existence of a custom involved, viz. whether the plaintiff and the alienor's family are governed by Zamindara custom in matters of alienation. Maini Khatri hold in proprietary right one-third of the village of Kotli Rai Abu Bakar. The history of this community is given in the note to

the pedigree-table of 1868 (Ex. D-34). According to this document the Muhammadan Rajputs, owners of Kotli Rai Abu Bakar, invited Suba and his nephew Sobha and their collateral Samman from Raja Jang. These men were Sowars in the Maharaja's service and apparently had some influence. They invited other fellow troopers of their own caste who came from villages Narli and Kahna and another collateral from village Gager. This must have been in about 1840. Since then these Khatri have been engaged in agriculture. They also hold occupancy rights in village Raja Jang, which is five miles distant from Kotli Rai Abu Bakar, so that they must have been agriculturists from a considerable time. They have their own lambardar.

According to the pedigree-table Mangal Singh was the great-grandson of Suba Singh. Suba Singh had three sons, Mehtab Singh, Jawan Singh and Ratan Singh. The first two and their descendants live in Kotli Rai Abu Bakar. Ratan Singh's branch, however, continued to reside at Raja Jang, though they had houses in Kotli Rai Abu Bakar. Mangal Singh himself apparently was a money-lender. In the wajib-ul-arz of Kotli Rai Abu Bakar of 1856 (Ex. P. 2), para 9, the proprietors recorded that on the death of any sonless proprietor his widow shall be the owner of the deceased's share subject to her not taking any husband and remaining chaste. In the event of her husband's relatives failing to look after her she was competent to get the land cultivated by others and in case of any necessity was competent to effect sale and mortgage like the owners. A palak, a pichhlag and daughters could not inherit property without a writing of the original proprietor. That is the custom of the village and it appears from the introduction to Bolster's Customary Law of the Lahore District that in 1856 the record of custom was included in the wajib-ul-arz of each village, no other riwaj-i-am being prepared. This wajib-ul-arz obviously applied to all the owners in the village, whether Rajputs or Khatri, as no exceptions are mentioned.

For the appellant, Mr. Mahajan has argued that the Maini Khatri form a compact section of the community of Kotli Rai Abu Bakar and are agriculturists. Apart from the wajib-ul-arz of 1856, the Khatri as a tribe were consulted at the

time of the preparation of the *riwaj-i-am* of the Lahore District and, therefore, must be taken to be governed by Customary law, 15 Lah 739 (1), following 1932 Lah 326 (2). He further relies on certain instances which will be discussed later. For the respondents Mr. Jagan Nath Aggarwal contends that the parties are governed by Hindu law. Admittedly, it lies on the person asserting that he is ruled in regard to a particular matter by custom to prove that he is so governed and not by personal law and further to prove what the particular custom is 110 P R 1906 (3), cited with approval by their Lordships of the Privy Council in 45 Cal 450 (4). He contends further that a person carries his personal law with him, citing in this connexion 15 Lah 715 (5), 48 Cal 30 (6), 9 Lah 110 (7) and 94 P R 1913 (8). He argues therefore that as Mangal Singh's branch of the family remained in Raja Jang, even if the Khatri of Kotli Rai Abu Bakar were held to be governed by custom, custom would not apply to those who remained in Raja Jang and they would be governed by Hindu law. As regards the fact that Khatri are dealt with in the Customary law, he points out that Mainis are not among the clans consulted according to the introduction to the Customary law of the Lahore District. It appears from the introduction to that work that the principal Khatri clans were consulted and there is nothing to show that the Mainis do not follow the same customs as the other agricultural Khatri of the Lahore District. As regards the argument that the Customary law, if proved in Kotli Rai Abu Bakar would not apply to members of the same family who remained in Raja Jang, that, I think, has no force. The villages are only five miles apart and it would be absurd to hold without very

strong evidence that while the descendants of two of Suba Singh's sons might be governed by custom because they live in Kotli Rai Abu Bakar the descendants of the third son who also own land in Kotli Rai Abu Bakar should be held to be governed by Hindu law, because they happened to reside in Raja Jang, five miles away, where they hold land as occupancy tenants.

Apart from the *wajibularz* of 1856 and the entries regarding Khatri in the *riwaj-i-am* of the Lahore District which, coupled with the fact that they form a compact section of the village community in Kotli Rai Abu Bakar, would raise a presumption that these people are governed by Customary law, we have a considerable amount of oral evidence. No less than nine witnesses, P. Ws. 1, 2, 3, 5, 7, 9, 10, 11 and 12, are Khatri of Kotli who depose to the fact that they are governed by Customary law in such matters, while even D. W. 14 admitted that he knew no woman other than Mt. Naraini who had made any alienation. As Mr. Mahajan points out, custom can properly be proved by general evidence given by members of the family or tribe without proof of special instances: see 6 Lah 502 (9), a Privy Council case. Similarly, in 10 Lah 86 (10)—a case of Aroras—their Lordships of the Privy Council attached some weight to two oral witnesses who, though unable to cite any instances, gave evidence of the existence of a custom as stated in the Customary law of the Peshawar District. In the present case however we have a number of instances among the Khatri of village Kotli Rai Abu Bakar. In the first instance Devi Ditta died leaving a daughter, but the property went to his brother Kanhaiya and his nephew Guranditta. Secondly, on the death of Mt. Mehtab Kaur, the property went to her husband's collaterals and not to her daughter. This instance, apart from the oral evidence, is supported by a mutation.

Among the descendants of Suba, three instances are given. Among the descendants of his son Jawand Singh, Hira Singh's daughters were excluded, and the property went to the collaterals. On the

1. Chhajji v. Bhagat Ram, 1934 Lah 580=148 I C 862=15 Lah 789=35 P L R 883.
2. Thakar Das v. Gopal Das, 1932 Lah 326=137 I C 81=33 P L R 257.
3. Daya Ram v. Sohail Singh, (1906) 110 P R 1906=31 P L R 1907 (F B).
4. Abdul Hussein Khan v. Mt. Bitu Sona Dero, 1917 P C 181=43 I C 306=45 I A 10=45 Cal 450 (P C).
5. Iqbal Singh v. Jasmer Singh, 1934 Lah 296=153 I C 862=15 Lah 715=35 P L R 215.
6. Balwant Rao v. Bajirao, 1921 P C 59=57 I C 545=47 I A 213=48 Cal 30 (P C).
7. Jugal Dass v. Jasodan Bai, 1928 Lah 212=103 I C 170=9 Lah 110.
8. Rulla v. Wariam Singh, (1913) 94 P R 1913=20 I C 454.

9. Ahmad Khan v. Channi Bitu, 1925 P C 267=91 I C 455=52 I A 379=6 Lah 502 (P C).
10. Vaishno Ditti v. Mt. Rameshri, 1928 P C 294=113 I C 1=55 I A 407=10 Lah 86 (P C).

death of Roda Singh and Vir Singh, the daughters were excluded by their collaterals: vide the evidence of the lambardar, P. W. 3. As regards the third instance among the descendants of Rattan Singh, it is said that on the death of Mangal Singh's brother Ishar Singh, the property went to the father of the plaintiff, Nandu, and Hukam Singh. This instance is contested by Mr. Jagan Nath, who points out that in the pedigree-table Ishar Singh is shown as having sons who died without issue, so that in reality it may be a case of the exclusion of sisters by collaterals and not of daughters. The next instance is among the descendants of Sobha Singh where the daughters of Hari Singh were excluded by Hari Singh's nephew (P. W. 10). A mutation has been produced in support of this instance. Mr. Aggarwal contends that in this case the family had not separated as according to one witness (P. W. 3) the family was joint. P. W. 10 however, who got the land, definitely states that his father was separated from his uncle. Finally, there is an instance in the line of Samman, but this is of no value, as it is not shown whether the absentee, whose estate was divided among the uncles had any daughters. There are thus five undoubted instances among these Khatris to show that daughters are excluded by near collaterals. This, coupled with the *wajibularz* of 1856, in my opinion, clearly shows that these Maini Khatris are governed by custom in the matter of succession to sonless proprietors and not by Hindu law. This conclusion is strengthened by the fact that according to the *riwajiam* of the Lahore District agricultural Khatris generally are governed by custom for which many instances are given in the appendix to Bolster's Customary Law.

It is urged on behalf of the respondents that the certificate given by the learned District Judge relates to the custom of alienation and not as to whether daughters are excluded. But unless the daughters or sisters were heirs, it is clear that the widow would have no right to alienate except for valid necessity and that the heir, in this case the plaintiff, would be entitled to contest alienations effected by her. Mr. Aggarwal has attempted to contest the findings of the learned District Judge regarding the necessity for the two alienations by mortgage. The

finding of the learned District Judge, however, is one of fact. He has held that, in view of the income enjoyed by Mt. Naraini and Mt. Nihal Devi there was no necessity for them to alienate the land for the purpose of raising money for the marriage of Mt. Gur Devi. No point of law is involved and the matter cannot be re-opened in second appeal. In view of my finding, that the parties are governed by custom, I would accept the appeals and grant Sobhan Singh a decree in each case declaring (1) that the gift made by Mt. Naraini and Mt. Nihal Devi in favour of Mt. Gur Devi is invalid; (2) that the mortgage of 15th August 1914 for Rupees 3,000 shall not affect his reversionary rights and (3) that the mortgage of 11th December 1928 for Rs. 10,000 shall not affect his reversionary rights. His claim in each case will therefore be decreed. In the circumstances, the parties will bear their own costs throughout.

Bhide, J.—I agree to the order proposed.

R.M./R.K.

Appeals allowed.

A. I. R. 1936 Lahore 543

AGHA HAIDAR, J.

Mt. Akhtari Begam—Defendant—Appellant.

v.

Allah Jawaya and others—Plaintiffs and another—Defendant—Respondents.

Second Appeal No. 1903 of 1935, Decided on 14th February 1936, from decree of Dist. Judge, Hissar, D/- 27th May 1935.

Appeal—Judgment—Lower appellate Court need not look into all evidence to give finding of fact.

There is no authority which lays down that the lower appellate Court before recording a finding of fact should refer to each and every document or piece of evidence on the record while recording its finding. It should be assumed that all the relevant evidence was brought to the notice of the Judge and he had it in his mind when he delivered his judgment. [P 544 C 2]

N. C. Pundit—for Appellant.

Tasuddug Hussain and Muhammad Amin—for Respondents (Plaintiffs).

Judgment.—This is a defendant's appeal arising out of a suit for possession of certain land. The trial Court dismissed the plaintiffs' claim. The plaintiffs went up in appeal and the District Judge has allowed the appeal in part and sent the case to the Deputy Commissioner for necessary action. The defendant Mt.

Akhtari Begum has come up to this Court in second appeal. Mt. Akhtari Begum (defendant 2) is the wife of Muhammad Amin (defendant 1). The couple have no children. On 21st January 1922 Muhammad Amin (defendant 1) executed a deed of gift in favour of his wife. In this deed of gift the value of the property is given as Rs. 10,000. The property, the subject-matter of the deed, consisted of houses and agricultural land. On 1st March 1932 the patwari made a report and on 29th November 1932 mutation was presented before the Tehsildar. The donor, Muhammad Amin, appeared before the revenue authorities and denied the gift. Subsequently, he admitted the gift and mutation was sanctioned in the name of Mt. Akhtari Begum, his wife, on 9th July 1934. This was, of course, during the pendency of the present suit. On 7th July 1933 Muhammad Amin (defendant 1) executed a sale-deed in favour of the plaintiffs for a sum of Rs. 3,000. The sale-deed was in respect of a portion of the landed property which formed the subject matter of the deed of gift in favour of defendant 2. When the plaintiffs proceeded to obtain possession, they were resisted. They brought the present suit on 11th November 1933.

The lower appellate Court has observed that the trial Court's finding that Muhammad Amin had really sold the land in dispute for Rs. 3,000 on 7th July 1933 had not been challenged before it by the defendants. Therefore this sale must be taken to be a good and valid sale. The important question however which arose on the pleadings was whether the gift made by defendant 1 in favour of defendant 2 was made in good faith or it was merely a fictitious and colourable transaction. The lower appellate Court has considered the surrounding circumstances of the deed of gift. It is pointed out that about the time when the deed of gift was executed, defendant 1 was in a very embarrassed condition and a decree for a sum of Rs. 14,589-8-0 had been passed against him and his brother on 24th January 1930. There was also a bond which defendant 1 and his brother had executed for Rs. 1,400 on 22nd August 1930. There was another debt of Rupees 1,000 which was due to the plaintiffs themselves from defendant 1. It is important to note that the property covered by the deed of gift, which is valued at

Rs. 10,000 represents the whole of the immoveable property belonging to defendant 1, while his debts about this time amounted to Rs. 9,000. In a matter of this kind, a Court cannot lose sight of the relationship existing between the alleged donor and the donee. The finding of the lower appellate Court is that the gift was not perfected as required by the Muhammadan law by delivery of possession to the donee as the husband has been living with the wife in the family residence. The District Judge has made a somewhat curious observation in trying to fortify his finding as to the fictitious nature of the transaction by the sage observation that, if the donor had really gifted his property to his wife, he would not have sold it to the appellants subsequently. However no importance need be attached to this remark and the fact remains that we have a clear finding that the gift was a fictitious transaction to which no legal effect can be given. I attach considerable importance to the fact that neither the donor nor the donee entered into the witness-box in order to support the story of the gift. If they had given evidence, they would have been able to show the circumstances under which the gift was made and the case would have been considerably strengthened if after cross-examination they would have satisfied the Court that the gift, as a matter of fact, was a real and genuine transaction under which the title to the house passed from the donor to the donee. This has not been done and I always look with suspicion at the absence from the witness-box of the parties principally interested in upholding the transactions such as the one before me.

It was argued by counsel for the appellant that important evidence has not been looked into by the lower appellate Court inasmuch as there is no mention of it in the judgment. There is no authority which lays down that the lower appellate Court before recording a finding of fact should refer to each and every document or piece of evidence on the record while recording its finding. We may take it that all the relevant evidence was brought to the notice of the District Judge and he had it in his mind when he delivered his judgment. I therefore affirm the decree of the lower appellate Court and dismiss the appeal with costs. I have

heard Mr. Tasuddaq Hussain in support of the cross-objections. He challenges the finding of the Court below that Muhammad Amin (defendant 1) was an Abbasi Qureshi and therefore a member of the agricultural tribe. This finding, which is a finding of fact, seems to be based upon some evidence and in second appeal I cannot go behind it. The cross-objections are accordingly dismissed. No order as to costs.

B.D./R.K. *Appeal and cross-objections dismissed.*

A. I. R. 1936 Lahore 545

ADDISON AND ABDUL RASHID, JJ.

Deputy Commissioner, Muzaffargarh—Petitioner.

v.

Joint Hindu Family, of Tahliaram—Decree-holder and others—Judgment-debtors—Respondents.

Civil Revn. No. 13 of 1935, Decided on 11th December 1935, against order of Dist. Judge, Muzaffargarh, D/- 3.11.1934.

(a) Interpretation of Statutes—Restrictive legislation—Construction though strict must be harmonious.

No doubt, restrictive legislation has to be strictly construed, but that does not mean that the language has to be strained in order to do so. Every clause of a statute should be construed with reference to the context and the other clauses of the Act so as, so far as possible, to make a consistent enactment of the whole statute, and the true meaning of any passage is that which being permissible best harmonises with the subject and with every other passage of the statute. [P 545 C 2; P 546 C 1]

(b) Punjab Alienation of Land Act (13 of 1900), S. 16 (2)—'Decree or order' includes 'decrees or orders' and land cannot be leased for aggregate period exceeding 20 years.

The words 'decree or order' can be read as 'decrees or orders' there being nothing repugnant in the subject or context, and consequently, the land belonging to a member of an agricultural tribe cannot in execution of decrees or orders of civil or revenue Court be leased or farmed out for an aggregate term exceeding 20 years: 1935 Lah 56, Ref. [P 546 C 1]

Ram Lal—for Petitioner.

Roop Chand—for Respondents.

Addison, J. — This is an application under S. 21-A (3), Punjab Alienation of Land Act by the Deputy Commissioner of Muzaffargarh through the Government Advocate, Punjab, for revision of an order, dated 3rd November 1934, passed by the District Judge of Multan.

The facts are as follows: The joint Hindu family of Tahliaram applied for 1936 L/69 & 70

execution of their money decree against certain judgment-debtors. The executing Court on 23rd July 1934, granted them a lease of the land of the judgment-debtors who are agriculturists for a period of 20 years from 1938 in lieu of the sum of Rs. 1,011-4-0 which is less than the full decretal amount. Some time ago, the same land had been attached in execution of another decree and a lease of it had been granted in favour of that decree-holder up to 1938. The result of the second lease or farm of the land is that the land of the judgment-debtors has been leased or farmed out for a period of 24 years, counting from the date of the second lease or farm.

The Deputy Commissioner of Muzaffargarh moved the District Judge of Muzaffargarh to set aside this order on the ground that such a lease or farm could not be granted under the provisions of S. 16 (2), Punjab Alienation of Land Act, for a greater period than 20 years counting from the date of the second transaction and that the period of the second mustajri should, therefore, be reduced to 16 years. The District Judge rejected this application, holding that the land could be farmed out for a period of 20 years in the case of every decree. It is for the revision of that order that this petition has been presented. This subject has already been before a learned Single Judge of this Court whose decision is reported in 1935 Lah 56 (1), and I may say at once that I am in agreement with this decision. S. 16 (2), Punjab Alienation of Land Act, runs as follows:

Notwithstanding anything contained in any other enactment for the time being in force no land belonging to a member of an agricultural tribe shall in execution of any decree or order of any civil or revenue Court, whether made before or after the enactment of this subsection, be leased or farmed for a period exceeding 20 years or mortgaged except in one of the forms permitted by S. 6.

It is true that restrictive legislation has to be strictly construed, but that does not mean that the language has to be strained in order to do so. Every clause of a statute should be construed with reference to the context and the other clauses of the Act so as, so far as possible, to make a consistent enactment of the whole statute and the true mean-

1. Deputy Commissioner, Muzaffargarh v. Sukhdial Chandar Bhan, 1935 Lah 56=157 I C 1028.

ing of any passage is that which, being permissible, best harmonises with the subject, and with every other passage of the statute (Maxwell on Interpretation of Statute, Edn. 7, pp. 20 and 26). Under the statute no alienation of land by a member of an agricultural tribe to a non-agriculturist shall exceed 20 years. In this respect Ss. 6 (a) and (b), 9, 11, 12 and 14 may be seen. S. 12 deals with mortgages and leases made during the currency of existing mortgage or lease and runs as follows :

During the currency of a mortgage made under S. 6 in form (a) or form (b) or of a lease or farm under this Act, the owner shall be at liberty to make a further temporary alienation of the same land for such term as together with the term of the current mortgage, lease or farm will make up a term not exceeding the full term of 20 years.

Any such further temporary alienation, if made for a longer term than is permitted by this section, shall be deemed to be a temporary alienation for the term permitted by this section.

The judgment-debtors, therefore, themselves cannot give two mortgages, farms or leases for a period exceeding twenty years and it is obvious from the wording of S. 16 (2) that this is what is meant by it, namely, that the civil or revenue Courts also cannot farm out the land of a member of an agricultural tribe for a period exceeding 20 years in the aggregate, however, many farms or leases there may be. Any other construction of the section would do violence to the wording thereof and to the context. Further, under S. 11 (2), Punjab General Clauses Act, unless there is anything repugnant in the subject or context, words in the singular include the plural and vice versa. The words "decree or order," therefore, in S. 16 (2) can be read as "decrees or orders," there being nothing repugnant in the subject or context. The section would then read that no land belonging to a member of an agricultural tribe shall in execution of decrees or orders of any civil or revenue Court be leased or farmed for a term exceeding 20 years. In my judgment, therefore, the order of the District Judge and of the executing Court should be set aside and a lease granted for a period of 16 years only, and I would so direct. In these circumstances, the sum for which the lease has been given must be reduced by 1/5th.

I might add that there will be no particular hardship in this interpretation of

the statute as, if there are more decrees than one against a judgment-debtor, the decree-holders can apply for pro rata distribution with the attaching decree-holder, and the amount fixed as the value of the lease or farm would have to be shared pro rata. One decree-holder or an outsider would get the farm or lease, but the other decree-holders would be paid their pro rata share by such person.

Abdul Rashid, J.—I agree.

V.B./R.K.

Order accordingly.

A. I. R. 1936 Lahore 546

ADDISON AND ABDUL RASHID, JJ.

Mela Mal-Shib Dayal — Assessee —
Petitioners.

v.

Commissioner of Income-tax—Opposite Party.

Civil Misc. Petn. No. 620 of 1935, Decided on 10th February 1936, from order of Commissioner of Income-tax, Punjab.

Income-tax Act (1922), S. 13 — Method of accounting—Provisions of section explained.

The provisions of S. 13, Income-tax Act, to the effect that income, profits or gains shall be computed in accordance with the method of accounting regularly employed by the assessee do not imply that the assessee must necessarily adopt the financial year as the accounting period or must adopt a method which would avoid two dates of the 31st of March falling within one accounting period. [P 547 C 1, 2]

Kirpa Ram Bajaj—for Petitioners.

J. N. Aggarwal and Sikri — for Opposite Party.

Abdul Rashid, J. — This is an application under S. 66 (3), Indian Income-tax Act, for a mandamus to compel the Commissioner of Income-tax, Punjab, to state the case of the firm *Mela Mal-Shib Dayal* and refer the points of law arising therein to this Court. The following questions of law have been formulated on behalf of the assessee: (1) whether the sum of Rs. 2,062 on account of loss of the Ferozepore excise branch, and Rs. 4,663 of Mahalpur, Hariana and Moga, which follow the financial year as their accounting periods (1st April 1930 to 31st March 1931) should not have been allowed to the assessee in the assessment relating to the year 1932-33 which follows the accounting period Chet Sudi 1 to Chet Badi 15 which corresponds to 20th March 1931 to 5th April 1932, for the year under assessment; (2) when a method of accounting is regularly em-

ployed by an assessee and the same is accepted by the Income-tax Officer from year to year, is an Income-tax Officer legally justified in departing from that practice in any subsequent year?

It appears that the Head Office of the assessee's firm is at Hoshiarpur and they also carry on business at Ferozepore, Mahalpur, Hariana and Moga. The accounting period of the Head Office is the Sambat year from Chet Sudi 1 to Chet Badi 15. The length of the Sambat year is not constant, and sometimes it extends over two dates of 31st March, and sometimes it does not include even a single date of the 31st March. The accounting period of the branch offices which mainly deal with excise contracts is from the 1st of April to the 31st of March, that is the ordinary financial year. According to the assessee there was a loss at the Ferozepore excise branch amounting to Rs. 2,062 and at Mahalpur, Hariana and Moga branches amounting to Rs. 4,663 during the accounting period 1st April 1930 to 31st March 1931. The accounting period of the Head Office for the assessment year, 20th March 1931 to 5th April 1932, happened to correspond to the period from "30th March 1930 to 19th March 1931." As the accounting period of the Head Office ended before the accounting period of the branch offices came to an end, the losses of the branch offices during 1930-31 were not shown in the Head Office accounts dealing with the accounting period "30th March 1930 to 19th March 1931." In the assessment for the year 1932-33 the losses referred to above were sought to be claimed as they could not have been claimed in the previous year, as the accounting period of the Head Office ended before the accounting period of the branch offices had come to an end.

The learned Commissioner refused to state the case to this Court on the ground that the method of accounting resorted to by the assessee could not be regarded as "a regular method of account" under S. 13 of the Act. On the other hand it was claimed on behalf of the assessee that this "method of accounting" had been employed by the assessee for a number of years and the Income-tax authorities had raised no objection thereto. We are of the opinion that the provisions of S. 13, Income-tax Act, to the effect that income, profits or gains shall

be computed in accordance with the method of accounting regularly employed by the assessee do not imply that the assessee must necessarily adopt the financial year as the accounting period or must adopt a method which would avoid two dates of 31st March falling within one accounting period. For the reasons given above, we direct the Commissioner of Income-tax, Punjab, to state the case of the petitioners and refer it to this Court. We formulate the following question of law: "Whether in the circumstances mentioned above the losses of the branches ought to have been allowed in the assessment year 1932-33 of the Head Office." The respondent will pay the costs of the petitioner.

B.D./R.K.

Mandamus granted.

A. I. R. 1936 Lahore 547

AGHA HAIDAR, J.

Brij Lal—Plaintiff—Petitioner..

v.

Dhanna Ram and another — Defendants—Opposite Parties.

Civil Revn. No. 642 of 1935, Decided on 8th January 1936, from decree of Senior Sub-Judge, Mianwali, D/- 15th May 1935.

Pro-note — Assignment—Pro-note can be orally transferred in Punjab.

Although the proper mode of assignment is by endorsement only, yet in Punjab there can be an oral assignment of a promissory note: 28 *Mad* 544, *Ref.*; 1932 *Lah* 30 and 29 *P R* 1919, *Rel. on.* [P 548 C 1]

Qabul Chand for Bishen Narain—for Petitioners.

Nawal Kishore—for Opposite Parties.

Order.—This is an application in revision under S. 115, Civil P. C., Khuda Yar defendant 2 executed a promissory-note in favour of the plaintiff Brij Lal. Dhanna Ram, defendant 1, claiming to be an assignee of the promissory-note, recovered the amount due under it from Khuda Yar, defendant 2. The plaintiff brought the present suit in which he impleaded Dhanna Ram as defendant 1 and Khuda Yar as defendant 2 for the recovery of the amount due on the promissory-note. The promissory-note was for a sum of Rs. 15 only which together with interest amounted to Rs. 23 only. The trial Court decreed the plaintiff's claim. Dhanna Ram went up in appeal and the learned Judge of the lower appellate Court came to the conclusion that

the plaintiff had orally assigned the pro-note to Dhanna Ram and that by virtue of this verbal assignment Dhanna Ram could recover the amount of the pro-note from defendant 2. The suit of the plaintiff was accordingly dismissed. The plaintiff has come up to this Court in revision.

There cannot be any doubt that there is a conflict of judicial opinion on the subject, but there is a decision of a learned Single Judge of this Court in 1932 Lah 30 (1), in which it was held that there can be an oral assignment of a pro-note in the Punjab at least, as the technical provisions relating to the assignment of choses in action contained in the Transfer of Property Act were not strictly applicable to this Province. He relied upon 28 Mad 544 (2). In this case the learned Judges, though not trammelled with the question of the applicability of the Transfer of Property Act, held that negotiable instruments were choses in action and that the rules in regard to them prior to the passing of the Negotiable Instruments Act continued to apply to them to the extent that they are not expressly or impliedly affected by any provisions of the Act. They point out that a pro-note, whether negotiable or not, is nevertheless a chose in action and is subject to the incidents attaching to it in that aspect, so long as the rules of Law Merchant are not departed from and that choses in action have been held orally assignable in this country, and such an assignee will have only the right, title and interest of the assignor while suing upon it in his own name. There is another case reported in 29 P R 1919 (3) where two learned Judges of the Chief Court of the Punjab held that :

An endorsement is not the only mode by which a negotiable instrument may be transferred and that it may be otherwise assigned and the assignee may sue in his own name.

The learned Judges followed 28 Mad 544 (2). There are cases of other Courts which have been cited by the learned counsel for the applicant and which no doubt seem to lend support to his contention that the proper mode of the

assignment of a pro-note is by endorsement only and that a verbal assignment was invalid, but in a revision in which a sum of Rs. 23 only is involved I do not think it worth while either to refer the matter to a larger Bench or to record my dissent from a case decided by a learned Judge of this Court especially when that decision is based upon an earlier authority which is entitled to great respect. I therefore decline to interfere in revision and dismiss this application with costs.

B.D./R.K.

Revision dismissed.

A. I. R. 1936 Lahore 548

ADDISON AND ABDUL RASHID, JJ.

Mian Channu Factories Union—Petitioner.

v.

Commissioner of Income-tax, Punjab—Opposite Party.

Civil Ref. No. 65 of 1935, Decided on 10th February 1936, from Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore, D/- 25th October 1935.

Income-tax — Partnership consisting of firms and undivided Hindu family — Shares of members of firm not mentioned in partnership deed — Partnership is trading concern and not firm within meaning of Income-tax Act — Such partnership is classed as other associations of individuals.

Where a partnership Union purports to consist of two firms and one Hindu undivided family and the shares of the members of the firm are not mentioned in the deed of partnership and the partnership is undoubtedly a trading concern, it cannot fall within the definition of the words 'firm' as given in the Income-tax Act. It is more appropriate to regard it as 'Other Association of Individuals.'

[P 549 O 2]

M. L. Sethi and J. G. Sethi — for Assessee—Petitioner.

J. N. Aggarwal and S. M. Sikri — for Commissioner of Income-tax.

Order.—This a reference under S. 66 (2), Income-tax Act. The Commissioner of Income-tax, Punjab, has formulated the following questions of law for the opinion of this Court: (1) whether on the facts of the case, the assessee was chargeable to tax under S. 3, Income-tax Act; (2) whether the assessee was to be dealt with as a "firm" or as an "association of individuals;" (3) whether registration under S. 26-A could be granted or not; (4) whether, in the circumstances of the case, interest paid to partners was an

1. Lachha Ram v. Hem Raj, 1932 Lah 30=134 I C 121=33 P L R 120.

2. Muthar Sahib v. Kadir Sahib, (1905) 28 Mad 544=15 M L J 384.

3. Panna Lal Lachhman Das v. Hargopal Khubi Ram, 1919 Lah 85=51 I C 250=29 P R 1919.

allowable deduction under S. 10 (2) (iii). The Mian Channu Factories Union (hereinafter called the assessee) were assessed for the year 1933-34 on an income of Rs. 39,969 in the status of an "association of individuals." This Union was constituted by means of a deed of partnership dated 13th September 1931. There were three partners according to the partnership deed, namely the firm of Dhanpat Mal-Diwan Chand, the firm of Ujjal Singh-Ajaib Singh and the Hindu undivided family of Dhanpat Mal-Bhagwan Das described as the first, the second and the third party, and owning 70, 60 and 75 shares in the partnership respectively. It was provided in the deed that all the goods purchased by the partnership shall be sent to all the three factories for ginning in proportion to their respective shares and that each factory shall charge Rs. 10 per bale for ginning. The factory ginning was to keep Rs. 5-8 per bale and pay Rs. 4-8 to the partnership. At the end of the year, the profit made by the partnership was to be divided between the partners in accordance with their respective shares. Any amount remaining unrealized from a purchaser or an Arthi was to be borne by the partnership. The partnership was to pay the employees and the ginning charges were to be debited to each factory after the whole lot was pressed.

In view of the above mentioned provisions of the deed of partnership it is clear that the Union was a trading concern and as such liable to assessment on its profits. In the case reported as 50 Mad 175 (1), four unregistered firms entered into a partnership to purchase certain goods, to sell them at different times and divide the profits, and it appeared that the total number of members of all the firms together came to twenty-two, but the partnership was not registered under the Indian Companies Act. On a suit instituted by three of the firms against the fourth for dissolution of partnership and taking of partnership accounts, it was held that the transaction was a business within S. 4, Cl. 2, Companies Act, and not a single venture falling outside the section. It was further held that for purposes of registration required by S. 4,

Cl. 2, of the Act, each of the unregistered firms cannot be regarded as a single legal entity; that "persons" under S. 4, Cl. 2, denotes individuals and does not include bodies of individuals. This decision was affirmed by their Lordships of the Privy Council: 34 C W N 1107 (2).

It is well settled that a firm is a mere group of individuals, and that a firm as such cannot legally be a partner in another firm. In the present case the Mian Channu Factories Union purports to consist of two firms and one Hindu undivided family. The shares of the members of the firm Dhanpat Mal-Bhagwan Das and those of Ujjal Singh-Ajaib Singh inter se, are not mentioned in this deed of partnership. While this partnership is undoubtedly a trading concern, it does not appear to us to fall within the definition of the word "firm" as given in the Income-tax Act. It is more appropriate to regard it as "Other Association of Individuals." In view of our finding that the Union is not a firm, the question of registration really does not arise. In any case, even if the Union is held to be a firm, it cannot be registered as the individual shares of the different members of the firm constituting the partnership are not mentioned in the deed.

With regard to interest it is provided in the deed of partnership that each factory shall invest its own capital for the purchase and sale of goods and shall get interest at the rate of Rs. 10 per cent per mensem. The money thus used by the different partners cannot be considered to be capital borrowed for the purposes of the business within the meaning of S. 10 (2) (iii). For the reasons given above, we answer the first question in the affirmative. With respect to the second question we hold that assessee must be regarded as an "association of individuals." The third and the fourth questions are answered in the negative. The assessee shall pay the costs of the Commissioner in this Court.

B.D./R.K.

Answer accordingly.

2. Senaji Kapurchand v. Pannaji Devichand, 1930 P O 300 = 126 I O 429 = 34 C W N 1107 (PC).

1. Pannaji Devichand v. Senaji Kapurchand, 1927 Mad 128 = 99 I O 640 = 51 M L J 667 = 50 Mad 175.

A. I. R. 1936 Lahore 550

AGHA HAIDAR, J.

Piare Lal—Defendant—Appellant.

v.

Karta Ram—Plaintiff—Respondent.

Second Appeal No. 22 of 1935, Decided on 4th February 1936, from decree of Addl. Dist. Judge, Karnal, D/- 6th October 1934.

(a) **Limitation—Copy—Person should not suffer for delay of copying section—Copying department is not agent of public.**

A litigant cannot be made to suffer for the laches and action of any department connected with the administration of justice. Hence there is no reason why a party should lose his right of appeal for the dilatory methods of copying department. The copying department is not the agent of the applicant for copies but for the particular department of the Government which is in charge of the Deputy Commissioner: 1936 Lah 200, Ref. [P 550 C 2]

(b) **Lahore High Court Rules — Copying rules—Rules very complicated—Amendment of rules suggested.**

The rules relating to the obtaining of copies in Punjab are far from being easily understandable and it is to be hoped that some simple rules shall be devised so that the litigants shall not be harassed and the time of the Court in considering these matters, which unfortunately crop up almost every day, shall not be wasted. [P 551 C 1]

Shamair Chand—for Appellant.

Achhru Ram and Indar Dev Dua—for Respondent.

Judgment.—This is a defendant's appeal, which raises a question of limitation. The trial Court decreed the plaintiff's claim on 14th July 1933. On 15th July 1933, the defendant, with a view to filing an appeal in the Court of the District Judge, made an application for copies of judgment and decree and along with his application deposited a sum of Rs. 3. Nothing further was done by the copying department. They could easily have informed the applicant that the amount which he had deposited was inadequate for the purpose of obtaining the copies; or they might have demanded the balance from him or they could at least have returned the application itself to him on the ground that it was not a good application owing to the proper copying fee not being deposited along with it. They did nothing of the kind until 27th July 1933 when they prepared the estimate of costs. This estimate was communicated to the applicant and he promptly paid the balance on the same day. The copies were ready on 27th July 1933 and

were delivered to the applicant on the same day. The appeal was filed on 25th August 1933. The position therefore is that, if the appellant is allowed to exclude the time between 15th July 1933, and 27th July 1933, he would be within time. On the other hand, as the learned District Judge has held, if the applicant was entitled only to two days' concession, namely, the 26th and 27th July, the appeal would be clearly time-barred. Holding this view, the learned District Judge has dismissed the appeal as barred by limitation.

In second appeal two contentions are raised by the defendant-appellant. In the first place, it is argued that the copying department after receiving application on 15th July 1933, did not take any action at all and therefore the petitioner was lulled into a state of false security. There is force in this contention. The copying department, as already pointed out, should have taken prompt action either by returning the application on the ground that it was not in order because the full cost of copying had not been paid or it could have demanded the balance. But there was no justification for them to keep it in their office from 15th July to 27th July 1933 without taking any action. A litigant cannot be made to suffer for the laches and inaction of any department connected with the administration of justice, hence there is no reason why in the present case the defendant-appellant should lose his right of appeal for the dilatory methods of the copying department. I have already laid down in 37 P L R 784 (1) that the copying department is not the agent of the applicant for copies but of the particular department of the Government which is in charge of the Deputy Commissioner.

It was pointed out to me by the learned counsel of the opposite party that the applicant should have put in the minimum deposit of Rs. 5 along with the application and not Rs. 3 as he actually did. The learned counsel however forgets the admitted fact that the cost of the copy of the decree in the present case would have been only Rs. 1-2-0. There was nothing whatsoever to prevent the copying department from supplying the applicant with a copy of the decree

only and withholding the copy of the judgment until the balance had been paid. Now, counting the period from 15th July 1933, when application was undoubtedly made for copy of the decree with a deposit of Rs. 3 up to 27th July 1933, the applicant was undoubtedly entitled to a deduction of this time. Having regard to S. 12, sub-s. (2), Lim. Act, and deducting the period between 15th July and 27th July the appeal of the defendant in the lower appellate Court would be within time.

Furthermore, an appeal is filed against the decree a copy of which must accompany the memorandum of appeal. The applicant could have been supplied with a copy of the decree and he would have taken his chance of filing the memorandum of appeal in the lower appellate Court together with a copy of the decree only. He could then have prayed for dispensation as regards the copy of the judgment and the Court might have granted the same to him. That was a matter entirely between the applicant and the Court and not for the copying department. The chances for obtaining that dispensation might have been remote, but that again was a matter for the appellate Court and for nobody else. The rules, as I have pointed out on more than one occasion, relating to the obtaining of copies in this Province, are far from being easily understandable and it is to be hoped that some simple rules shall be devised so that the litigants shall not be harassed and the time of the Court in considering these matters, which unfortunately crop up almost every day, shall not be wasted.

I therefore hold that defendant's appeal before the lower appellate Court was within time. I therefore allow the appeal and, setting aside the order of the lower appellate Court, remand the case for disposal according to law. The remand may be treated under O. 41, R. 23 or S. 151, Civil P. C. The appellant is entitled to a refund of the court-fee. Having regard to all the circumstances, I order that costs shall abide the result.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 551

BHIDE, J.

Jaginder Singh—Plaintiff—Appellant.

v.

Kartara and another—Defendants—Respondents.

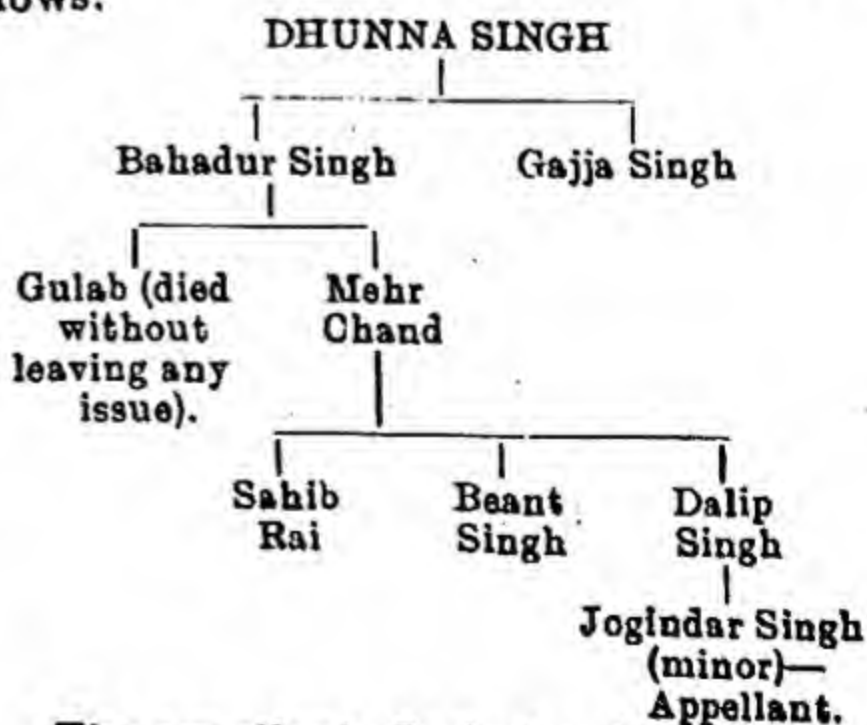
Second Appeal No. 1195 of 1935, Decided on 20th March 1936, from decree of Dist. Judge, Hoshiarpur, D/- 23-3-1935.

Custom (Punjab)—Marriage—Jats of Garhshankar tahsil—Jats are regarded as Sudras—Among Sudras marriage of father-in-law with his daughter-in-law is valid—'Factum valet' applicable to marriage—Marriage accepted by brotherhood—Long cohabitation raises strong presumption of marriage amongst Jats—Daughter-in-law comes from different 'got'—No objection to such marriage.

There is no direct prohibition in Hindu law as regards a marriage between a father-in-law and a widowed daughter-in-law at least so far as Sudras are concerned. Jats are classed as Sudras and for the purposes of marriage, they are governed by the restrictions laid down in Hindu law only to such extent as they may have adopted them by usage. There is, therefore, no initial presumption against the validity of such marriage. On the contrary, when a marriage has taken place in fact, there is in law a presumption in favour of legitimacy. The presumption is stronger when it appears that the marriage took place long ago and was accepted as valid by the brotherhood. The same presumption is raised even in cases of long cohabitation as man and wife amongst Jats. The daughter-in-law comes from a different got and from the standpoint of got pure and simple, there would be no objection to her marriage with her father-in-law. Jats of Garhshankar Tahsil consider that a man has a claim to marry not only his brother's widow, but also widows of other near relations and this he can do even without a marriage ceremony. [P 554 C 1; P 555 C 1]

D. N. Aggarwal—for Appellant.*N. C. Pandit*—for Respondents.

Judgment.—The pedigree table of the parties concerned in this case is as follows:



The appellant Jogindar Singh, a Jat, of the Garhshankar Tahsil in the Hoshi-

arpur District sued for a declaration that a sale of 20 kanals 7½ marlas of land made by his father Dalip Singh was without consideration and necessity and should not, therefore, affect his reversionary rights. The defendants resisted the suit inter alia on the ground that the land was not ancestral. This plea was founded on the contention that Dalip Singh and his two brothers Sahib Rai and Beant Singh were born to Mehr Chand by his marriage with his widowed daughter-in-law and the marriage being invalid according to custom they were Mehr Chand's illegitimate sons. The learned Subordinate Judge who tried the case had not at first framed any issue on the point of custom, but when the case came up on appeal before the learned District Judge he framed an issue as follows:

Whether according to custom as followed by the parties a marriage of a daughter-in-law with a father-in-law is invalid and the children of such union illegitimate?

The case was remanded for enquiry on this point. Evidence of both the parties was then recorded by the trial Court and a few witnesses were also examined by it suo moto. After considering this evidence the learned District Judge came to the conclusion that it was not established that a marriage between a father-in-law and a widowed daughter-in-law was valid by custom among Jats. Accordingly he upheld the defendants' plea that the land in suit was not ancestral qua the plaintiff and dismissed the suit. From this decision the present appeal has been preferred. The sole point agitated in this appeal is that of the custom involved in the issue which was remanded by the learned District Judge for enquiry as stated above. It will, therefore, be sufficient to discuss the evidence so far as it relates to the question of custom. The appellant produced 18 witnesses while the respondents produced 14 witnesses. Five witnesses were examined by the Court suo moto. Out of the appellant's witnesses four are lambardars, one is a retired Jamadar and one is a Havaladar pensioner. These witnesses have deposed that a marriage between a father-in-law and a widowed daughter-in-law is considered valid by custom amongst Jats. They have referred to two instances, namely one of Sahib Ditta, a Jat of the village Jainpur who married his widowed daughter-in-law named Mt. Khanon. He

had two children by this marriage named Bir Bal and Milkhi and they succeeded to his property (vide Ex. A-1). Bir Bal has himself appeared as a witness and supported this instance. Another instance mentioned by the witnesses is that of Mangal Singh of Lalian who married his daughter-in-law and had two sons named Pal Singh and Lal Singh.

It appears that Mangal Singh gifted his property in favour of Pal Singh and Lal Singh as well as another son named Sahib Singh by another wife in equal shares. Mutation was effected in accordance with this gift (vide Ex. A-2). The witnesses have also referred to an instance of a marriage wherein a Jat had married the widow of his nephew. This instance was the case of Sant Singh who had married Mt. Prabhi, widow of his nephew. This instance is supported by the judgment in Civil Appeal No. 2167 of 1929 decided by Addison, J., on 22nd May 1930. The validity of the marriage was questioned in this case, but the marriage was ultimately upheld as valid by this Court. This judgment follows another case of a similar marriage reported in 2 Lah L J 370 (1). In that case the question of the validity of the marriage was not gone into by this Court as there was no certificate on the question of custom, but it appears that the marriage had been held to be valid by the Courts below. The appellant's witnesses have also mentioned certain other cases wherein Jats had married widows of their uncles and so forth. The evidence of the appellant's witnesses also shows that Mehr Chand's marriage, which took place long ago, was attended by the Baradari and that his sons and daughters have been married into Jat families.

The witnesses for the respondents have on the other hand deposed that a marriage between a father-in-law and a widowed daughter-in-law is considered to be immoral and invalid according to custom. They have not however cited any instance in which the validity of such a marriage was questioned and the marriage was ultimately held to be invalid by the Courts. The witnesses have merely deposed that they do not know of any such marriage having taken place and that they considered it to be repug-

1. Maha Ram v. Basan, 1920 Lah 461=2 L L J 370.

nant to morals. Out of the respondents' witnesses there are lambardars and one is a Jagirdar. Out of the witnesses examined by the Commissioner suo moto two are pleaders, one is a Subedar Major, another a Subedar and one a Zaildar. All the witnesses excepting Kartar Singh Zaildar have deposed that they have not heard of any marriage between a father-in-law and a daughter-in-law having taken place amongst Jats. Sardar Amar Singh pleader deposed that he was not able to say whether such a marriage would or would not be valid according to custom, and to the same effect is the evidence of Kartar Singh Zaildar although he has mentioned one instance in which one Bela Singh, a Jat of Mauza Soona, had married his nephew's (Narain Singh's) widow by Chaddar Andazi. He states that the Baradari attended the marriage and that Bela Singh had sons by the marriage. He was however unable to say whether such a marriage is or is not valid according to custom. The other three witnesses, namely, Sardar Arjan Singh, Sardar Dalip Singh and Subedar Major Manohar Singh, stated that a marriage between a father-in-law and a widowed daughter-in-law is not recognised as valid by custom.

It will appear from the above that the evidence of the appellant is supported by two instances exactly in point and two instances of a marriage with the widow of a nephew which may be considered to be analogous. The case of the respondents on the other hand rests entirely on oral evidence. It is true that opinions of persons belonging to the same tribe on the question of custom are relevant in a case of this kind, but mere opinions unsupported by instances have to be taken with caution. The learned counsel for the respondents laid stress on the fact that six of their witnesses belong to Chabbewal and some of them belong to the same got as the appellant, but it was not suggested that the custom invalidating the marriage was peculiar to the village or to the got of the appellant. Moreover, the appellant's witnesses also include some belonging to the village Chabbewal and of the Jhuti got. In my opinion the balance of the evidence is clearly in favour of the appellant. The appellant's witnesses include several men holding respectable positions, and the cross-examination does not show that

they are interested. I see no reason to disbelieve their statements that the marriage of Mehr Chand was openly performed and was attended by the brotherhood and that his sons and daughter have also been married into Jat families. The respondents' witnesses, when questioned on the latter point, have given evasive answers, while some of them have made statements to the effect that Jats do not approve of Karewa and do not marry outside their tribe which appear to be clearly untrue in view of the answers to questions in the Customary Law of the District (see e. g., answers to questions 11 and 25).

The appellant's witnesses have moreover cited some instances two of which (those of Sahib Ditta and Mangal Singh) are supported by documentary evidence in the shape of mutations. As regards the instance of Sahib Ditta it was objected that it was not shown why the collaterals did not go to Court. But it was really for the respondents to rebut the appellant's evidence on this point. The appellant's evidence shows that two of the collaterals did object at the time of mutation, but the objection was overruled. Yet they did not care to take the matter to Court. As regards the other instance, i. e., that of Mangal Singh, it was urged that this was a case of gift. But it is not shown that the land was self acquired. The gift was made in equal shares in favour of the sons and it is noteworthy that no objection was raised to the mutation on behalf of the son of the other wife. It is true that Mehr Chand himself made gifts of his property in favour of the appellant and his brothers. His reasons for this course are not known.

It was suggested that he adopted this course, because he knew that the marriage was invalid by custom. But it is significant that no one challenged those gifts, and the point has been only incidentally raised by a third party in this case. As I have already stated, there is evidence to show that Mehr Chand's marriage was attended by the brotherhood and his children have been married into Jat families. This evidence appears to be reliable and is important. It was further urged that the respondents have not been able to prove any instances in which such marriages were held to be invalid, because such marriages are repugnant to the community and do not take place.

But in view of the oral evidence produced by the appellant, which is referred to above, this contention does not appear to be tenable. It may be that such marriages are perhaps not now looked upon with approval and are therefore rare. But that does not necessarily mean that they are invalid. Marriage of Jats with Chumar and Chuhra women have also been held to be valid, though such marriages also are probably not looked upon with approval, and are rare.

The oral evidence of the appellant seems to receive support also from the Customary Law of the Hoshiarpur District. In reply to question 9, which relates to the prohibited degree of relationship for the purpose of marriage, it was stated that Jats now prohibit marriages within the boy's got and his mother's got. It was added that a man may not marry the descendants of his mother's or father's sisters, but this prohibition does not extend to their got. The daughter-in-law comes from a different got and from the standpoint of "got" pure and simple, as indicated in the above reply, there would be no objection to her marriage with her father-in-law. The real objection to the marriage would be founded on affinity. But from the reply to question 25, Jats of Garhshankar Tahsil at any rate do not appear to attach importance to this objection. Question 25 and the answer thereto run as follows :

Question 25.—Where the marriage ceremony has not been performed, does the cohabitation of a man and woman constitute a marriage ?

Answer.—Generally the reply is that mere cohabitation without the performance of marriage ceremonies will not constitute a valid marriage. Hindu Jats of Dasuya and Garhshankar Tahsil however admit that the union of a man with his deceased brother's widow or the widow of any other near relative, whom he had a claim to marry by *Karewa* is sufficient to constitute a marriage even though no ceremonies may have been performed.

It would appear from the above that Jats of Garhshankar Tahsil consider that a man has a claim to marry not only his brother's widow, but also widows of other near relations, and this he can do even without a marriage ceremony. The custom is probably a relic of the times when women were looked upon as property and though this idea is repugnant to modern notions, it appears to survive still in certain customs amongst Jats. So far as mere repugnancy to modern notions is concerned, a marriage with a deceased

brother's widow can scarcely be considered to be less repugnant than a marriage with a son's widow. If the latter marriage is considered to be objectionable because a daughter-in-law stands on the same footing as a daughter, the marriage with a brother's widow would equally be repugnant as the latter stands on the same footing as a sister. But there can be no doubt whatever that Jats do recognize *Karewa* with a brother's widow as valid and the answer quoted above indicates that they do not object to marriages with widows of other near relatives also. As regards decided cases, I have already referred to one in which a marriage with the widow of a nephew was held to be valid. This case (Ex. A-5) relates to Rajput Mehtons of the Hoshiarpur District. The instance is not exactly in point and it is true that custom cannot be extended by logic or analogy. But the instance might be considered to be relevant at least so far as it indicates that marriages which would be objected to on grounds of affinity are not yet considered objectionable amongst certain tribes of this district.

The learned counsel for the respondents laid much stress on a case relating to Jats from the Ambala District reported as 15 Lah 688 (2), in which it was held by a Division Bench of this Court that, according to the custom governing the parties in that case, the marriage of a father-in-law with his widowed daughter-in-law is not valid. The instance related to Jats belonging to a different district and is, therefore, not exactly in point. The case was decided on such evidence as was before the learned Judges and did not purport, so far as I can see, to lay down any custom for Jats in the whole Province. It is well known that customs relating to the same tribe often vary from district to district, and even in different localities of the same district. It is only necessary to refer to the customary laws of the different districts in this Province to verify this fact. In the present instance we find that Jats from Garhshankar Tahsil are governed by customs differing in certain respects from those of other Jats in the Hoshiarpur District (See e. g., answers to questions 11, 25, etc.).

2. Jagnahar Singh v. Sadhu Ram, 1934 Lah 283=149 I C 943=15 Lah 688=36 P L R 503.

It was remarked in 15 Lah 688 (2) that there is no direct prohibition in Hindu Law as regards a marriage between a father-in-law and a widowed daughter-in-law, at least so far as Sudras are concerned. It is not disputed that Jats are classed as Sudras, and for the purposes of marriage they are governed by the restrictions laid down in Hindu Law only to such extent as they may have adopted them by usage. (See Mayne's Hindu Law 1922, pp. 105-6). There is therefore no initial presumption against the validity of the marriage in dispute. On the contrary, when a marriage has taken place in fact, there is in law, presumption in favour of legitimacy [See 13 M I A 141 (3) at p. 158; also 54 M L J 388 (4) and 2 Lah 207 (5).] The presumption is stronger when it appears that the marriage took place long ago and was accepted as valid by the brotherhood, as seems to have been the case in the present instance. The same presumption has been raised even in cases of long cohabitation as man and wife amongst Jats (See answer to question 25 in the Customary Law of the Hoshiarpur District referred to above, 74 P R 1893 (6), 54 P R 1900 (7), etc.). Customs recognizing such marriages were not unknown amongst non-Aryan tribes in ancient times and are still known to survive amongst certain tribes (see Mayne's Hindu Law, 1922, at p. 106). It was the respondents who raised the plea that the marriage in question in the present case was invalid according to custom and the burden lay heavily on them to prove their allegation. In view of the evidence discussed above it seems to me that they have failed to discharge that onus. I hold accordingly that it has not been proved that the marriage in question is invalid according to the custom governing Jats of Garhshankar Tahsil, of the Hoshiarpur District. I accept the appeal and remand the case to the learned District Judge for decision of the appeal before him on merits. Costs to follow final decision.

B.D./R.K.

*Appeal accepted.***A. I. R. 1936 Lahore 555**

ADDISON AND ABDUL RASHID, JJ.

Hoshnak Ram and another — Auction-purchasers—Appellants.

v.

Punjab National Bank, Ltd.—Decree-holder and *others*—Judgment-debtors—Respondents.

Letters Patent Appeal No. 139 of 1935, Decided on 4th February 1936, from judgment of Jai Lal, J., D/- 11th October 1935.

(a) Civil P. C. (1908), O. 21, R. 90 — Auction-purchaser arbitrarily closing auction at 4 o'clock, although another bidder is willing to purchase property for larger sum — It amounts to material irregularity in conducting sale — Applicant applying for setting aside sale not sustaining substantial injury by reason of irregularity — Sale will not be set aside.

Where the auctioneer conducting an execution sale, arbitrarily closes the auction either before or as soon as it is 4 o'clock although a bidder is willing to purchase the property for a much larger sum than the price realized, and although, the bid for the larger sum even if made after 4 o'clock is made immediately after the bid for which the property is knocked down, it amounts to a material irregularity in conducting the sale. Where however the property has not been sold at an inadequate price and the applicant has not sustained any substantial injury by reason of the irregularity in conducting the sale, the sale will not be set aside. [P 556 C 2; P 557 C 1]

(b) Civil P. C. (1908), O. 21, R. 65—Sale is complete when property is knocked down to highest bidder — It is not open to Court to offer property to person offering higher amount.

When the officer of the Court or such other person as the Court may appoint to conduct a sale as provided in O. 21, R. 65 knocks down the property to the highest bidder, such person must be deemed to have been declared to be the purchaser of such property. The sale is complete when the property is knocked down to highest bidder and it is not open to the Court thereafter to offer the property to any person who may be prepared to purchase it for higher amount: 1931 Lah 78 and 1933 Nag 123, *Foll.*; 1929 Rang 311, *Ref.* [P 557 C 1, 2]

(c) Letters Patent (Lab), Cl. 10 — Appeal—Objection not specifically raised before single Judge cannot be raised.

An objection not specifically raised in an appeal before a single Judge of the High Court cannot be raised in an appeal under Cl. 10, Letters Patent. [P 557 C 2]

J. L. Kapur—for Appellants.

Har Gopal—for Respondent 1.

3. Inderan Valungypuly v. Ramaswami Pandia, (1869) 18 M I A 141=3 Beng L R 1=12 W R 41 (P C).

4. Andrahennedige Dinohamy v. Wijatunge Liyanapatabendige, 1927 P O 185=104 I O 327=54 M L J 388 (P O).

5. Indar Singh v. Thakar Singh, 1921 Lah 20=68 I C 387=2 Lah 207.

6. Hira Singh v. Mt. Rami, (1893) 74 P R 1893.

7. Chet Singh v. Asu, (1900) 54 P R 1900=217 P L R 1900.

Abdul Rashid, J.—The Punjab National Bank obtained a decree against Har Dial and his brother for a sum of Rs. 19,000, and in execution of this decree one house belonging to the judgment-debtors, situate in Chiniot Town, was auctioned on 17th October 1932, for Rs. 4,305. The auction was conducted by the Official Receiver, Lala Hans Raj, and the last bid recorded was that of Nihal Chand and Hoshnak Ram for Rs. 4,305.

On 19th October 1932, the Bank presented an application to the executing Court stating that the sale had been concluded by the Official Receiver before 4 p. m., in spite of the fact that Paras Ram, Manager of the Bank, had offered a bid of Rs. 4,500. It was also alleged that the value of the house in dispute was more than Rs. 7,000 and that the Bank was willing to offer Rs. 6,000. It was prayed that the auctioneer may be ordered to continue the auction. On 19th November 1932, the Bank put in objections under O. 21, R. 90, Civil P. C., alleging that there had been grave irregularities in conducting the sale and that the sale was therefore liable to be set aside. Both these applications were rejected by the executing Court by its order dated 27th November 1934, and the sale in favour of Nihal Chand and Hoshnak Ram was confirmed on 10th January 1935. Against this decision the Bank preferred an appeal to this Court. It was held by a single Judge of this Court that it was not certain whether the last bid by the Manager of the Bank was made after 4 o'clock and, that under the circumstances, the auctioneer should have continued the sale, if necessary, to another date.

On this finding the appeal was accepted and a fresh sale of the house in dispute was ordered. The auction-purchasers have preferred an appeal under Cl. 10, Letters Patent, against the decision of the single Judge. We have been taken through the entire evidence by the learned counsel for the parties. The executing Court has mainly relied on the evidence of the Official Receiver who stated that he concluded the sale at 4 o'clock and that Paras Ram, Manager of the Bank, told him a few minutes after 4 p. m. that he wanted to give a bid of Rs. 4,500. A look at the list of bids shows that the Manager of the Bank con-

tinued to raise the bid by a substantial amount whenever a bid was given by Nihal Chand and Hoshnak Ram. When Nihal Chand and Hoshnak Ram gave a bid of Rs. 2,700, the Manager raised it to Rs. 3,000. Further, when Nihal Chand gave a bid of Rs. 3,050, the Manager gave a bid of Rs. 4,000. The list of bids also shows that the present auction-purchasers raised the bid of the Manager of the Bank by five rupees, while the Manager continued to raise it by Rs. 100. It is also in evidence that the Manager of the Chiniot Branch of the Bank had been authorized by the Head Office to purchase the house in dispute up to Rupees 7,000.

It appears therefore that the auctioneer arbitrarily closed the auction either before or as soon as it was 4 o'clock, though the Manager of the Bank was eager to purchase the property for a much larger amount than the price realized. The learned single Judge was therefore right in holding that it had not been established that the Manager of the Bank had given his bid of Rs. 4,500 after 4 o'clock. The circumstances point to the fact that, even if this bid was made after 4 o'clock, it was made immediately after the bid of Rs. 4,305 made by the auction-purchasers. We therefore agree with the single Judge that there was a material irregularity in conducting the sale.

The provisions of O. 21, R. 90, Civil P. C., make it clear that no sale in execution can be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. This point appears to have been overlooked in the judgment under appeal. Tek Chand (J. D. W. 1) states that he intended to purchase the house in dispute, but as the price went above Rs. 4,000, he did not purchase it, as Rs. 4,000 was a reasonable price for the house. He is a vice-President of the Municipal Committee, Chiniot, and there is no reason to suppose that he is favouring the judgment-debtors. Narpat Ram (J. D. W. 2) stated that the house in dispute was equal in area and similar in construction to his house and adjoined it, and that his house was mortgaged with the Punjab National Bank for Rs. 9,000, but the Bank received Rupees 4,500 and gave up the house. This shows

that the value of the house in dispute is not above Rs. 4,500. The only evidence produced on behalf of the Bank was that the Bank was prepared to offer a bid of Rs. 6,000 for the house in dispute. The decretal amount due to the Bank is over Rs. 19,000. The mere fact that the Bank was prepared to purchase the house for Rs. 6,000 therefore does not show that the house had been sold for an inadequate price. We are therefore not satisfied that the applicant has sustained any substantial injury by reason of the irregularity in conducting the sale.

The learned counsel for the respondent contended that when a house is sold in execution of a decree it is for the Court to declare as to who is the purchaser of the property, and that it is open to the Court, after the last bid has been accepted by the auctioneer, to offer the house to any person who may be prepared to purchase it for a higher amount. Reliance was placed in this connection on a ruling of the Patna High Court reported as 2 Pat 548 (1). It was laid down in that ruling that:

The formal order declaring who has purchased the property put up for sale should be submitted for signature under R. 84 expeditiously, before the presiding officer rises for the day, and the presiding officer of the Court, before signing the bid, should enquire from the persons present in Court whether there is any advance on the highest bid given by the officer conducting the sale.

Reference was also made in this connection to 58 Cal 788 (2), 1925 Mad 318 (3), and 1929 Lah 673 (4). On behalf of the appellants it was contended that 2 Pat 548 (1) was based on a special procedure governing Court auctions at Patna, as was pointed out in 7 Rang 425 (5). It was held in the Rangoon ruling that the officer conducting the sale can declare the highest bidder to be the purchaser. In 1931 Lah 78 (6), it was held that when the officer of the Court or such other person as the Court may appoint, to conduct the sale as provided in O. 21, R. 65, knocks down

the property to the highest bidder, such person must be deemed to have been declared to be the purchaser of such property. The sale is, therefore, complete when the property is knocked down to the highest bidder.

To the same effect is 1933 Nag 123 (7). We are inclined to agree with the observations made in 1931 Lah 78 (6). The objection that the auctioneer is merely a ministerial officer, and that the Court can refuse to declare the highest bidder to be the purchaser was not specifically raised before the Single Judge. For the reasons given above, we accept this appeal, set aside the judgment of the learned Single Judge ordering a re-sale, and affirm the decision of the executing Court confirming the sale in favour of Nihal Chand and Hoshnak Ram. Parties will bear their own costs in this appeal.

R.M./R.K.

Appeal allowed.

7. Mannu Lal v. Nanhelal, 1933 Nag 123=141
I C 367=29 N L R 52.

A. I. R. 1966 Lahore 557

BHIDE, J.

Abdul Sattar and others—Plaintiffs—
Petitioners.

v.

(Khan Bahadur Sheikh) Aziz-ul-Rah-
man and another—Defendants—Oppo-
site Parties.

Civil Revn. No. 553 of 1935, Decided on 12th December 1935, from order of Sm. C. C., Delhi, D/- 7th June 1935.

Provincial Small Cause Courts Act (1887). Art. 31—Suit for recovery of balance of price of sale—Mere notice to go into accounts is one for accounts within Art. 31.

A suit for recovery of balance due out of the consideration of the completed sale is cognizable by Small Cause Court. The mere fact that the plaintiff had given defendant a notice to go into account cannot convert this suit into one for account: 1917 Lah 27, *Rel. on*; 1916 Cal 530 and 1918 Mad 364, *Disting.* [P 558 C 1]

Bishan Narain—for Petitioners.

Sheikh Niaz Ali—for Opposite Parties.

Order.—This is a petition for revision of the order of the Judge, Small Cause Court, Delhi. The petitioners sued for recovery of a sum of Rs. 129-12-0 on the basis of a sale-deed. The defendants raised a preliminary objection that the suit was not cognizable by a Small Cause Court. This objection was upheld and the plaint was returned for presentation to proper Court. The learned counsel for the petitioners urges that this view of the learned Judge of the Court below was not correct as the suit was not really

1. Jaibhadar Jha v. Matukdhari Jha, 1923 Pat 525=76 I C 113=2 Pat 548=4 P L T 498.
2. Surendra Mohan v. Manmathanath, 1931 Cal 583=134 I C 447=58 Cal 788.
3. Ratnasami Pillai v. Sabapathy Pillai, 1925 Mad 318=82 I C 793.
4. Punjab National Bank Ltd. v. Sundar Singh, 1929 Lah 673=118 I C 901.
5. Ohn Tin, Mg. v. P. R. M. P. S. R. M. Chettyar Firm, 1929 Rang 311=120 I C 142=7 Rang 425.
6. Nur Din v. Bulagimal & Sons, 1931 Lah 78=131 I C 227.

one for account within the meaning of Art. 31 of the Schedule to the Provl. Small Cause Courts Act, the mere fact that certain accounts may have to be gone into in the course of a suit not being sufficient for holding that the suit was one for account. In support of this contention, the learned counsel cited 34 P R 1917 (1). The learned counsel for the respondents relied, on the other hand, on 43 Cal 59 (2) and 45 I C 161 (3). He also referred to a notice given by the plaintiffs to Azizul Rahman, defendant, on 14th January 1935, in which they called upon him to go into accounts with them.

The rulings cited by the learned counsel for the respondents do not appear to be in point. All that was held in those cases was that a suit for recovery of unpaid mortgage money is a suit for specific performance of an agreement to lend money on a mortgage and that such a suit was not maintainable. It was also held that such a suit, even if maintainable, would not be cognizable as a Small Cause Court case in view of Arts. 15 and 16, Sch. 2, Provl. Small Cause Courts Act. In the present case the suit is for recovery of the balance due out of the consideration of a completed sale, and such a suit has been held to be within the cognizance of a Court of Small Causes: vide 10 I C 267 (4), 55 I C 541 (5) and 73 I C 125 (6). The mere fact that the plaintiffs had given the defendant a notice to go into accounts cannot convert the present suit into one for account. In view of the above authorities and on 34 P R 1917 (1), I accept the petition for revision and remand the case to the Small Cause Court, Delhi, for trial on merits; costs will follow final decision.

M.D./R.K.

Petition accepted.

1. Muhammad Said v. Tldoo Mal, 1917 Lah 27=41 I C 46=34 P R 1917.
2. Galim v. Sadarjan Bibi, 1916 Cal 530=29 I C 621=43 Cal 59=21 C L J 532=19 C W N 1332.
3. Rajgopala Aiyar v. Davood Rowther, 1918 Mad 364=45 I C 161=34 M L J 342.
4. Sowdagar Nabheekan Sahib v. Muhammad Hussain Sahib, (1911) 10 I C 267.
5. Thevar v. Ammunni, 1920 Mad 578=55 I C 541.
6. Dhuman v. Ramji Mal, 1924 Lah 314=73 I C 125.

A. I. R. 1936 Lahore 558

TEK CHAND AND DALIP SINGH, JJ.

Mt. Mallan and another—Plaintiffs—Appellants.

v.

Parmatma Das and others — Defendants—Respondents.

Appeal No. 242 of 1931, Decided on 6th January 1936, from order of Senior Sub-Judge, Amritsar, D/- 30th July 1930.

Hindu Law—Debts—Hindu incurring debt during his lifetime, dying leaving son and widow—Son dying later leaving his widow—Property in hands of widows is liable for debt—Even widow's rights of maintenance are subject to obligation to pay debt.

There is no distinction between a personal obligation to pay a debt which is the duty of the original debtor and the pious obligation enforced by the Hindu law against the son of the original debtor. The piety of the obligation does not make it cease to be a personal obligation to pay a debt. [P 559 C 2]

Where a Hindu governed by the Mitakshara incurring a debt during his lifetime, dies leaving a son and a widow and the son also subsequently dies leaving a widow, the property left by the son and in the hands of the widows is liable to satisfy the debt incurred by the original owner of the property and even the widow's rights of maintenance from the property are subject to the obligations to pay the debt: 1921 All 163, Dissent.; 2 Bom 67, *Expl. and Rel. on.* [P 559 C 2; P 560 C 1]

*J. N. Aggarwal and A. R. Aggarwal—*for Appellants.

*D. N. Aggarwal and Inder Dev —*for Respondents.

Dalip Singh, J. — One Nathu Mal, a Hindu governed by the Mitakshara law, stood surety for a debt contracted by his son-in-laws, Madan Chand, Jiwan Ram and their brother Ram Nath. These persons had mortgaged certain property of their own to the predecessors-in-interest of the present plaintiffs. The mortgagee brought the mortgage property to sale and for the balance brought a claim under O. 34, R. 6 against Nathu Mal. During the pendency of the mortgage suit Nathu Mal had died and his son Nand Lal was brought on the record as his legal representative. Nand Lal also died before the mortgage decree was passed. An application was then made to bring on the record Mt. Malan, the widow of Nathu Mal, and Mt. Parkasho, widow of Nand Lal, as the legal representatives of Nand Lal. This was allowed and the preliminary decree and the final decree were passed in the mortgage suit. As the mortgaged property was in-

sufficient to discharge the mortgage debt an application under O. 34, R. 6 was made against the estate in the hands of Mt. Malan and Mt. Parkasho as stated above. Certain objections were taken by Mt. Malan and Mt. Parkasho. It was admitted that the property was ancestral in their hands and it was contended that as the debt was not for family necessity it did not bind the property in the hands of the widow of Nathu Mal nor his daughter-in-law, Mt. Parkasho, widow of his son Nand Lal.

The trial Court, however, held that though the debt was not for family necessity it was neither immoral nor illegal and hence the property was liable to satisfy the debt; but it held that both Mt. Malan and Mt. Parkasho had a right of maintenance in the said property, and as the property was ancestral and the debt was not for necessity, therefore, their right of maintenance had priority over the debt, and the discharge of the debt from the property, was subject to their right of maintenance. From this decree Mt. Malan and Mt. Parkasho have appealed and the creditor has put in cross-objections against the right of maintenance allowed to the ladies.

It was contended before us in appeal that while there was a pious obligation on Nand Lal to pay the debt of his father Nathu Mal because the debt was neither immoral nor illegal, yet nonetheless on the death of Nand Lal the property vested in Mt. Parkasho, widow of Nand Lal; and there was no pious obligation on her to pay the debt and that, therefore, the property is not now liable for the debt originally contracted by Nathu Mal. For this proposition 43 All 604 (1), has been cited as an authority. In that case no doubt it was held that where a Hindu mother had succeeded to her son's estate, she could not validly alienate the property in order to pay off certain time-barred debts incurred by her own husband. It was pointed out that the bar of time was not recognized by Hindu law, but the learned Judges were of the opinion that as the estate was not encumbered with the debt of her husband, and it was only the pious duty of the son to pay the debts of his father, therefore, on the death of the son the

widow got an unencumbered estate and could not validly alienate the estate to the detriment of the reversioners. They distinguished 2 Bom 67 (2), which was cited before them and which proceeds on the authority of a text from Narada on the ground that the proposition there laid down, "whoever takes the estate must pay the debts with which it is encumbered," was a correct proposition, but the estate was not encumbered. With the greatest respect to the learned Judges it appears to me that the learned Judges misunderstood the meaning of the word "encumbered" as used in 2 Bom 67 (2). The original text of Narada as translated in Sacred Books of the East (edited by Max Muller) Vol. 33, page 46 reads as follows :

A sonless widow, and one who has been enjoined by her dying husband (to pay his debt), must pay it. Or (it must be paid) by him who inherits the estate. (For) the liability for the debts goes together with the right of succession. (Narada I, 17).

The word "encumbered," therefore, does not in the ruling mean an "incumbrance" in the sense of a hypotheca or charge on the property at all. It is merely used in the ordinary sense that the estate of a person who owes a debt is liable to pay it upon the decease of that person and anybody inheriting that estate takes it subject to the debt. There is no distinction at all between a personal obligation to pay a debt, which is the duty of the original debtor, and the pious obligation enforced by the Hindu law against the son of the original debtor. The piety of the obligation does not make it cease to be a personal obligation to pay a debt. I, therefore, with all respect to the learned Judges of the Allahabad High Court must dissent from the proposition laid down in that ruling.

The debt in the present case had been incurred by Nathu Mal in his lifetime. At that time Mt. Malan could have no right of maintenance against the property, her right being solely a personal one against the husband. Upon the death of the husband, if there had been no son, it is clear that the property would have been subject to the debt created by the husband and Mt. Malan's right of maintenance would not have priority over the debt. In the hands of

1. Sheo Ram v. Sheo Ratan, 1921 All 168=68
I O 279=43 All 604=19 A L J 613.

2. Bhala Nahana v. Parbhu Hari, (1877) 2 Bom 67.

Nand Lal there was personal obligation on Nand Lal to pay the debt of his father Nathu Mal, and similarly when he died and Mt. Prakasho inherited the estate she took it subject to the obligation to pay the debts due from Nand Lal. In the present case it is admitted before us that Mt. Prakasho has since remarried and therefore there is no right of maintenance now claimable by her at all. But quite apart from this, at the date of the suit it seems to me clear that Mt. Parkasho's right of maintenance, and similarly Mt. Malan's right of maintenance, from the property were subject to the obligation to pay the debts which had been contracted by Nathu Mal, the original owner of the property, and, therefore, I would dismiss the appeal with costs and accept the cross-objections. I would leave the parties to bear their own costs in the cross-objections.

Tek Chand, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Lahore 560

AGHA HAIDAR, J.

Tilok Singh and others—Plaintiffs—Petitioners.

v.

Mohammad Rashid and others—Defendants and *others*—Plaintiffs—Respondents.

Civil Revn. No. 545 of 1935, Decided on 30th January 1936, from order of Sub-Judge, Third Class, Ambala City, D/- 29th May 1935.

Practice—Transfer of suit — Transferee Court informing pleaders of parties of new date fixed—Pleader intimating to Court inability to appear in transferee Court—Court should inform parties as well.

A suit during administrative changes was transferred from one Court in one town to another Court in a different town. The transferee Court issued notice to the pleaders of the parties intimating to them new date fixed for hearing in the transferee Court. The pleader for the plaintiff in that suit informed that he was engaged to appear in one particular Court only. The Court did not inform the transfer to the party. On the date of hearing neither the plaintiff nor his pleader appeared and consequently the suit was dismissed for default. On revision against the order of dismissal:

Held: that the pleader ought to have conveyed information to his client that the date had been changed and that the case would be heard at a different Court, when he was not prepared to appear. But it did not justify the action of the Court in refraining from serving notice upon the party and conveying to him the date which had been fixed for hearing as

well as the name of the Court before which he was to appear: 1934 Lah 91, Rel. on.

[P 560 C 2; P 560 C 1]

Mohammad Aslam Khan for *Tek Chand*—for Petitioners.

N. C. Mehra for *Jalaluddin*—for Respondents.

Order.—A suit was brought in respect of some land in the Court of Mr. Brander, I. C. S., Subordinate Judge, Rupar. The District Judge, as a measure of administration, transferred the case to the Court of Mr. Masud Ahmed, Subordinate Judge of Ambala, and it was further ordered that notices of the transfer be served on the parties or their counsel. Notice was served upon Mr. Tej Pal, pleader for the plaintiff, at Rupar, intimating to him that the 6th April 1935 had been fixed for the hearing of the case. On 1st April 1935 Mr. Tej Pal made an endorsement on the notice that as he had been engaged to appear in the Court of the Subordinate Judge at Rupar only and not at Ambala therefore the party might be served personally. The notice, together with the endorsement reached, the office of the Subordinate Judge, Ambala, on 2nd April 1935, and was brought to the notice of the Subordinate Judge on 3rd April 1935, on which date the Subordinate Judge initialled it. No further action was taken in consequence of the information conveyed to the Court on 3rd April 1935 and therefore no notice was personally served upon the party intimating to him the date fixed for hearing and also informing him of the altered venue of the Court by which the case was to be heard. The result was that on 6th April 1935 there was no appearance on behalf of the plaintiff either in person or through Mr. Tej Pal, pleader. In my opinion under the circumstances of the present case it was the duty of the Court to inform the party personally of the date of hearing and the Court before which he was to appear.

It was argued that the pleader ought to have conveyed information to his client that the date had been changed and that the case would be heard at Ambala, where he was not prepared to appear. This may be so, but it did not justify the action of the Court in refraining from serving notice upon the party and conveying to him the date which had been fixed for hearing as well as the name of the Court before which he was to ap-

pear. The observations of the learned Single Judge of this Court in 1934 Lah 91 (1) are applicable to the facts of the present case. On behalf of the opposite party it was further argued that, as the plaintiff had a remedy open to him to institute a fresh suit, this Court should not interfere in revision. This is a sound rule in most cases, but I do not think that it is an inflexible rule and that in all cases in which a parallel remedy is open to a party, his application in revision should, as a matter of course, be dismissed.

It was also argued that the provisions of O. 3, Rr. 4 and 5, Civil P. C., apply and that the pleader could not put an end to his duties merely by making the endorsement on the notice. The pleader's point of view however cannot be ignored. If a local pleader is engaged to appear in a case before local Court and that case is subsequently transferred to some other and distant Court, it cannot be expected that the pleader should undertake a journey to the latter Court to inform it that his duties as a pleader have come to an end on account of the transfer of the case. Be that as it may, the fact remains that in the circumstances of the present case the Court, in common fairness, ought to have informed the party. This has not been done. In my opinion, the Court acted in the exercise of its jurisdiction with material irregularity. I therefore allow this application in revision, set aside the order of the Court below and remand the case to the Court of the Subordinate Judge, Ambala, for disposal according to law. Under the circumstances of the present case I make no order as to costs.

B.D./R K. *Application allowed.*

1. Satya Pal v. Sant Ram, 1934 Lah 91=146 I O 944.

A. I. R. 1936 Lahore 561

AGHA HAIDAR, J.

Jamna Das—Objector—Petitioner.

v.

Jalal-ud-Din—Decree-holder and others—Judgment-debtors and another—Auction-Purchaser—Respondents.

Civil Revn. No. 179 of 1936, (formerly Civil Appeal No. 1903 of 1935), Decided on 2nd March 1936, from order of Dist. Judge, Rawalpindi, D/- 10th June 1935.

Civil P. C. (1908), O. 21, R. 89 (as amended by Lahore High Court)—Person taking mort-

1936 L/71 & 72

gage of property under attachment—Property put to sale—Mortgage can under R. 89 save property.

A person who has obtained a mortgage of the property after attachment can come forward according to the amended rule as amended by the Lahore High Court, and by making the necessary payments under O. 21, R. 89 save the property and prevent its sale from taking place: 1935 Lah 51, Rel. on. [P 562 C 1]

*Barkat Ali and S. N. Bali—*for Petitioner.

*Achhru Ram and Inder Dev Dua—*for Respondents.

Order.—One Jalal-ud-Din obtained a decree against Jagan Nath Amar Nath, judgment-debtors, on 28th November 1932 for a sum of Rs. 1,500 odd. On 19th December, 1932 an application was made by the decree-holder for execution of his decree. It appears that some payments were made in part satisfaction of the decree from time to time and a balance of Rs. 700 remained outstanding. On 24th January 1933 the property in dispute now was attached. On 11th February 1933 the judgment-debtor mortgaged the property in dispute for a sum of Rs. 1,200 to one Bakhshi Jamna Das. On 21st February 1935 the property was auctioned and purchased by one Hira Nand, respondent. On 15th March 1935 Jamna Das, the mortgagee, made an application under O. 21, R. 89, Civil P. C., and deposited the decretal amount plus 5 per cent as required under the said rule. He asked the Court to set aside the sale. The trial Court dismissed the application on the ground that he had no locus standi and the learned District Judge on appeal affirmed the order of the trial Court. Jamna Das has preferred an appeal to this Court against the order of the lower appellate Court.

A preliminary objection was taken on behalf of the respondent Hira Nand, auction-purchaser, that no second appeal lay inasmuch as only one appeal is allowed under the law from an order refusing to set aside the sale under the provisions of O. 21, R. 89, Civil P. C. This objection appears to be well founded; but Mr. Barkat Ali, the learned counsel for the appellant, has asked this Court to treat the application as a revision. This seems to have been the position taken up before the learned Judge of this Court who, while admitting the appeal observed that the question whether an appeal or revision lies will also be considered at the

hearing. The language of O. 21, R. 89 of the present Code is much wider than that of the analogous S. 310-A of the old Code (Act No. 14 of 1882). The scope of O. 21, R. 89 has been further widened by an amendment recently made by this Court where, instead of the words "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale," the following words have been substituted:

Any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person.

This language is very wide and confers a right to save the property upon any person who purports to act for the judgment-debtor or in his interest. There is authority of this Court in a judgment of a learned Single Judge which is to be found in 1935 Lah 51 (1), where this amendment had been considered and was given effect to. In my opinion a person who has obtained a mortgage of the property after attachment can come forward according to the amended rule, and by making the necessary payments under O. 21, R. 89 save the property and prevent its sale from taking place. The lower appellate Court has in the exercise of its discretion acted with material irregularity in ignoring the provisions of the amended rule, which only carried a step further the principle underlying O. 21, R. 89 as the history of the legislation clearly indicates. I would therefore in the circumstances of the present case, treat the appeal as a revision and allow the same with the result that the sale shall be set aside and the money, which has already been deposited by the mortgagee, would go to satisfy the decree and compensate the auction-purchaser according to law. Parties shall bear their own costs.

B.D./R.K.

Revision allowed.

1. Ram Chandra v. Narain Parshad, 1935 Lah 51.

A. I. R. 1936 Lahore 562

ABDUL RASHID AND ADDISON, JJ.
Suraj Bhan and others—Appellants.

v.

Allahabad Bank, Delhi and others—Respondents.

Appeal No. 1817 of 1935, Decided on 24th January 1936, from decision of Sub-Judge, 1st Class, Delhi, D/- 3-9-1935.

(a) Civil P. C. (1908), O. 34, R. 5—Auction-purchaser is not necessary party—Decision on application under O. 34, R. 5 falls within S. 47, Civil P. C., and is appealable—Auction-purchaser is not necessary party to appeal from order on application under O. 34, R. 5.

In proceedings under O. 34, R. 5 the auction-purchaser is not a necessary party. The decision of an executing Court on an application under O. 34, R. 5 falls within the purview of S. 47, Civil P. C., and is appealable. When an appeal is preferred from a decision of a Court dismissing an application under O. 34, R. 5, Civil P. C., it is unnecessary to make the auction-purchaser a respondent as he was not a party to the original proceedings under O. 34, R. 5. [P 564 C 1,2]

(b) Mortgage—Sale of property in execution of mortgage decree—Sale taking place after 1st April 1930—O. 34, R. 5 as amended coming into force on 1st April 1930—Amended law applies—Judgment-debtor can set aside sale before its confirmation.

Under O. 34, R. 5 as it stands since the amendment from 1st April 1930, the right of redemption remains intact till the date of the confirmation of sale and if before that date the judgment-debtor pays into Court the entire decretal amount together with 5 per cent of the purchase money, the Court cannot proceed any further with the execution proceedings. The law of procedure governs all pending cases from the time it comes into force unless there is anything in the amending Act to the contrary. Where the mortgage sale took place on 16th although all proceedings in execution had taken place before 1st April 1930 the debtor by virtue of O. 34, R. 5, Civil P. C., retains his right to redeem the property till the confirmation of the sale. [P 563 C 2 ; P 564 C 1]

Mehr Chand Mahajan, Shamair Chand and Qabul Chand—for Appellant.

J. N. Aggarwal and Partap Singh—for the Bank.

Bhagwat Dayal—for Auction-purchaser.

Abdul Rashid, J.—The facts of the case bearing on the question of law involved in this appeal may be shortly stated. Kidar Nath and Sheo Parshad purchased the property in dispute, known as Tawela Mul Chand-Ganga Bishan, in 1917 for Rs. 76,000. On 3rd January 1925 they mortgaged this property in favour of the Allahabad Bank for Rs. 12,000. On 2nd January 1926, Kidar Nath and Sheo Parshad sold the equity of redemption of this property to Suraj Bhan for Rupees 1,20,000. On 2nd June an application was made by the creditors of Kidar Nath and Sheo Parshad for their adjudication as insolvents. On 23rd December 1927 the Allahabad Bank brought a suit against the mortgagors and Suraj Bhan for sale of the mortgaged property on

the basis of the mortgage. On 19th January 1928 Kidar Nath and Sheo Parshad were adjudicated as insolvents and their property was placed in the hands of the Official Receiver. A preliminary decree was obtained by the Allahabad Bank on 4th August 1928, against the insolvents and Suraj Bhan. As the Official Receiver had not been impleaded as a defendant by the Allahabad Bank he is contesting the validity of the decree and is also contesting the sale of the equity of redemption in favour of Suraj Bhan in separate proceedings. The final decree in the suit instituted by the Allahabad Bank was passed on 2nd July 1929.

On 6th July 1929, the Bank started execution proceedings with respect to the final decree obtained by it. At that time the amount due to the Bank was about Rs. 15,000. On 16th April 1930 the property in dispute was sold by means of a Court-auction and was purchased by Kanshi Ram and Hannu Mal for Rs. 30,500. On 13th May 1930, Suraj Bhan filed an application under O. 21, R. 90, Civil P. C., praying that the sale may be set aside on the ground that there had been material irregularity in publishing and conducting the sale. On 4th June 1932 Suraj Bhan presented an application under O. 34, R. 5, Civil P. C., as amended by Act 21 of 1929 and deposited a sum of Rs. 22,000 in Court. The preliminary decree was amended in some minor particulars on 1st October 1932, and Suraj Bhan presented a third application on 21st November to the effect that as the preliminary decree had been amended the final decree based on the preliminary decree was a nullity. There was also an application under O. 21, R. 84, Civil P. C., to the effect that Kanshi Ram and Hannu Mal had not been properly declared to be the auction-purchasers. By means of its order dated 3rd September 1935, the executing Court dismissed all the applications presented by Suraj Bhan and confirmed the sale of the property in dispute in favour of Kanshi Ram and Hannu Mal in lieu of Rs. 30,500. Against this decision Suraj Bhan has preferred an appeal to this Court.

The executing Court dismissed the application under O. 34, R. 5, Civil P. C., on the ground that the sale had taken place in pursuance of the execution proceedings initiated by the Allahabad Bank

on 6th July 1929, and that as Act 21 of 1929 did not come into force till 1st April 1930 the present case was governed by O. 34, R. 5 as it stood before the amendment made in 1929. It held that under the old rule it was possible for the defendant to redeem the mortgaged property till the date of the sale by paying into Court the amount declared due on the basis of the mortgage, but that once the sale had taken place the defendant was debarred from redeeming the mortgaged property. It was contended by the learned counsel for the appellant that the lower Court had erred in holding that the new rule introduced by Act 21 of 1929, which came into force on 1st April 1930, was inapplicable to the present case. Cl. (e), S. 15 (1), Act 21 of 1929 lays down that nothing in the Act shall be deemed to affect anything done in the course of any proceeding pending in any Court before the first day of April 1930. In the present case the sale took place on 16th April 1930. All the acts which had already been done in the course of execution proceedings before 1st April 1930 would undoubtedly be governed by the provisions of the old law, but as the sale took place on 16th April 1930 the sale itself cannot be said to be an act which had been done in the course of any proceeding pending on 1st April 1930. Even under the old rule the right of redemption was not destroyed by the passing of the final decree. The right of redemption was available to the judgment-debtor till the date of the sale. On 16th April 1930 the right of redemption was still available to the judgment-debtor. Before 16th April 1930 the new Act came into force and the right to redeem which was available to the judgment-debtor till the date of the sale was made available to him by means of the amended rule till the date of the confirmation of the sale. It is well settled that the law of procedure governs all pending cases from the time it comes into force, unless there is anything in the amending Act to the contrary.

Reliance was placed on behalf of the respondents on 59 Cal 1464 (1). That case is however clearly distinguishable. In that case the sale had taken place on 19th February 1930, and as Act 21 of

1. Asla Khatun v. Nurjahan Khatun, 1933 Cal 39=142 IC 125=59 Cal 1464=36 O W N 955.

1929 did not come into force till 1st April 1930, it was held that the provisions of O. 34, R. 5, Civil P. C., as they stood before the amendment, were applicable and that the right of redemption with reference to persons who were concluded by the decree for sale was extinguished by the sale actually taking place. We are therefore of the opinion that the provisions of O. 34, R. 5, Civil P. C., as amended by Act 21 of 1929 are applicable to the present case. Under O. 34, R. 5, Civil P. C., where on or before the date fixed or at any time before the confirmation of the sale made in pursuance of a final decree the defendant makes payment into Court of all the money due from him together with 5 per cent of the amount of the purchase money for payment to the purchaser the Court is bound to pass an order ordering the plaintiff to transfer the mortgaged property to him and to put him in possession thereof. In the present case this deposit was made by Suraj Bhan on 4th June 1932. The executing Court had therefore no jurisdiction to proceed with the execution proceedings, and, after rejecting the objections raised by the judgment-debtor, to confirm the sale in favour of the auction-purchasers on 3rd September 1935. Under O. 34, R. 5 the law, as it stands since the amendment, the right of redemption remains intact till the date of the confirmation of sale and if before that date the judgment-debtor pays into Court the entire decretal amount together with 5 per cent of the purchase money the Court cannot proceed any further with the execution proceedings. We are therefore of the opinion that the Court acted illegally and without jurisdiction in continuing the execution proceedings after 4th June 1932, and in confirming the sale on 3rd September 1935.

It may be mentioned that a preliminary objection was taken to the hearing of this appeal to the effect that as the auction-purchasers had not been made parties to the appeal, the appeal was incompetent. We are of the opinion that this contention has no force so far as the consideration of the application under O. 34, R. 5 is concerned. In proceeding under O. 34, R. 5 the auction-purchaser is not a necessary party. When an appeal is preferred from a decision of a Court dismissing an application under

O. 34, R. 5, Civil P. C., it is unnecessary to make the auction-purchaser a respondent as he was not a party to the original proceedings under O. 34, R. 5. The decision of an executing Court on an application under O. 34, R. 5, falls within the purview of S. 47, Civil P. C., and is appealable: vide 1933 Lah 361 (2). For the reasons given above we accept this appeal, set aside the order of the Court below dismissing the application under O. 34, R. 5, Civil P. C., and hold that the appellant was entitled to redeem the mortgaged property as he deposited the decretal amount together with 5 per cent of the purchase money in Court on 4th June 1932, before the sale had been confirmed. The result of our finding is that the sale must be set aside. No arguments were addressed to us with regard to the dismissal of applications under O. 21, Rr. 84 and 90, Civil P. C. Parties will bear their own costs in the executing Court and in appeal.

B.D./R.K.

Appeal allowed.

2. Malawa Mal v. Sunder Singh, 1933 Lah 361
=112 I C 313=34 P L R 373.

A. I. R. 1936 Lahore 564

TEK CHAND AND DALIP SINGH, JJ.

Nihal Chand and others—Applicants—
Appellants.

v.

Dist. Board Mianwali—Respondent.

First Appeal No. 85 of 1933, Decided on 3rd January 1936, from order of Dist. Judge, Mianwali, D/- 1st July 1932.

(a) Practice—Remand—Preliminary objections not decided by Court remanding case—Objection can again be raised in appeal.

Where it cannot be held that certain preliminary objections were either explicitly or impliedly decided by the Court remanding a case, the objections can be raised when the case again comes up before the Court which remanded it: 1933 Lah 423, *Disting.*

[P 565 C 2; P 566 C 1]

(b) Court-fee—Limitation—Time granted to make up deficient Court-fee—Court-fee made up within time—Document dates back to date of original presentation.

Where within the time allowed the proper Court-fee and printing-fee are paid up, the document on which the Court-fee is so made up must be taken to date back to the date on which it was originally presented: 1929 P C 147, *Foll.*

[P 565 C 1]

(c) Land acquisition—Appeal against award—Secretary of State is an essential party.

From S. 50, Land Acquisition Act, it is clear that the party for whom the land is acquired can only assist the Collector on the question of the amount of compensation to be paid to the claimant. It cannot apparently assist the collector on the question of the area acquired though this may affect the amount of the compensation. The Secretary of State through the Collector is therefore a necessary party: 13 C W N 116, *Applied*. [P 566 C 2]

Mehr Chand Mahajan and B. Narain—for Appellants.

Mohammad Amin for Barkat Ali—for Respondent.

Dalip Singh, J.—The facts of this appeal are as follows: Certain land was acquired in Harnauli village for the District Board for the purposes of a school by the Local Government under the Land Acquisition Act. The owners of 28 kanals 18 marlas applied under S. 18, Land Acquisition Act, demanding increased compensation. The reference made only the District Board parties and did not implead the Secretary of State through the Collector. The learned District Judge dealing with the reference, however, sent a notice to the Collector under S. 20 of the Act. The Collector did not appear and the proceedings before the District Judge were conducted by the District Board, Mianwali. The compensation was enhanced by the District Judge from Rs. 40 per kanal to Rs. 50 per kanal. But in the award again the District Board was mentioned as the sole defendant and the parties were left to bear their own costs.

The claimants appealed to this Court making only the District Board, Mianwali, through its Chairman and Secretary, party to the appeal without impleading the Secretary of State through the Collector. The appeal was heard by a Division Bench of this Court. No objection was taken that the appeal was not properly constituted, and after hearing the parties an order of remand was passed under O. 41, R. 25, Civil P. C., by which the parties were directed to lead further evidence as it was not possible to come to a correct decision on the appeal on the various issues raised. The remand proceedings have come back to this Court but now the learned counsel for the District Board has put in certain objections which go to the root of the appeal. He claims that the original appeal was filed on the last day of limitation on a stamp of Rs. 4 only and the Court-fee was not made up until

21st December 1932, the last day of limitation for the appeal being 10th October 1932; secondly, that the printing fee of Rs. 100 was not deposited till 21st December 1932; and thirdly that as the Secretary of State was never impleaded as a party to the appeal there was no proper appeal before the Court. He therefore, prayed that before the new paper book was printed of the remand proceedings the question of limitation raised in the above three objections might be decided first. Accordingly we have heard the learned counsel for the District Board and the learned counsel for the appellants on the points involved.

The learned counsel for the appellants raises a preliminary objection that these objections cannot now be heard by this Bench because the order of remand implies that there was a properly constituted appeal before the Bench deciding it, and that these objections not having been raised at the time must be taken to have been impliedly decided or waived by the respondent, the District Board, Mianwali. He contends that the true law applicable to a remand under O. 41, R. 25, Civil P. C., is contained in 1933 Lah 423 (1), where it was held that where an issue has been decided by a Court remanding the case under O. 41, R. 25, Civil P. C., the successor of that Court cannot change the decision on that issue when the case comes before it again under O. 41, R. 25. The learned counsel for the respondent has cited 43 All 377 (2), 68 I C 242 (3) and 70 I C 983 (4). It is unnecessary, however, to go into this question because it seems to me, on reading the judgment remanding the case, that nothing whatsoever was decided by that Bench at all. The issues as then appearing to the Court were held to be insufficiently proved and in the circumstances of the case a fresh opportunity was given to the parties to lead further evidence on those issues. It cannot be held that the present objections were either explicitly or impliedly decided by the

1. *Mast Ram v. Mahomed Khalil*, 1933 Lah 423=144 I C 978=84 P L R 215.
2. *Masihunnissa v. Kaniz Sughra*, 1921 All 276=60 I C 975=48 All 877=19 A L J 189.
3. *Shyam Narain v. Jadunath Singh*, 1922 Oudh 116=68 I C 242=25 O C 41.
4. *Jadki Shah v. Mahomed Abbas*, 1923 Oudh 50=70 I C 983=25 O C 245.

Court at all. To hold that these objections cannot now be raised would be tantamount to holding that these objections should have been raised at the first hearing of the appeal or at the earliest opportunity. There is no law that I have been able to see which compels the respondent to raise these objections at the earliest opportunity. I would, therefore, overrule the preliminary objection.

Coming now to the merits of the objections, there is no force in the first two objections regarding the absence of proper Court-fee and printing fee. It appears from the record that further time was allowed by the taxing authority and then the appeal was placed before a learned Judge of this Court who again extended the time for deposit of proper Court-fee and printing fee. Within the time so allowed the proper Court-fee and printing fee were paid up. Following the Privy Council ruling reported in 10 Lah 737 (5) the document on which the Court-fee was so made up must be taken to date back to the date on which it was originally presented and, therefore, the appeal must be held to be within time. I would, therefore, repel the contentions of the respondents on these two points. The third point, however, has more force. It appears clear from a reading of the Act and of the authorities, namely 59 P R 1913 (6) and 13 C W N 116 (7), that the only party to an appeal of this kind and to the proceedings before the learned District Judge, where the question is as to the amount of compensation or of the area involved in the acquisition, is the Secretary of State through the Collector. The learned counsel for the appellants has endeavoured to contend that the party for whom the land is acquired is also a proper party, and he rests his contention on S. 50 of the Act. He contends that the substantial party is the party for whom the land is being acquired and who is responsible for the costs and the amount of the compensation to be paid to the claimant. Even from S. 50, however, it is clear that the

party for whom the land is acquired can only assist the Collector on the question of the amount of compensation to be paid to the claimant. It cannot apparently assist the Collector on the question of the area acquired though this may affect the amount of the compensation. It, therefore, appears to me that S. 50, far from supporting the contention of the learned counsel, is really, when properly read, against him, and the Secretary of State through the Collector was therefore, a necessary party to this appeal as well as to the proceedings before the learned District Judge.

It now becomes clear, therefore, that not only was the appeal not properly constituted here but the award itself of the learned District Judge in which the Secretary of State through the Collector was not shown as a party at all was a bad award. The case, therefore, differs from 59 P R 1913 (6) and is more analogous to the case reported as 13 C W N 116 (7). It differs from 13 C W N 116 (7) in that notice was duly served on the Collector who did not choose to appear. There was however no order directing that proceedings should be ex parte against the Secretary of State through the Collector. Thus the award which is both the judgment and the decree in the case was, therefore against a wrong party. Following therefore, the rule as laid down in 13 C W N 116 (7), it would appear that the proper course is to send the case back to the learned District Judge for correcting his award, that is to say, its heading and making the Secretary of State through the Collector, the sole party defending the claim. After this is done the appellants, if dissatisfied with the award, can appeal again to this Court.

The appeal must, therefore, be accepted, and the case having been decided on a preliminary point the Court-fee on the appeal must be refunded to the appellants. As regards other costs, both parties being equally at fault, I would leave them to bear their own costs so far incurred in this Court.

Tek Chand, J.—I agree.

B.D./R.K.

Appeal accepted.

5. Faizullah Khan v. Mauladad Khan, 1929 P C 147=117 I C 493=56 I A 232=10 Lah 737 (PC).

6. Fakirchand v. Municipal Committee, Hazro, (1913) 59 P R 1913=18 I C 37.

7. Municipal Corporation of Pabna v. Jogen-dra Narain, (1909) 13 C W N 116 = 4 I C 332.

A. I. R. 1936 Lahore 567

AGHA HAIDAR, J.

Jeswant Singh—Petitioner.

v.

Shiromani Gurdwaras Prabandhak Committee—Opposite Party.

Civil Misc. Petn. No. 28 of 1936 in Civ. Reg. First Appeal No. 12 of 1936, Decided on 3rd February 1936.

Civil P. C. (1908), S. 151—Application for preventing orders of Judicial Commission from taking effect during pendency of appeal under O. 41, R. 5—O. 41, R. 5 and O. 39, R. 2, Civil P. C., inapplicable—Applicant not coming with clean hands—Injunction not granted.

The petitioner applied under O. 41, R. 5, Civil P. C., praying to issue order preventing the order of the Judicial Commission from taking effect during the pendency of the appeal. O. 41, R. 5 and also O. 39, R. 2, Civil P. C., were not applicable. The only alternative was whether S. 151 could be invoked:

Held: that the applicant did not come to Court with clean hands and no equitable relief could be granted to him by way of injunction.

[P 568 C 1]

Barkat Ali and Bhagat Singh—for Petitioner.

Mehr Chand Mahajan and Harnam Singh—for Opposite Party.

Order.—This is a miscellaneous application made to me for the purpose of preventing the order of the Court below from taking its proper effect, during the pendency of the appeal, preferred against that order to this Court. An application was made under S. 142, Sikh Gurdwaras Act, in which various charges were made against Sardar Jaswant Singh, President of the Gurdwara Durbar Sahib and other institutions situated within the Municipal limits of Amritsar, and it was prayed that Sardar Jaswant Singh be removed from the office. The matter was tried by the Judicial Commission consisting of three members and they arrived at a unanimous decision in allowing the application. In recording their finding on issue 17 they came to the conclusion that:

The defendant has been guilty of abuse of power, neglect of duty, misfeasance and malfeasance and breach of trust in the management of the Gurdwaras under his control and of the public funds, and that he has been recklessly not caring for the rules, and in many matters behaved like an autocrat.

On this finding they ordered the removal of Sardar Jaswant Singh 'forthwith' from the membership. It is admitted

that this would result in his removal from Presidentship automatically. It was further ordered that Sardar Jaswant Singh should pay towards the funds of the local committee a small sum of money which he had advanced to one Lieutenant Jagjit Singh and that he should also pay a sum of Rs. 75 as costs. Sardar Jaswant Singh has appealed to this Court under the provisions of S. 142, sub-s. (3), Sikh Gurdwaras Act. That appeal is pending.

The volume of evidence oral and documentary in the case is considerable, but the office has assured me that if the usual charges for printing and translation are deposited with due promptitude, the appeal would be ready for hearing and disposal well within three months' time from today. At present, however, I have to deal with the application for stay only. Now the application bore the heading 'Under O. 41, R. 5, Civil P. C.' Admittedly no application for execution had been made to the Judicial Commission or any other Tribunal empowered to carry on the work of execution in such cases; therefore the application cannot be treated as one under O. 41, R. 5, Civil P. C. I was asked by the learned counsel for the applicant to treat the application as one under O. 39, R. 2, Civil P. C. and in any event he urged that the Court, under its inherent powers, should interfere and grant a temporary injunction prohibiting the opposite party from taking any action which would in any way disturb the performance of the functions, which Sardar Jaswant Singh has been carrying on in his capacity as president, so far. O. 39, R. 2, Civil P. C., has no application as the opposite party are not committing any breach of contract or other injury of any kind. The only alternative is if S. 151, Civil P. C. can be invoked in aid. It has been brought to my notice that the term of Sardar Jaswant Singh's presidentship would, in the normal course of events, expire some time in July 1936. It is argued that if the present application for stay is not granted then even if he succeeds in his appeal, the result would be that the whole period of his presidentship would not be available to him and he would be deprived of his office as President which entitles him to act until the final termination of his period of presidentship, i. e. until July 1936. There are difficulties in the way of the applicant. In the first place, the findings recorded

by the Court below cast very damaging aspersions upon the petitioner's conduct of the affairs of the Gurdwara as President. There is a distinct finding about the President's being guilty of breach of trust in respect of funds committed to his care.

The granting of an injunction in a case of this kind is purely in the nature of an equitable relief. This relief can only be granted to persons who come to Court with clean hands. On the finding which is before me, and which I cannot at this stage review, I cannot say that the applicant has come to this Court with clean hands. This finding is too strong for me to ignore. It may be set aside in appeal but that is a different matter as to which I do not wish to express any opinion. The facts, however remain that Sardar Jaswant Singh has been removed by the unanimous decisions of the Tribunal who have recorded the findings which I have quoted above and to stay the operation of the order of the Judicial Commission would amount to its virtual reversal. This I find myself unable to do. There is another way of looking at the matter. When on 23rd December 1935 the Judicial Commission made an order dismissing Sardar Jaswant Singh from the membership of the committee, the Vice-President under S. 99, Sikh Gurdhwaras Act, convened a meeting and on 31st December 1935 Sardar Tarlochan Singh was duly elected as President. This matter was not brought to my notice when the application was placed before me on 9th January 1936 and I passed an ex parte order.

In applying for an ex parte order which would materially affect the opposite party the petitioner should observe the rule of *uberima fides*, that is to say, he should observe the most complete good faith and should not conceal any relevant matter whatsoever from the Court, which would influence its judgment in making an order of this nature. It is a matter of regret that the petitioner did not bring to my notice on 9th January 1936 when I passed the ad interim order, that Sardar Tarlochan Singh had already been elected as President according to the rules of the procedure prescribed by S. 99, Sikh Gurdhwaras Act. This is also a circumstance which I cannot possibly ignore while deciding this application. Under all the circumstances of the case I discharge the

rule which was issued ex parte and dismiss the application with costs.

M.D./R.K. *Application dismissed.*

A. I. R. 1936 Lahore 568

JAI LAL, J.

Shakar Khan—Applicant.

v.

Ishar Das and others—Creditors—Opposite Parties.

Appeal No. 1428 of 1935, Decided on 26th February 1936, from order of Dist. Judge, Jhelum, D/- 8th April 1935.

Provincial Insolvency Act (1920), S. 37—Annulment of adjudication—Court must pass order vesting property in some one—In absence of order property reverts to insolvent.

The phraseology of S. 37 clearly indicates that on passing an order annulling the adjudication the Insolvency Court must pass an order vesting the property of the insolvent in some person appointed by it and in the absence of such an order the property reverts to the insolvent: 1933 *Rang* 223 (F B), Ref. [P 569 C 1]

Prakash Chandra and Mohammad Amin—for Applicant.

Judgment.—Shakar Khan, appellant, was adjudicated insolvent on his own application, but he failed to apply for an order of discharge before the date fixed for this purpose in the adjudication order. In the meantime, his estate had vested in the Official Receiver, but at the time of the annulment of the adjudication, the Insolvency Judge omitted to pass an order under S. 37 relating to the vesting of his property. It may be mentioned that the actual possession had remained with the insolvent in spite of the order of adjudication and the vesting of the property in the official receiver. The Insolvency Judge dismissed the application of the insolvent objecting to the action of the official receiver in dealing with his property. The learned Judge has held as follows:

Our registers show that insolvent's adjudication was annulled because he failed to pursue his application for discharge. Under these circumstances it will be presumed that the order of an annulment vested the insolvent's property in the receiver.

Section 37, Provincial Insolvency Act, provides that where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the Court or receiver shall be valid, but subject, as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such

person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor to the extent of his right or interest therein on such conditions (if any) as the Court may, by order in writing, declare. This section contemplates that unless the Court has passed an order vesting the property of the insolvent, after the adjudication has been annulled, in a person appointed by the Court, it shall revert to the debtor. The mere fact that the property on passing of the adjudication order vested in the official receiver does not authorise the receiver to deal with it after the adjudication has been annulled in the absence of an express order to that effect by the Insolvency Judge. The effect of annulment of adjudication is that the condition with regard to the property which existed immediately before the passing of the adjudication order is restored unless, of course, an order under S. 37 vesting the property in a person appointed by the Insolvency Judge has been passed. No direct authority has been cited at the Bar but some observations made in 11 Rang 287 (1) support the contention of the appellant though the point involved in this appeal was not directly involved in that case. In my opinion the phraseology of S. 37 clearly indicates that on passing an order annulling the adjudication the Insolvency Court must pass an order vesting the property of the insolvent in a person appointed by it and in the absence of such an order the property reverts to the insolvent. The Court below therefore was wrong in presuming that the order of annulment vested the insolvent's property in the receiver. I accept this appeal and set aside the order of the Insolvency Judge. There will be no order as to costs of this appeal.

B.D./R.K.

Appeal accepted.

1. Jaing Bir Singh v. R. K. Banerji, 1933 Rang 223=145 I C 820=11 Rang 287 (F B).

A. I. R. 1936 Lahore 569

BHIDE, J.

Durga Das—Plaintiff—Petitioner.

v.

Gobind Singh—Defendant — Opposite Party.

Civil Revn. No. 890 of 1935, Decided on 11th February 1936, from order of Senior Sub.Judge, Jhelum, D/- 21st November 1935.

Revision — Refusal to stay proceedings under S. 10, Civil P. C.—No revision lies.

No revision lies from an order refusing to stay proceedings under S. 10, Civil P. C., as the order is an interlocutory one: 1933 Lah 50 and 1931 Lah 644, *Disting.*; 1924 Lah 425 (FB), *Rel.* on. [P 569 C 2]

Amar Nath Chona—for Petitioner.

Achhru Ram—for Opposite Party.

Order.—This is a petition for revision of an order refusing to stay proceedings in a suit under S. 10, Civil P. C. A preliminary objection is raised that the order being interlocutory no revision is competent. Reliance is placed on 5 Lah 288 (1) and 1933 Lah 191 (2). The learned Counsel for the petitioner, on the other hand, relied mainly on 1933 Lah 34 (3); 1933 Lah 50 (4) and 13 Lah 59 (5). In 1933 Lah 34 (3), the Full Bench ruling, 5 Lah 288 (1), is not referred to. 1933 Lah 50 (4) was not a case under S. 10, Civil P. C. The application for stay was made on the ground of the pendency of an appeal in a connected case and could therefore be looked upon as a separate proceeding or a 'case' by itself for the purposes of S. 115, Civil P. C. The same reasoning would also apply to 13 Lah 59 (5), as will appear from the remarks at pp. 68-69 of the report, which are as follows:

The word 'case' in S. 115, Civil P. C., has always been interpreted as a more comprehensive term than suit, and including other proceedings. Regarded merely as a proceeding in the suit before the lower Court the order refusing stay was no doubt merely an interlocutory one. But it was clearly more both in nature and effect than a mere refusal to stay those proceedings. It was an order in separate proceedings not under the provisions of the Procedure Code but under those of a special Act, giving the defendant a right to apply to have the dispute decided outside the civil Court. From this point of view the order refusing stay may properly be held to have decided finally a separate case, for virtually it put an end to the arbitration as an effective proceeding. I would, therefore, hold that in the present instance, a petition for revision would be competent.

In the present case the order sought to be revised appears to me to be an 'interlocutory' one within the rule laid

1. Lal Chand Mangal Sen v. Behari Lal Mehr Chand, 1924 Lah 425=84 I C 259=5 Lah 288 (FB).
2. Kulwant Rai v. Fonseca & Co., 1933 Lah 191=141 I C 177=34 P L R 86.
3. Nanak Chand v. Ishar Das, 1933 Lah 34=139 I C 48=33 P L R 787.
4. Mulchand v. Jiwan Das, 1933 Lah 50=144 I C 107.
5. Punjab Marwari Chamber of Commerce Ltd., Delhi v. Ram Mal-l-ilu Shah, 1931 Lah 644=132 I C 850=13 Lah 59.

down in 5 Lah 288 (1). I uphold the preliminary objection and dismiss the petition, but in view of the point of law involved leave the parties to bear their costs.

M.D./R.K.

Petition dismissed.

A. I. R. 1936 Lahore 570

JAI LAL, J.

Godar Shah and another—Plaintiffs—Appellants.

v.

Fazal Ilahi—Defendant—Respondent.

Second Appeal No. 2230 of 1935, Decided on 18th February 1936, from decree of Dist. Judge, Jhelum, D/- 28th August 1935.

Instalment bond—Suit on—Bond providing that in case of default of three consecutive instalments, creditor entitled to sue for recovery of defaulted instalments or for whole amount—Creditor taking no action on defaults being made by debtor—It amounts to waiver—Creditor can sue for instalments within three years of suit, and for balance due—Proof of waiver is not necessary—It must be assumed.

Where an instalment bond provides, that in case of default in payment of three consecutive instalments, the creditor would be entitled at his option either to sue for the recovery of the instalments in respect of which default is made or for the whole of the remaining balance due under the bond, and it is not provided that the whole amount due under the bond shall become due unless the creditor waives the default, a discretion is given to the creditor either to recover the instalments in respect of which a default has been made or to recover the whole balance due under the bond. The creditor has the right to waive the first and subsequent defaults and if the creditor takes no action on a number of defaults being made by the debtor, it amounts to a waiver and it is open to the creditor to sue for those instalments in respect of which a default had taken place within three years of suit and taking advantage of the default in payment thereof to recover the whole balance due under the bond even if he has allowed a suit for recovery of instalments in respect of which default has been made previously to become barred by time. It is not necessary for the creditor to prove by affirmative evidence that he waived the first default. On the other hand such waiver must be assumed from the fact that the creditor has abstained from suing for the recovery of the whole amount due under the bond. [P 571 C 1]

Shujauddin—for Appellants.

Mukand Lal Puri—for Respondent.

Judgment.—The appellant instituted a suit for recovery of balance due on a bond executed in his favour by the respondent. The bond was for Rs. 800 which was payable by monthly instal-

ments of Rs. 10 each. It was stipulated that if default was made in the payment of three consecutive instalments, the creditor would be entitled, at his option, either to sue for the recovery of the instalments in respect of which default was made or for the whole of the remaining balance due under the bond. It appears that default was made by the debtor in the payment of several instalments and that it was made more than three years prior to the institution of the suit. The creditor took no action on that default and allowed a suit for as many as 27 instalments to become barred by time. Taking advantage of default in respect of the last three consecutive instalments however which default took place within three years of the institution of the suit, he has filed a suit for the recovery of those three instalments and also of the whole of the amount that remains due under the bond.

The only question raised in this appeal is whether the suit under the circumstances is barred by time. The trial Judge and the learned District Judge have both held that the time should run against the plaintiff-appellant from the date of the first default in the payment of three consecutive instalments, and therefore the suit is barred by time. It is however contended by the learned counsel for the appellant that it is always open to the creditor to waive a default and that conditions, as in the present case, must be deemed to be for the benefit of the creditor and that by not suing for the recovery of the whole balance under the bond on the happening of the default in the payment of the first three instalments the plaintiff cannot be deemed to have waived his right to recover the whole of the amount due under the bond if a fresh default occurs, and therefore it is open to him to recover those instalments in respect of which default was made within three years from the suit, and also taking advantage of that default to recover the whole of the amount then due under the bond.

A number of cases were cited at the Bar, but it is not necessary to refer to them in detail because the question turns on a decision whether plaintiff has in this case the right to waive the first or any subsequent default and whether under the circumstances he must be deemed to have waived such a default. Now, hav-

ing regard to the conditions of the bond discretion was given to the creditor either to recover the instalments in respect of which default had been made or to recover the whole of the balance due under the bond. In such a case, it is not necessary for the plaintiff to prove by affirmative evidence that he waived the first default; on the other hand such waiver must be assumed from the fact that he abstained from suing for the recovery of the whole of the amount due under the bond. The bond is not so worded that the whole amount due under the bond shall become due unless the creditor waived the default. On the other hand the whole of the amount due under the bond becomes payable only if the plaintiff chooses to exercise his right to call in the whole amount.

Therefore, in this case, in my opinion, there has been a waiver and it was open to the plaintiff to sue for the recovery of those instalments in respect of which default had taken place within three years of the suit and taking advantage of the default in payment thereof to recover the whole of the balance due under the bond even if he has allowed a suit for recovery of instalments in respect of which default had been made previously to become barred by time. There is no other point involved in this case. I accept this appeal and set aside the decrees of the Courts below and grant the plaintiff a decree for Rs. 495 with proportionate costs throughout.

R.M./R.K.

*Appeal allowed.***A. I. R. 1936 Lahore 571**

JAI LAL, J.

Kalu Ram and others—Plaintiffs.

v.

Nur Mohammad and others—Defendants.

Civil Ref. No. 3 of 1936, Decided on 24th March 1936, from order of Dist. Judge, Montgomery, D/- 6th January 1936.

Jurisdiction—Civil and Revenue Courts—Landlord and Tenant—Tenant becoming liable to enjoyment by reason of his tenancy having been terminated by notice which is not contested under Punjab Tenancy Act—Suit for ejectment is cognizable by revenue Courts.

A suit by a landlord for ejectment of his tenants, who are tenants at will and who have become liable to ejectment by reason of their

tenancy having been terminated by notice which has not been contested as required by the provisions of the Punjab Tenancy Act, is cognizable by Revenue Courts only and not by Civil Courts. [P 571 C 2]

Order.—This reference under S. 99, Punjab Tenancy Act, has been made by the Subordinate Judge of Montgomery. The facts are these: A suit was instituted for ejectment of the defendants on the ground that the plaintiffs were the proprietors of the land and the defendants were their tenants-at-will and that a notice of ejectment had been served upon the defendants, but that they had not instituted any suit to contest their liability to ejectment and consequently the defendants became liable to ejectment. This suit was instituted in the Revenue Court. The defendants pleaded that the suit was cognizable by the Civil Courts and that the Revenue Courts had no jurisdiction to hear it. This objection prevailed in the Revenue Court and the plaint was returned to the plaintiffs to present it in the Court having jurisdiction. It was consequently presented in the Civil Court. The case came up for hearing before the Subordinate Judge, 1st Class, of Montgomery and an objection was raised before him by the defendants that he had no jurisdiction to try the suit on the ground that it was cognizable by the Revenue Courts. The Subordinate Judge is of opinion that the suit is cognizable by the Revenue Courts and has consequently made this reference. In my opinion, on the facts stated above, it is quite clear that the case is cognizable by the Revenue Courts only.

It is a suit by a landlord for ejectment of his tenant who has become liable to ejectment owing to his tenancy having been terminated by notice which has not been contested as required by the provisions of the Punjab Tenancy Act. I therefore hold that the suit is cognizable by the Revenue Courts and direct the Subordinate Judge to return the plaint to the plaintiffs for presentation in the Court of the Assistant Collector, first grade, Montgomery. The conduct of the defendants in raising objections first to the jurisdiction of the Revenue Courts and then to the jurisdiction of the Civil Courts to entertain the suit has necessitated unnecessary proceedings. I consider therefore that the defendants should pay the costs of these proceedings irres-

pective of the result of the suit. I assess these costs at Rs. 40.

R.M./R.K. *Order accordingly.*

A. I. R. 1936 Lahore 572

JAI LAL, J.

Municipal Committee, Sialkot—Defendant—Appellant.

Jagat Singh—Plaintiff—Respondent.

Second Appeal No. 1167 of 1935, Decided on 20th November 1935, from decree of Senior Sub-Judge, Sialkot, D/- 8th April 1935.

Punjab Municipal Act (3 of 1911), Ss. 195 and 225—Jurisdiction of civil Court to give relief to persons aggrieved by order ultra vires, arbitrary, oppressive or capricious is not ousted.

The mere fact that the decision of the appellate Court shall be final or that the order of the committee shall not be called in question otherwise than by appeal does not oust the jurisdiction of the civil Court, which it otherwise has to give relief to the person aggrieved by an order of the Municipal Committee which may be found to be ultra vires, arbitrary, oppressive or capricious : 1932 Lah 597 ; 1932 Lah 59 and 1919 Lah 111, Ref. ; 38 P R 1911 and 1925 Bom 162, Disting. [P 573 C 1]

Mohammad Monir—for Appellant.

Mukand Lal Puri, Qabul Chand and T. D. Khana—for Respondent.

Judgment. — The respondent Jagat Singh applied to the Municipal Committee of Sialkot for permission to build three shops. Each shop was to measure 9 feet in width. Sanction was granted by the Committee. The plaintiff built three shops in pursuance of the sanction but their width was 10', 8'.8" and 8'.7". The shops were built on his own land. The Committee thereupon issued a notice to him under S. 106, Municipal Act, directing him to demolish the shops. Jagat Singh instituted the suit out of which this appeal has arisen for a permanent injunction to the Municipal Committee directing it to refrain from carrying out the order to demolish the shops. Both the Courts below agree in holding that the notice of the Committee was unreasonable and that though the shops were not strictly in accordance with the sanctioned plan the deviations are of such a trivial nature that the order passed by the Committee to demolish them is unnecessarily harsh, arbitrary and amounts to an abuse of power vested in the Committee. The suit has consequently been decreed.

On this appeal Mr. Muhammad Monir on behalf of the Municipal Committee has not contested the conclusions of the trial Court; on the facts he was not in fact entitled to do so. His only contention is that the jurisdiction of the civil Court is ousted by S. 225, Punjab Municipal Act, which provides the only remedy that is open to a person aggrieved by an order passed by the Committee under S. 195. That section provides that any person aggrieved by orders of the Committee under the specified sections may appeal to such officer as the Local Government may appoint for the purpose of hearing such appeals, and, failing such appointment, to the Commissioner or to the Deputy Commissioner, as the case may be, and that no such orders shall be liable to be called in question otherwise than by such appeal. It further provides that the order of the appellate authority shall be final. It is contended that this section prohibits civil Courts from entertaining a suit calling in question the nature or validity of the orders of the Municipal Committee even in case in which the bona fide of the conduct of the Municipal Committee is questioned. It is however alleged in this case that the action of the Committee is arbitrary or oppressive.

It has been held in 1932 Lah 597 (1), that a suit lies under circumstances as in this case. In another case, 1932 Lah 59 (2), it was held that if the action of the Committee be ultra vires or arbitrary or capricious then the civil Court is entitled to interfere with the orders of the Committee. The same view was taken in 62 P R 1919 (3) and 38 P R 1911 (4), relied upon by the learned counsel for the appellant related to a different topic. The question there involved was whether a person is entitled to sue for the refund of money alleged to have been illegally realised by the Committee on account of custom duty. Similarly, 49 Bom 152 (5),

1. *Jiwan Das v. Municipal Committee, Pindi Gheb*, 1932 Lah 597=138 I C 743=33 P L R 782.
2. *Municipal Committee, Delhi v. Tirkha Ram*, 1932 Lah 59=133 I C 549.
3. *Basant Mal v. Municipal Committee, Hoshiarpur*, 1919 Lah 111=51 I C 708=62 P R 1919=86 P L R 1919.
4. *Municipal Committee, Ambala v. Mohendar Singh*, (1911) 38 P R 1911=9 I C 1000.
5. *Nur Mohammad v. Monteath*, 1925 Bom 162=86 I C 81=49 Bom 152=27 Bom L R 56.

has no bearing on the present case. That case was under the Cantonments (House Accommodation) Act, and the relevant section provided that the decision on appeal shall be final, and shall not be questioned in any Court otherwise than on the ground that the house is situate in a Cantonment in which the Act is not operative. By the express wording of the section therefore a limited power was conferred on the civil Courts and the ordinary jurisdiction barred pro tanto. In the present case there is no express prohibition to the civil Court entertaining such suits. The mere fact that the Act provides that the decision of the appellate Court shall be final or that the order of the Committee shall not be called in question otherwise than by appeal does not, in my opinion, oust the jurisdiction of the civil Court which it otherwise has, to give relief to the person aggrieved by an order of the Municipal Committee which may be found to be ultra vires, arbitrary, oppressive or capricious. I dismiss this appeal with costs.

V.B./B.K.

*Appeal dismissed.***A. I. R. 1936 Lahore 573**

BHIDE, J.

Matab Mal-Jinda Shah — Decree-holder—Appellant.

v.

Darya Ram Guranditta Suram Ram Karam Chand—Judgment-debtor—Respondent.

Misc. Second Appeal No. 1798 of 1935, Decided on 25th February 1936, from order of Dist. Judge, Montgomery, D/- 2nd May 1935.

(a) Civil P. C. (1908). O. 21, Rr. 38 and 57—Decree directing property to be considered as under mortgage and judgment-debtor prevented from alienating it—Attachment before sale is not necessary.

Where a decree directs that certain property will be deemed to be under mortgage and that the judgment debtor will not be entitled to alienate it, it is not necessary that the property should be attached before being brought to sale in execution of the decree: 1918 *Lah* 368, *Foll.* [P 578 O 2]

(b) Civil P. C. (1908), S. 47—Order setting aside sale for want of attachment—Order is decree and second appeal is competent.

An order setting aside a sale on the ground that the executing Court had no jurisdiction to sell the property without attachment, in the first instance, falls under S. 47 and a second appeal is competent against such an order.

[P 574 O 1]

A. R. Khosla—for Appellant.*Mohammad Amin Khan*—for Respondent.

Judgment.—This is an appeal arising out of execution proceedings relating to a decree. Certain land belonging to the judgment-debtor having been attached and sold, objections were raised to the sale on the ground of certain material irregularities and loss resulting therefrom. It was also urged that the sale was void as there had been no attachment prior to the sale. The learned District Judge found that the judgment-debtor had failed to prove that any substantial loss had resulted from the alleged material irregularities, but he was of opinion that the sale was void inasmuch as there had been no previous attachment. It appears that as a matter of fact the land had been previously attached, but the learned Subordinate Judge had thereafter dismissed the execution application. While dismissing the application he noted that the attachment had been effected with considerable difficulty and will stand in spite of the dismissal of the application. The learned District Judge held that the learned Subordinate Judge had no jurisdiction to order the attachment to continue in spite of the dismissal of the application for execution, in view of the provisions of O. 21, R. 57, Civil P. C. He therefore held that there being no valid attachment, the sale must be set aside.

On behalf of the decree-holder who has preferred this appeal, his learned counsel contended that there was no need for any attachment in the present case as the decree itself directed that the property will be considered to be under mortgage and the judgment-debtor would not be entitled to alienate it. In support of the contention the learned counsel relied on 58 P R 1918 (1). The learned counsel for the respondents was unable to cite any authority to the contrary, but merely urged that the sale was vitiated by the fact that it did not take place on the date mentioned in the proclamation but two days later. This point, however, does not appear to have been pressed in the Courts below and in the circumstances cannot be gone into in this appeal. The next contention of the learned counsel for the respondent

1. *Ratan Lal v. Bala Parshad*, 1918 *Lah* 368=44 I O 986=58 P R 1918.

was that a second appeal is not competent. But the learned counsel for the decree-holder has argued the appeal only on the ground that the learned District Judge was not right in holding that the executing Court had no jurisdiction to sell the property without attaching it in the first instance. This ground would fall under S. 47, Civil P. C., and thus a second appeal would be competent. For the reasons given above, it seems to me that the order of the learned District Judge cannot be supported on the ground on which it proceeds. I accept the appeal with costs and restore the order of the learned Subordinate Judge confirming the sale.

V.B./R.K.

*Appeal allowed.***A. I. R. 1936 Lahore 574**

AGHA HAIDAR, J.

Hira and others—Judgment-debtors—Petitioners.

v.

Ram Singh—Decree-holder—Opposite Party.

Civil Revn. No. 792 of 1935, Decided on 25th February 1936, from order of Senior Sub-Judge, Rohtak, D/- 14th May 1935.

Punjab Relief of Indebtedness Act (7 of 1934), Ss. 6, 35 and 60—Provisions of S. 6 do not apply to part 8 — Property belonging to judgment-debtor attached — Judgment-debtor can before sale has taken place raise objection even in appeal that property is not liable to attachment and sale — Court dismissing objection and refusing to apply provisions of the Act—It fails to exercise jurisdiction vested in it by law.

The provisions of S. 6, Punjab Relief of Indebtedness Act, apply only to part 3 and not to part 8. S. 35 is to be found in part 8, and a judgment-debtor whose property has been attached in execution of a decree against him, is entitled to raise an objection, even in appeal, that that property attached is not liable to attachment and sale in view of the provisions of S. 35 provided the objection is raised before sale of the property has taken place. Under S. 60 objections can be taken to protect the property before the sale. [P 574 C 2]

Where the Court on such objection being raised refuses to apply the provisions of the Punjab Relief of Indebtedness Act, it fails to exercise jurisdiction vested in it by law and its order is open to revision. [P 574 C 2]

Fakir Chand Mital—for Petitioners.

Shamair Chand and Prakash Chandra—for Opposite Party.

Order.—A simple money decree was obtained against the estate of Ram Mehar. The decree-holder took out execu-

tion and some property was attached. Objections were raised. The trial Court partly allowed the objections but dismissed them in respect of a certain house (B). The decree-holder went up in appeal and the judgment-debtors filed cross-objections that house (B) was not liable to attachment and sale in view of the provisions of S. 35, Punjab Relief of Indebtedness Act (Local Act No. 7 of 1934). The lower appellate Court repelled this contention holding that the provisions of S. 6, Punjab Relief of Indebtedness Act, applied only to suits and not to appeals, and also that the attachment in this case took place before the Act came into operation. On this ground it allowed the appeal of the decree-holder as regards house (A) and dismissed the cross-objections as regards house (B). The objectors judgment-debtors have come up to this Court in revision.

Mr. Shamair Chand has raised a preliminary objection that no revision can be entertained because the Court below has, if at all, made a mistake of law. In my opinion this objection has no force. The provisions of S. 6, Punjab Relief of Indebtedness Act, apply only to part 3 of the Act and not to part 8 in which S. 35 is to be found. Therefore the question that the objections could not be raised in appeal, and that the attachment had taken place before the Act came into operation, has no force. The language of S. 35 is perfectly clear. It has made certain alterations to the provisions of S. 60 (1) (c), Civil P. C., and for the words "occupied by him," the words "not let out on rent or lent to others or left vacant for a period of a year or more" have been substituted. The Court, by refusing to apply the provisions of the Punjab Relief of Indebtedness Act, has failed to exercise jurisdiction which was vested in it by law and therefore the revision is maintainable. Under the provisions of S. 60, objections can be taken to protect the property before the sale. In the present case the sale has not taken place and therefore the objections are taken at the right time.

I therefore allow the application for revision, set aside the order of the lower appellate Court and remand the case. The Court shall take evidence in order to satisfy itself whether the conditions laid down in S. 35, Punjab Relief of Indebtedness Act, have been satisfied. In

other words, the objectors will have to satisfy the Court that the property, which is sought to be sold, is not let out on rent or lent to others or left vacant for a period of a year or more. The applicants shall get their costs.

R.M./R.K. *Application allowed.*

A. I. R. 1936 Lahore 575

ADDISON AND ABDUL RASHID, JJ.

Jiwan and others — Plaintiffs—Appellants.

v.

Sant Singh and another—Defendants—Respondents.

Letters Patent Appeal No. 148 of 1935, Decided on 17th February 1936, from judgment of Dalip Singh, J., D/- 21st October 1936.

Second Appeal—Absence of jurisdiction — Absence of jurisdiction to hear appeal is good ground for second appeal — District Judge entertaining appeal which under notification issued under S. 39 (3), Punjab Courts Act, lies to senior Sub-Judge—He acts without jurisdiction.

The absence of jurisdiction to hear an appeal is a good ground for second appeal. [P 576 C 1]

It is a defect of jurisdiction if the District Judge entertains an appeal from the Court of the first instance which under the Notification issued under S. 39 (3), Punjab Courts Act, lies to a Subordinate Judge of the First Class. The District Judge in hearing the appeal acts without jurisdiction and his judgment and decree are liable to be set aside. The consent and acquiescence of the parties to the appeal cannot give jurisdiction to the Court in which the appeal does not lie: 1927 *Lah* 187 and 36 *P R* 1902 (*F B*), *Foll.* [P 576 C 1]

M. L. Puri—for Appellants.

Mohammad Amin Indrabi — for Respondents.

Abdul Rashid, J. — This appeal has arisen out of an action brought by Jiwan and others for possession of a site under a house, on the allegations that they were the owners of the site in suit and that the defendants had built a house thereon unlawfully a few months before the institution of the suit. The value of the suit for purposes of jurisdiction and court-fee was fixed at Rs. 75 in the plaint. The defendants pleaded, *inter alia*, that the plaintiffs were not the owners of the site, that the defendants had built a house thereon about 40 years before the institution of the suit, and that the suit was, therefore, barred by time. The trial Court granted the plaintiffs a decree for possession of the site in dispute with

costs. The defendants were, however, allowed to remove the superstructure within a period of two months. Against this decision the defendants preferred an appeal to the learned District Judge, Sialkot. The learned District Judge held that the plaintiffs had failed to establish their ownership of the site in dispute, and that the suit of the plaintiffs was also barred by limitation. On these findings the appeal of the defendants was accepted and plaintiffs' suit was dismissed with costs. Against this decision the plaintiffs preferred a second appeal to this Court. One of the grounds of appeal was that the suit was an unclassified suit of the value of Rs. 75, and that as it had been decided by a Subordinate Judge, Fourth Class, the appeal lay to the Senior Subordinate Judge and not to the District Judge, Sialkot. This appeal was dismissed by a learned Single Judge *in limine*. Against the decision of the Single Judge the plaintiffs have preferred the present appeal under Cl. 10, Letters Patent. S. 39 (3), Punjab Courts Act, lays down that:

The High Court may by notification direct that appeals lying to the District Court from all or any of the decrees or orders passed in an original suit by any Subordinate Judge shall be preferred to such other Subordinate Judge as may be mentioned in the notification, and the appeals shall thereupon be preferred accordingly and the Court of such other Subordinate Judge shall be deemed to be a District Court for the purpose of all appeals so preferred.

In pursuance of this section notification No. 81-G., dated 14th February 1924, was issued by the High Court directing that in the Sialkot District appeals lying to the District Court from decrees or orders passed by any Subordinate Judge, other than one of the First or Second Class, in a small cause of the value not exceeding Rs. 500, or in an unclassified suit of the value not exceeding Rs. 100, shall be preferred to the Subordinate Judge of the First Class exercising jurisdiction within the District. In view of the provisions quoted above, it is clear that the appeal from the judgment and the decree of the trial Court lay to the Senior Subordinate Judge, Sialkot, and not to the District Judge, as the suit was undoubtedly an unclassified suit of the value of Rs. 75. The learned District Judge acted without jurisdiction in hearing the appeal and his judgment and decree must, therefore, be set aside. Reference may be made in this connexion

to 1927 Lah 187 (1), where it was held that the absence of jurisdiction to hear an appeal is a good ground for second appeal. In 36 P R 1902 (2), it was held that there is a defect of jurisdiction if a Divisional Judge entertains an appeal direct from a Court of first instance which, under the provisions of S. 39 (a), Punjab Courts Act, lies to a District Judge. The consent and acquiescence of the parties to a suit cannot give jurisdiction to a Court of limited jurisdiction. For the reasons given above, we accept this appeal, set aside the judgment and the decree of the learned District Judge, and remit the appeal of the defendants to the Senior Subordinate Judge, Sialkot, for decision. The costs will abide the result of the appeal before the Senior Subordinate Judge.

R.M./R.K.

Appeal allowed.

1. Tuman Singh v. Bija, 1927 Lah 187=100 I C 92.
2. Hansa v. Ran Singh, (1902) 36 P R 1902 (F B).

A. I. R. 1936 Lahore 576

JAI LAL, J.

Waryam Singh—Defendant — Appellant.

v.

Sundar Singh and others—Plaintiffs—Respondents.

Second Appeal No. 1554 of 1935, Decided on 6th January 1936, from decree of Dist. Judge, Montgomery, D/- 15th June 1935.

(a) Punjab Colonization of Government Lands Act (5 of 1912), S. 19—Agreement to have mutation when proprietary rights are acquired—Agreement not declaring right not previously existing—Agreement does not require registration.

An agreement by a person that after the acquisition of the proprietary rights he would have a mutation made in the names of his brothers jointly with himself, is an agreement which is merely a recital of existing facts and it does not by itself declare any rights which did not previously exist, and it is further an agreement to enter mutation of the proprietary rights when they have been acquired. Such document does not require registration.

[P 576 C 2]

(b) Punjab Colonization of Government Lands Act (5 of 1912), S. 19—Agreement to have mutation of proprietary rights is valid.

A mere agreement to have mutation effected in respect of the proprietary rights does not make the agreement void under S. 19: 1932 Lah 32, *Rel. on*; 1926 Lah 14, *Disting.* [P 577 C 1]

Jhanda Singh—for Appellant.

Shamair Chand—for Respondents.

Judgment.—The appellant obtained tenancy rights in Government land under the Colonization of Government Lands Act. At the time of the acquisition he was joint with his brothers, the respondents. It has been found that they are members of a joint Hindu family and that the funds for the acquisition of the tenancy rights were furnished by the joint Hindu family. It has also been found that the appellant has now become a full proprietor of the land by payment of the remaining instalments to the Government. These instalments have also been paid by the joint family. On 1st May 1930 the appellant executed an agreement in favour of the respondents reciting the above facts, that the tenancy rights had been acquired by the family funds, that the proprietary rights also would be acquired in the same manner and that his brothers were joint with him in the tenancy rights from the very beginning. He further undertook that after the acquisition of the proprietary rights he would have a mutation made in the names of his brothers jointly with himself. The question is whether this agreement requires registration and also whether it is void under S. 19 of the Colonization of Government Lands Act. The District Judge has held in favour of the validity of the agreement on both these points and in my opinion rightly.

The learned counsel for the appellant contends, but cites no authority in support of his contention, that the document must be deemed to declare rights in land in favour of the respondents, but in my opinion it is merely a recital of existing facts and it does not by itself declare any rights which did not previously exist, and it is further an agreement to enter mutation of the proprietary rights when they have been acquired. According to the recitals the proprietary rights also already vest in the respondents, and what has to be done is a formal mutation in favour of the respondents in the revenue records. In my opinion such a document does not require registration.

On the second question the learned counsel cites 6 Lah 536 (1), but the facts in that case are distinguishable because in that case the two brothers had paid for the land jointly and had expressly undertaken to remain joint ten-

1. Hussain Bakhsh v. Sarbuland, 1926 Lah 14 =92 I C 268=6 Lah 536.

ants. In the present case there is no agreement to remain joint tenants. Much depends upon the terms of the document. Then in the present case there is nothing which is opposed to the provisions of S. 19 which prohibits the transfer of tenancy rights without the permission of the commissioner or such other officer to whom the powers of the commissioner may be delegated. In 11 Lah 685 (2) under almost similar circumstances it was held that the transaction was not opposed to S. 19 of the Colonization of Government Lands Act and this view was followed in 1932 Lah 32 (3). The agreement in question does not confer or transfer any rights in favour of the respondents. It merely states that these rights already vest in them from the date of the acquisition of such rights by the appellant and the agreement to transfer is not in respect of the tenancy rights but in respect of the proprietary rights. As a fact it has been found by the District Judge that the proprietary rights have already vested in the appellant and by virtue of contribution made by them to the purchase price the respondents have already become joint proprietors. A mere agreement to have mutation effected in respect of the proprietary rights does not make the agreement void under S. 19.

A minor question raised by the learned counsel is that the trial Judge should have awarded proportionate costs to the respondents, but he gave full costs because he considered that substantially the respondents had won the case, and the matter does not appear to have been agitated before the District Judge. I dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

2. Preman v. Hardit Singh, 1930 Lah 835 = 126 I C 523 = 32 P L R 185 = 11 Lah 685.

3. Nand v. Bhagat Singh, 1932 Lah 32 = 134 I C 101 = 32 P L R 879.

A. I. R. 1936 Lahore 577

AGHA HAIDAR, J.

Wazir Khan—Defendant—Appellant.
v.

Mukhtar Khan and another—Plaintiffs
and *another*—Defendant—Respondents.

Second Appeal No. 1540 of 1935, Decided on 19th February 1936, from decree of Dist. Judge, Jullundur, D/- 8th June 1935.

1936 L/78 & 74

Custom (Punjab)—Alienation—Valid necessity—Payment of Government revenue is valid necessity—Mortgage executed for raising money to make payment of Government revenue is valid and binding on reversioners.

The payment of Government revenue is a valid necessity. A mortgage executed by a person who is a lambardar, for raising money to make payment of the Government revenue is valid and binding on the reversioners, when there is evidence to show that not only was the amount borrowed to make payment of Government revenue but it was actually paid into the Government treasury for that purpose.
[P 578 C 1]

Muhammad Sharif—for Appellant.

Aldul Haye—for Respondents.

Judgment.—This appeal arises out of a suit for a declaration that the mortgage executed by Sohne Khan, Akbar Khan and, their mother Mt. Hashmate, in favour of defendant 2 shall not affect the plaintiffs' reversionary rights on the demise of defendant 1, Akbar Khan. The trial Court decreed the plaintiffs' claim in full. The defendant, Wazir Khan, went up in appeal and the decree of the trial Court was modified. The defendant has come up now in second appeal. Sardar Khan was a Lambardar and owned about 100 ghumaons of land and 10 or 12 houses in his native village. On his death he left him surviving his two sons Sohne Khan and Akbar Khan, his widow Mt. Hashmate and a daughter. All his children were unmarried at the time of the death of Sardar Khan and up till the institution of the present suit they were unmarried. On 20th June 1929, Sohne Khan and his mother Mt. Hashmate mortgaged 16 kanals and 8 marlas of land in favour of Wazir Khan for a sum of Rs. 1,150. In the present appeal we are concerned only with a sum of Rs. 370 which, according to the alienees, was borrowed by Sohne Khan for payment of Government revenue. Sohne Khan, at the time of the mortgage in suit, was a Lambardar. A part of his duties was to collect the Government revenue from the various Khewatdars holding proprietary rights in the Khewat or Mahal of which he was the Lambardar. He represented to the mortgagee that the amount of Rs. 370 was payable by him in the Government treasury as the land revenue. We have evidence on the record that this amount was received before the Sub-Registrar from the appellant and actually paid by Sohne Khan in the Government treasury on 20th and

21st June 1929, so that there cannot be any doubt as to the existence of the necessity at the time of the mortgage and the payment in the Government treasury of the amount due.

Ordinarily and as a matter of first impression, the payment of Government revenue would be considered a valid necessity and the alienee would be protected if it is shown that he made proper enquiries that the Government revenue was due and payable at the time of the loan. Here, we have not only a case in which there was evidence of pressing necessity but the actual payment of the amount borrowed into the Government treasury for the payment of the Government revenue. It was argued on behalf of the respondents very strenuously that Sohne Khan was a man of notoriously bad character, who was addicted to drinking, dissipation and profligacy and that under these circumstances the defendant Wazir Khan was not justified under the law to advance money to him. Reliance is placed upon the case reported in 76 P R 1917 (1), but that case was entirely different. In that case a mere statement was made by the borrower to the lender that he needed money to pay Government revenue and other sundry expenses and it was held by the learned Judges that when a man, who is notoriously extravagant, borrows money though he has ample income of his own, a creditor lending money to him should make full enquiry as to the necessity of the loan. This proposition is undoubtedly correct. But when the circumstances of the present case are examined carefully we find that there was a pressing necessity and Sohne Khan had to meet the Government demand. If the amount had not been paid then the revenue authorities would undoubtedly have taken drastic action against him by attaching and selling his property and possibly by sending him to the civil prison. If the argument of the collaterals respondents were to be accepted the result would be that a lambardar who is to pay the Government revenue, would not be able to borrow money for doing so and would remain a defaulter. This cannot possibly be the law.

I, therefore, in view of the facts of the present case, hold that there was a press-

ing need for paying the Government revenue and that in order to do so Sohne Khan borrowed money. The Government obviously would not excuse the non-payment of the Land Revenue on account of the previous mismanagement and negligence of Sohne Khan and his alleged inability to borrow. It seems to me that when necessity existed and the demand was pressing, it was sufficient for the mortgagee to pay the amount for the purposes of meeting the Government demand and the fact that the payment was actually made goes to strengthen the position of the borrower all the more. In my opinion, under the circumstances the Court below was in error in not allowing the sum of Rs. 370 to the mortgagee. I, therefore, allow the appeal to this extent only, and modify the decree of the Court below. The result, therefore, is that as Rs. 720 had already been allowed to the mortgagee in the Court below, the mortgage would stand. The appellant is entitled to his costs in this Court.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Lahore 578

AGHA HAIDAR, J.

Kehr Singh and others—Plaintiffs—Appellants.

v.

Chanda Singh and others—Defendants—Respondents.

Appeal No. 1607 of 1935, Decided on 17th January 1936, from decision of Dist. Judge, Amritsar, D/- 26th June 1935.

(a) Civil P. C. (1908), S. 2 (11)—Term 'next of kin' is not same as 'legal representative'—*Obiter*.

Obiter—The term 'next of kin' is peculiar to the English Law of inheritance and is not the same thing as 'legal representative' as under the Code of Civil Procedure. [P 579 O 2]

(b) Civil P. C. (1908), O. 22, R. 2—Jat agriculturists owning property enjoy it as tenants in common—One of five Jat brothers owning property transferring it—Suit for possession against transferee by all brothers—One brother dying during pendency of suit—His legal representative not brought on record—Suit abates as regards his share only.

The rule of joint ownership and survivorship as understood by the Benares School of Hindu Law does not apply to Jat agriculturists. They enjoy the family property as tenancy in common and share of each is capable of separation and division. Where therefore one of five Jat

1. Ram Kishen v. Mt. Hassi, 1917 Lah 428= 39 I C 191=76 P R 1917.

brothers, owning certain property, transfers it and the brothers institute a suit for its possession and during the pendency of the suit one of the brothers dies but his legal representative is not brought on record, the suit abates only as regards the share of the deceased brother only and does not abate as a whole. [P 579 C 2, P 580 C 1]

(c) Civil P. C. (1908), O. 22, R. 6—Court making local inspection during interval of last date of hearing and date of judgment—Suit cannot be said to have concluded on that hearing.

Where during the interval between the last date of hearing of the suit and the date on which the judgment is pronounced, the Court makes local inspection of the site in suit and makes a reference to it in his judgment, the hearing of the suit cannot be said to have concluded on that date of hearing within the meaning of O. 22, R. 6. [P 580 C 1]

Panna Lal Bahl—for Appellants.

L. Saunders—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for possession of a certain house. The trial Court decreed the plaintiffs' claim, but on appeal the lower appellate Court has held that the plaintiffs' suit had abated, and has accordingly dismissed the plaintiffs' claim in toto. The plaintiffs have come up to this Court in second appeal. Kehr Singh, Ganda Singh, Chanda Singh, Lachhman Singh and Sher Singh were five brothers. They were Jat agriculturists. On 12th September 1930 a sale was effected of the house in question in the name of Kehr Singh, one of the brothers, for a consideration of Rs. 99. The five brothers brought the present suit for possession of the house on 9th June 1931. The suit was tried in the usual way and arguments were finished on 7th July 1932. 14th July 1932 was fixed for delivery of judgment. It happened that the trial Judge at the suggestion of some of the parties decided to inspect the locality. He obtained the necessary permission of the District Judge and fixed a date for local inspection. The parties and their Pleaders were present and measurements were taken with the help of revenue records which were specially sent for. These proceedings went on right up to the month of August 1932.

In the meantime, on 22nd July 1932 Sher Singh, one of the plaintiffs, died. His legal representatives were not brought on the record and the trial Court, on 7th November 1932, decreed the plaintiffs' claim. The defendants went up in appeal and at the time of argument it was pointed out on their behalf that, as

the legal representatives of Sher Singh had not been brought on the record in the trial Court, the whole suit abated. It may be mentioned here that the defendants in their appeal had not impleaded the legal representatives of Sher Singh and in fact Sher Singh is shown as one of the respondents. It was argued on behalf of the plaintiffs respondents that, as Sher Singh had died between the conclusion of the hearing and the pronouncement of the judgment, therefore under the provisions of O. 22, R. 6, Civil P. C., the decree of the Court had the same force and effect as if it had been pronounced before the death of Sher Singh took place and consequently there was no question of abatement of the claim. This contention was overruled by the learned District Judge. In the end he allowed the appeal holding that the suit had abated in toto and the decree passed against the defendants by the trial Court was a nullity. I may point out in passing that the learned District Judge has throughout wrongly used the expression "next of kin" when he ought to have used the phrase "legal representative" which is defined in S. 2 (11) Civil P. C., and which alone is mentioned in the relevant rules of O. 22, Civil P. C. The term "next-of-kin" is peculiar to the English law of inheritance and is not the same thing as "legal representative" as understood in the Code of Civil Procedure. This however is by the way.

As already mentioned the plaintiffs are Jats and agriculturists. The Hindu law of joint family, according to the Mitakshara School has been considerably modified in the Punjab among people who are governed by the Customary law. The rule of joint ownership and survivorship, as understood by the Benares School of Hindu law, does not apply to Jat agriculturists. They enjoy family property as tenancy in common. If the five brothers are once held to be joint brothers of the Hindu family law, according to the Mitakshara, then no question of abatement would arise because, on the death of Sher Singh, the right to sue would survive to his brothers (O. 22, R. 2). But Mr. Panna Lal for the appellants has based his claim, and I think properly on the Customary law of the agriculturists in the Punjab, and his case is that the brothers held their shares separately or that in any case their shares were cap-

able of separation and division and therefore the suit could not abate as a whole. This contention, in my opinion, is well founded. The result therefore is that, on the death of Sher Singh in the trial Court, and in the absence of his legal representatives from the record, his share only would abate and there is no reason whatsoever why the whole suit should be treated as having abated. It was further argued by Mr. Panna Lal that, having regard to the provisions of O. 22, R. 6, Civil P. C., the death of Sher Singh ought not to have made any difference because he died between the conclusion of the hearing and the pronouncement of the judgment. According to his argument the hearing concluded on 7th July 1932. This in my judgment is not so. A series of proceedings were taken after 7th July 1932 as mentioned in detail in the judgment of the trial Judge, and the learned District Judge has also pointed out that, after the trial Judge had decided to inspect the locality and to make measurements on the spot on 27th August 1932, he actually visited the spot, measurements were taken under his own supervision and a report was called from the kanungo. In fact the Sub-Judge has made a reference in his judgment to the inspection, the measurements and the report. In these circumstances it cannot be said that the hearing had concluded on 7th July 1932 and no judicial proceedings were taken in the interval between that date and the date on which the judgment was pronounced.

On the first point, however, I agree with the contention of the learned counsel for the appellant. I would therefore allow the appeal to this extent: that the suit cannot be held to have abated in toto, but that the abatement would take effect only in respect of the divisible share of Sher Singh, which in the present case amounts to one-fifth only. I therefore set aside the judgment and decree of the lower appellate Court in the terms noted above and remand the case for disposal according to law. The remand is under O. 41, R. 23, Civil P. C. The appellants are entitled to refund of the court-fee. The appellants shall get their costs of the appeal. Other costs shall abide the event.

R.M./R.K.

*Case remanded.***A. I. R. 1936 Lahore 580**

YOUNG, C. J. AND MONROE, J.

Fazl Karim—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1177 of 1935, Decided on 13th January 1936, from order of Sess. Judge, Jhelum, D/- 23rd October 1935

(a) Criminal Trial—Murder—Circumstantial evidence—Accused leaving one village for another, one afternoon along with his wife who has been unfaithful to him—Woman not subsequently seen alive by any one—Body of woman discovered in neighbourhood—Burden is on accused to explain what happened to his wife—Accused not giving any explanation—There is strong circumstantial evidence against him.

The accused set out one afternoon with his wife who had been unfaithful to him, from one village to another village. The woman was not subsequently seen alive by anyone. The woman did not return to the village nor was she seen with the accused when he visited a village nearabout the same night or at any of the places which he later on visited. The body of the woman was discovered between the two villages.

Held, that there was a heavy onus on the accused under the circumstances of the case and in view of the strong motive for murdering his wife, to explain what happened to his wife on the afternoon on which they started. The fact that he did not say a word about his wife from that date till his arrest, along with the circumstances of the case was strong circumstantial evidence that he was responsible for the death of his wife. [P 581 O 1]

(b) Criminal Trial—Murder—Sentence—Wife murdered with deliberate premeditation—Wife unfaithful is no ground for lesser sentence.

The mere fact that a woman has been unfaithful to her husband is not in itself sufficient ground for substitution of the lesser sentence where there has been deliberate premeditation. [P 581 O 2]

*R. N. Malhotra—for Appellant.**D. R. Sawhney—for the Crown.*

Judgment—Fazl Karim has been condemned to death for the murder of his wife, Khan Begam, by the learned Sessions Judge of Jhelum. Fazl Karim and his brother, Abdul Aziz, had been working in Quetta. Mt. Khan Begam, his wife, had been left with her sister, Mt. Sardar Begam in village Surgdhan. The husband being absent in Quetta for some considerable time the wife entered relationship with one Abdul Karim of the village. This was reported to the husband at Quetta and he returned. The intrigue

between Mt. Khan Begam and Abdul Karim is admitted. Fazl Karim obtained from Abdul Karim a promise that he would cease relationship with Mt. Khan Begam. Mt. Khan Begam refused to return to Quetta with Fazl Karim on the ground that she was afraid that harm would come to her. On 22nd May 1935 Fazl Karim persuaded his wife to accompany him and his brother to village Jodha on a visit. The three set out for Jodha in the afternoon. From that moment Khan Begam was not seen alive by any one. On that night Fazal Karim and Abdul Aziz stayed with Fazal Ahmad (otherwise known as Fazal Ilahi) at a village some distance from Jodha. They were by themselves: Mt. Khan Begam was not with them nor did she return to village Surgdhan. Fazal Karim and Abdul Aziz thereafter stayed at Domeli, Jhelum and Karachi, finally arriving at Quetta. At none of these places was Mt. Khan Begam seen with them.

On 25th May a body of a woman was discovered dead between village Surgdhan and Jodha. The body was identified to be that of Mt. Khan Begam. The Quetta earthquake was responsible for Fazal Karim and Abdul Aziz leaving Quetta and they were arrested on coming back to their own district. Fazal Karim made a complete confession before a Magistrate in which he gives details of the murder of his wife in a forest between Surgdhan and Jodha. Abdul Aziz was acquitted by the lower Court on sound grounds. It is not contested that Fazal Karim, Abdul Aziz and Mt. Khan Begam set out from Surgdhan together on 22nd May. It has been proved conclusively that Fazal Karim and Abdul Aziz that same night were by themselves staying with Fazal Ahmad. Under these circumstances, and in view of the very strong motive that Fazal Karim had for murdering his wife, there is very heavy onus upon Fazal Karim to explain what happened to his wife that afternoon. These facts and the fact that he did not say a word about his wife from that date up till his arrest is in itself strong circumstantial evidence that the death of his wife was due to him. The medical evidence owing to the decomposition of the body does not help us as to the cause of death but it is clear that if the woman had died a natural death Fazal Karim would have taken her body back to her

own village and not left her lying in the forest.

There is in addition of course in this case the confession of Fazal Karim. The learned Magistrate who heard the confession took every precaution in asking him every variety of question to show that the confession was voluntary. The confession itself is corroborated by evidence given by the various persons with whom Fazal Karim stayed after the death of his wife and also by the evidence which satisfactorily establishes that Fazal Karim, his brother and his wife left the village together on the afternoon of 22nd May. The confession in addition to the circumstantial evidence clearly establishes that Fazal Karim is rightly convicted of murder by the lower Court. The only real point in this case is whether the sentence of death ought to be confirmed. We are of opinion that there is no real reason to interfere. This was a deliberate and premeditated murder. Fazal Karim took his wife on this afternoon on a journey to Jodha obviously to murder her. It is not a case where a man in a moment of anger at the infidelity of his wife kills her. The mere fact that a woman has been unfaithful to her husband is not in itself, in our opinion, sufficient ground for substitution of the lesser sentence where there has been deliberate premeditation. We confirm the sentence and dismiss the appeal.

R.M./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 581

BHIDE, J.

Piars Lal-Moti Lal — Defendant —
Petitioner.

v.

Sri Ram — Plaintiff — Opposite Party.

Civil Revn. No. 500 of 1935, Decided on 7th February 1936, from decree of Small Cause Court Judge, Delhi, D/- 18th April 1935.

Master and Servant — Suit for wages — Servant committing theft — He is not entitled to damages and is liable to discharge with notice.

Where a servant is found to have committed theft, he is liable to discharge with notice and he cannot claim wages: 1925 All 680, *Rel. on.*

[P 582 O 1]

Qabul Chand — for Petitioner.

Order. — This petition has been heard ex parte as the respondent failed to appear in spite of service. The only point

raised is that the plaintiff was not entitled to any wages as it has been found that he had committed a theft and was therefore liable to discharge with a notice: This contention seems to be correct: vide 48 All 31 (1), also Smith's Law of Master and Servant, Edn. 8, p. 53. I accept the petition ex parte and dismiss the plaintiff's suit with costs.

V.B./R.K.

Petition accepted.

1. Bhakta Sheromani v. Seetal Nath, 1925 All 680=88 I C 1018=23 A L J 682=48 All 31.

A. I. R. 1936 Lahore 582

YOUNG, C. J. AND MONROE, J.

Shamas-ul-Nihar Fazal Elahi —
Plaintiff—Appellant.

v.

Secy. of State—Defendant—Respondent.

Second Appeal No. 1322 of 1935, Decided on 4th February 1936, from order of Dist. Judge, Rawalpindi, D/- 18th April 1935.

(a) General Orders by Governor-General in Council No. 179—S. 7—Land given under license, resumed under S. 6—S. 7 has no application.

Where land is originally taken under a license in accordance with the General Order by the Governor-General in Council, No. 179, and is resumed in accordance with the terms of that license, since paying compensation for land resumed under S. 6 is neither purchase nor hire, S. 7 of the same order has no application. [P 582 C 2; P 583 C 1]

(b) Cantonment (House-Accommodation) Act (6 of 1923), S. 4—S. 4 not applicable to licenses given under General Order No. 179 unless both parties give written consent.

Cantonment (House Accommodation) Act 1923 under S. 4 clearly does not apply to a license under General Order No. 179 unless the Secretary of State and the other party entitled consent to be bound by the terms of the Cantonments (House Accommodation) Act and consent in writing. [P 583 C 1]

Barkat Ali and Partab Singh—for Appellant.

M. C. Mahajan and R. C. Soni—for Respondent.

Young, C. J.—This is a second appeal from the decision of the learned District Judge of Rawalpindi. On 6th September 1884, the Secretary of State granted to one Fazal Ilahi two plots of land for the purpose of building a bungalow thereon. The document of title upon which the appellant relies contains this clause:

The above grant is to be registered and maintained as a separate estate and to be subject to all present and prospective orders and regula-

tions of Government regarding tenure of land and house property in Cantonments.

It is agreed by both parties that the relevant order is that entitled General Order by the Governor-General in Council, No. 179, dated 12th September 1936. It was in terms of this order that the grant was made. S. 6 of that order reads as follows:

No ground will be granted except on the following conditions, which are to be subscribed by every grantee, as well as by those to whom his grant may subsequently be transferred: 1st. The Government to retain the power of resumption at any time on giving one month's notice and paying the value of such buildings as may have been authorised to be erected. 2nd. The ground, being in every case the property of Government, cannot be sold by the grantee; but houses or other property thereon situated may be transferred by one military or medical officer to another without restriction, except in the case of reliefs, when, if required, the terms of sale or transfer are to be adjusted by a Committee of Arbitration. 3rd. If the ground has been built upon, the buildings are not to be disposed of to any person, of whatever description, who does not belong to the army, until the consent of the Officer Commanding the station shall have been previously obtained under his hand. 4th. When it is proposed, with the consent of the General Officer, to transfer possession to a native, should the value of the house, buildings or property to be so transferred exceed Rs. 5,000 the sale must not be effected, until the sanction of Government shall have been obtained through His Excellency the Commander-in-Chief.

On the 12th day of September 1932, the Secretary of State, in accordance with the above section, served one month's notice upon the widow of Fazal Ilahi that he was resuming possession of the land. He also offered in due course Rs. 5,698 to the widow in terms of the said section as compensation for the value of the building erected upon the land. It appears to us that this case is perfectly simple. The land was originally taken under a license in accordance with the General Order by the Governor-General in Council. No. 179, and it has now been resumed in accordance with the terms of that license. It appears therefore to us that nothing further remains to be said upon this matter. Counsel for the appellant however has endeavoured to show that S. 7 of the same order applies in this case. The section is as follows:

All houses in a military cantonment, being the property of persons not belonging to the army, which may be deemed by the Commanding Officer of the station suitable, from their locality, for the accommodation of officers,

shall be claimable for purchase or for hire at the option of the owner; in the former case at a valuation, and in the latter at a rent, to be fixed, in case of the parties disagreeing, by a Committee of Arbitration constituted as follows.

There can be no doubt that S. 7 has no application at all to this case. Paying compensation for land resumed under S. 6 is neither purchase nor hire. S. 7 clearly applies to a very different set of circumstances. Counsel also relied in the alternative upon the Cantonments (House-Accommodation) Act 1923. He read to us S. 5 of the Act and neglected to draw our attention to S. 4. This Act under S. 4 clearly does not apply to a license under General Order No. 179 unless the Secretary of State and the other party entitled consent to be bound by the terms of the Cantonments (House Accommodation) Act and consent in writing. The counsel cannot produce any consent in writing signed by the Secretary of State. There is nothing in this appeal and we dismiss it with costs.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 583

AGHA HAIDAR, J.

Rasul Shah—Defendant—Petitioner.

v.

Diwan Chand—Plaintiff and another—Defendant—Respondents.

Civil Revn. No. 599 of 1935, Decided on 30th January 1936, against Senior Sub-Judge, Attock, D/- 22nd May 1935.

(a) Appeal—Special power of attorney—Appeal is continuation of suits—Special power—Agent's acts to be taken for its executant's—Attorney can engage pleader for appeal.

Where the power-of-attorney provides that "whatever shall be done by the agent shall be acceptable to the executant thereof" and in light of the legal proposition that an appeal is a continuation or a stage in the progress of the suit, the special attorney can engage a pleader for prosecuting an appeal in the lower appellate Court: 1934 Lah 973, *Rel. on.*

[P 583 O 2, P 584 1]

(b) Appeal—Pleader validly representing party in lower Court—Such pleader can file memo of appeal and prosecute it in lower appellate Court.

Order 8, R. 4 (2), Civil P. O., provides that every appointment, of a pleader shall be filed in Court and shall be deemed to be in force until all proceedings in the suit are ended so far as the client is concerned. So where a pleader validly represents a party in the trial Court, he can present a memorandum of appeal on behalf of his client and prosecute the appeal in the lower appellate Court.

[P 584 O 1]

Dev Raj Sawhney—for Petitioner.

Nihal Singh—Respondents,

Order.—This is an application in revision against the order of the lower appellate Court passed in a suit of Small Cause nature. The lower appellate Court dismissed the appeal on the sole ground that the special power-of-attorney, dated 14th November 1932, given by the appellant to one Nur Khan was confined to his actings as such special agent in the Court of the Subordinate Judge, Campbellpur only, and that therefore he had no authority whatsoever to prosecute the appeal by engaging counsel in the appellate Court. It appears that the original power-of-attorney has been destroyed. This is a matter for regret because the litigation has not yet come to an end and the power-of-attorney should have been kept intact until the final disposal of the case. This has not been done. But fortunately the two learned counsels, who represented the parties before me, had on their briefs uncertified copies of the power-of-attorney and they exactly tallied with each other. Under the circumstances, after comparing them, I have decided to look into one of these documents in order to get over the difficulty created by the destruction of the original document. The advocates had no objection to this unusual course being adopted in the interest of justice.

The power-of-attorney no doubt mentions only the Court of the Subordinate Judge, Campbellpur, but there are expressions in it which are wide enough to enable the special agent to prosecute the case in every way. It is finally provided that whatever the special agent might do shall be considered to be the act of the principal, namely the executant himself. This document should be construed in a liberal manner so as to do substantial justice and not deny it by putting a narrow construction upon it. The matter had been before a Division Bench of this Court in 1934 Lah 973 (1). The Division Bench rightly pointed out that an appeal is a continuation of the suit and that the prosecution of the suit includes the prosecution of all the proceedings till a final decree is passed. The learned Judges attached importance to the provision in the document before them, where it was provided that whatever shall be done by the agent shall be acceptable to the exe-

1. Balqis Begam v. Shahzada Hamdam, 1934 Lah 973=155 I O 479=86 P L R 135.

cutant thereof. These are exactly the words with which the document concludes in the present case. In my opinion, the power-of-attorney read as a whole and in the light of the legal proposition that an appeal is a continuation or a stage in the progress of the suit, leaves no room for doubt that the special attorney in the present case could engage a pleader for prosecuting the appeal in the lower appellate Court.

There is another way of looking at the matter. In the decree sheet of the trial Court the name of Haidar Shah appears as a pleader for defendant 2. The same pleader, namely Haidar Shah, appears to have filed the memorandum of appeal in the lower appellate Court. At the foot of this memorandum of appeal the pleader Mr. Haidar Shah has put his signatures. Now O 3, R 4 (2), Civil P. C. provides that every such appointment (namely, of a pleader), shall be filed in Court and shall be deemed to be in force . . . until all proceedings in the suit are ended so far as the client is concerned. There cannot be any manner of doubt that Mr. Haidar Shah was rightly representing the defendant in the trial Court. There is no dispute about it. This being so, and construing the concluding words of O. 3, R. 4 (2), namely, 'until all the proceedings in the suit are ended,' in the light of the observations of the Division Bench case cited above, there cannot be any doubt that Mr. Haidar Shah could present the memorandum of appeal on behalf of his client and prosecute the appeal in the lower appellate Court.

In my opinion the Court below has put an unduly narrow construction upon the language of the power-of attorney and in doing so has acted in the exercise of its jurisdiction with material irregularity. I therefore allow the application, set aside the order of the Court below and remand the case to that Court for disposal according to law. In the circumstances of the present case I make no order as to costs.

B.D./R.K. *Application allowed.*

A. I R. 1936 Lahore 584

ADDISON AND ABDUL RASHID, JJ.
Shib Karan Das—Appellant.

v.

Mohammed Sadiq—Respondent.

Second Appeal No. 2042 of 1935, Decided on 3rd February 1936.

Civil P. C. (1908), O. 37, R. 3 — Leave to defend—Court not satisfied with bona fides of defendant—Leave should be granted only conditionally.

Where in a suit on a promissory-note instituted under O. 37, Civil P. C., the defendant applies for leave to appear and defend, but Court is not satisfied with the bona fides of the defendant and vague and indefinite assertions have been made by him to gain time, it is open to the Court to grant leave to defend only conditionally, i. e. on the defendant paying into Court the amount claimed: 1920 *Mad* 969, *Foll.*; 1927 *Sind* 60; 1934 *Sind* 191; 1929 *Mad* 841 and 1935 *Mad* 302, *Disting.* [P 585 C 1]

Mehr Chand Mahajan and *Bishen Narain*—for Appellant.

Jai Gopal Sethi—for Respondent.

Abdul Rashid, J. — The suit, which has given rise to this appeal, was instituted by Mohammed Sadiq on 13th June 1935, under O. 37, Civil P. C., for recovery of Rs. 3,058 on the basis of a pro-note. Defendant Shib Karan Das applied for leave to appear and defend the suit. His main plea was that he was a minor on 25th April 1935, when the pro-note, which forms the basis of the suit, was executed. The trial Court held that the assertions about the minority contained in the application of the defendant were vague and indefinite and that he had even failed to give the date of his birth. The Court, therefore, came to the conclusion that the defence was suspicious and doubtful and seemed to have been put forward to gain time. The Court, however, held that there was a triable issue in the case and leave was therefore granted to the defendant to appear and to defend the suit, subject to his payment into Court, of the sum of Rs. 3,058 with costs by 22nd July 1935. This order was passed by the trial Court on the 17th July. On the 19th of July an application was preferred on behalf of the defendant praying for an extension of time for depositing the money in Court. The learned Senior Subordinate Judge extended the time for payment up to the 29th of July. As the defendant did not comply with the order of the Court by the 29th of July, the plaintiff was granted a decree for Rs. 3,058 with costs under O. 37, Civil P. C. The defendant appealed to the learned District Judge who held that the imposition of conditions when granting leave to defend and the grant of extension of time were matters of discretion with the trial Court and as the trial Court had exercised its discretion in a proper man-

ner, it was not open to him to interfere with the order of the learned Senior Subordinate Judge. On these findings the plaintiff's appeal was dismissed. Against this decision, the plaintiff has preferred a second appeal to this Court.

It was contended by the learned counsel for the appellant that as the trial Court had held that there was a triable issue in the case, it was incumbent on the Court to grant leave to defend unconditionally, and that by ordering that the defendant was allowed to defend the case on payment into Court of Rs 3,058 with costs, the lower Court had acted illegally in the exercise of its discretion. Reference was made in this connection to 1927 Sind 60 (1), 1934 Sind 191 (2), 1929 Mad 841 (3) and 1935 Mad 302 (4). It was held in these rulings that if there is a triable issue in suits instituted under O. 37, Civil P. C., the Court ought to grant leave to defend without requiring the defendant either to pay the amount claimed or to furnish security therefor. In these four cases, however, there was no finding by the trial Court that the defence was not bona fide and had been put forward merely to gain time. It was held in 60 I C 639 (5), that

where in a suit on a promissory-note instituted under O. 37, Civil P. C., the defendant applies for leave to appear and defend, but the Court doubts the sincerity of the defence as disclosed in the affidavits filed with the application, the proper procedure is to grant leave to defend on condition of the defendant paying into Court the amount claimed.

In the present case the trial Court has held that it was not satisfied with the bona fides of the defendant and that vague and indefinite assertions had been made by him merely to gain time. Under these circumstances it was open to the Court to grant leave to defend only conditionally. We, therefore, hold that the trial Court did not exercise its discretion in an arbitrary or illegal manner. For the reasons given above, we dismiss this appeal. Parties will bear their own costs in this Court.

K. S./R. K.

Appeal dismissed.

1. Lloyds Bank, Ltd. v. Devidas Kallandas, 1927 Sind 60=98 I O 72.
2. Thadani v. Chellaram Atmaram, 1934 Sind 191=153 I O 400.
3. Olayatt Kunhu v. Ussan Kasim, 1929 Mad 841=119 I O 64.
4. Venkata Kistnayya v. A. Ramaswami, 1935 Mad 802=157 I O 591=58 M L J 407.
5. Chakrapany Chettiar v. Kamalavalli Ammal, 1920 Mad 969=60 I O 639.

A. I. R. 1936 Lahore 585

ADDISON AND ABDUL RASHID, JJ.

Banarsi Das—Assessee—Petitioner.

v.

The Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore—Respondent.

Civil Ref No. 20 of 1335, Decided on 27th January 1936, from Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore, D/- 28th March 1935.

(a) Income tax Act (1922), Ss. 28 and 30 (1)—Assistant Commissioner upholding assessment under S. 23 (4)—Proviso to S. 30 (1) coming into operation—Assistant Commissioner refuses to admit appeal—Thereafter Assistant Commissioner cannot proceed under S. 28 (3).

Section 30 deals with appeals against assessments, and as soon as the Assistant Commissioner finds that the assessment is validly made under S. 23 (4), the proviso to S. 30 (1) comes into operation, and it is in pursuance of that proviso that the Assistant Commissioner refuses to admit the appeal; and as soon as the Assistant Commissioner refuses to admit the appeal, he cannot thereafter take any action under S. 28 (3) by issuing a notice to the assessee regarding penalty [P 587 C 1]

(b) Income-tax Act (1922), S. 28—Penalty—Appeal to Commissioner against imposition of penalty—Commissioner himself cannot impose penalty—Penalty cannot be imposed without issuing notice.

The Commissioner, in deciding whether the imposition of the penalty by the Assistant Commissioner is illegal, cannot re-impose the penalty himself, and thereby validate the very order which was challenged in appeal before him. For the same reason the Commissioner is precluded from imposing the penalty when an application is preferred to him under S. 66 (2) of the Act praying that he may refer to the High Court the question of validity of the imposition of the penalty by the Assistant Commissioner. No penalty can be imposed under S. 28 of the Act unless a notice is served on the assessee to show cause against the imposition of a such a penalty. [P 587 C 1, 2]

Achhru Ram and Asa Ram Aggarwal—for Petitioner.

J. N. Aggarwal—for Respondent.

Order.—Under the provisions of S. 66 (1) and (2), Income-tax Act, the Commissioner of Income-tax, Punjab, has referred the following questions to this Court: (1) *Commissioner's First Question.*—Was there any material before the Commissioner on which he could uphold in appeal the finding that the assessee had concealed and deliberately furnished inaccurate particulars of income, and thereby returned it below its real amount?

(2) *Commissioner's Second Question.* — Is the maximum penalty admissible under S. 28 restricted in law otherwise than by the difference between the income-tax upon the total income actually returned and that upon the total income actually assessed? (3) (a) *Assessee's First Question.* — Whether in a case held as validly decided under S. 23 (4) by an Assistant Commissioner of Income-tax, is he lawfully competent to impose any penalty under S. 28 (1), Income-tax Act? (b) *Assessee's Second Question.* — Whether in the circumstances of the case there were any proceedings before the Assistant Commissioner of Income-tax within the meaning of S. 28 (1) of the Act. (c) *Assessee's Third Question.* — Whether the issue of the notice under S. 28 (3) on 20th April 1934, and imposition of the penalty on 30th April 1934, by the Assistant Commissioner are valid in law under S. 28, Income-tax Act, when he refused to admit the appeal on 18th April 1934. (4) *Assessee's Twelfth Question.* — Whether the imposition of surcharge of Rs. 4,506-11-0 is legal in the calculation of penalty under S. 28 (1) of the Act.

The material facts of the case may be briefly stated. The assessee, Rai Bahadur Lala Benarsi Das, returned his income for the year 1932-33 at Rs. 79,807. The Income-tax Officer made the assessment for the year 1933-34 at the sum of Rs. 2,12,927 under S. 23 (4) of the Act on the ground that the Gunny Bag Godown Register and the Gunny Bag Register of Receipts and Issues specifically called for under S. 23 (2) had been deliberately withheld by the assessee. The assessee preferred an appeal to the Assistant Commissioner. The principal ground of appeal was that the Registers which, according to the Income-tax Officer, had been deliberately withheld were not maintained, and that the non-production of a document not maintained was not a default and did not bring the case of the assessee within the ambit of S. 23 (4), Income-tax Act. It was contended that the order of the Income-tax Officer was in reality an order under S. 23 (3) of the Act, and that it was labelled as one under S. 23 (4) in order to deprive the assessee of his right to appeal. The Assistant Commissioner, in his order dated 18th April 1934, came to the conclusion that the Registers in question had been deliberately withheld

and that in view of these facts the assessment made by the Income-tax Officer under S. 23 (4) was valid, and that the order of the Income-tax Officer was consequently not appealable. The order of the Assistant Commissioner concludes with the following words:

The present appeal is, therefore, not admitted. The other objections relate to the merits of the case and so need no discussion. I also find that the appellant returned no income from the bardana (gunny bags) khata, although it has been found by the Income-tax Officer that he has got substantial income under this head. I have, therefore, issued a notice as required by S. 28 (3), Income-tax Act, calling upon the appellant to show cause why action should not be taken against him under S. 28 (1) of the said Act. The question of imposition of penalty will be finally decided after hearing the appellant.

By his order, dated 30th April 1934, the Assistant Commissioner held that on the assessee's own admission the gunny bags account did yield an income of Rs. 33,372 which he had failed to return, and that, therefore, the assessee was liable to penalty under S. 28 of the Act. The penalty of Rs. 22,533-6-0 was consequently payable by the assessee. Against the decision of the Assistant Commissioner imposing the penalty the assessee preferred an appeal to the Commissioner. This appeal was rejected on the merits and the order of the Assistant Commissioner was confirmed, but under S. 66 (2) of the Act the Commissioner has referred to this Court the question of the validity of the imposition of penalty which forms the subject-matter of the assessee's first three questions.

The Income-tax Officer completed the assessment on 31st January 1934. The assessment order contains an observation to the effect that the assessee had deliberately made a false return inasmuch as he had omitted to show the income in the gunny bags account and that separate action under S. 28 or S. 52 was being taken. In spite of this observation, however, the Income-tax Officer took no action on 31st January 1934, or at any time thereafter by issuing a notice to the assessee under S. 28, Income-tax Act. According to the Commissioner, the case was submitted to the Assistant Commissioner by the Income-tax Officer on 14th March 1934, recommending prosecution, but no action appears to have been taken on that recommendation. It was contended by the

learned counsel for the assessee that the Assistant Commissioner became functus officio as soon as he passed an order, on 18th April 1934, to the effect that the assessment under S. 23 was valid and that the order of the Income-tax Officer was not appealable. The Assistant Commissioner "did not admit the appeal." All proceedings before him, under the Income-tax Act ended as soon as that order was passed. After passing that order the Assistant Commissioner had no power to issue a notice under S. 28 (3) to the assessee as his power to take action under S. 28 lasts only so long as any proceedings under the Income-tax Act are pending before him. This contention, in our opinion, is sound and must be given effect to. The Commissioner has observed that in his opinion the determination of the issue raised under S. 30 was manifestly in the course of proceedings under that section. S. 30 deals with appeals against assessments, and as soon as the Assistant Commissioner found that the assessment was validly made under S. 23 (4), the proviso to S. 30 (1) came into operation, and it was in pursuance of that proviso that the Assistant Commissioner refused to admit the appeal. The issue raised under S. 30 was, therefore, conclusively determined, as soon as the Assistant Commissioner refused to admit the appeal, and thereafter, the Assistant Commissioner could not take any action under S. 28 (3) by issuing a notice to the assessee regarding penalty.

The learned Commissioner has further held that he has himself duplicated the order regarding the penalty in the proceedings under S. 32 and S. 66 (2) so that the decision of the above question as to the jurisdiction of the Assistant Commissioner would not affect the penalty. S. 32 deals with appeals preferred to the Commissioner against certain orders of the Assistant Commissioner. In the present case the assessee appealed to the Commissioner urging that the imposition of the penalty by the Assistant Commissioner was illegal as the concealment of income, if any, did not come to his notice during the course of any proceedings before him. The Commissioner in deciding whether the imposition of the penalty by the Assistant Commissioner was illegal could not, in our opinion, re-impose the penalty himself, and thereby vali-

date the very order which was challenged in appeal before him. For the same reason the Commissioner was precluded from imposing the penalty when an application was preferred to him under S. 66 (2) of the Act praying that he may refer to the High Court the question of the validity of the imposition of the penalty by the Assistant Commissioner. No penalty can be imposed under S. 28 of the Act unless a notice is served on the assessee to show cause against the imposition of such a penalty. The Commissioner never served any notice on the assessee that he intended to take an action against him under S. 28. An imposition of penalty in this case by the Commissioner under S. 28 would consequently be invalid. We, therefore, answer the first three questions of the assessee referred by the Commissioner in the negative. In view of the finding given above it was stated by the learned counsel for the assessee that he did not wish to argue the other questions and that they may be answered in accordance with the opinion of the Commissioner. We answer them accordingly. We order that the parties shall bear their own costs in this reference."

B.D./R.K.

Answer accordingly.

A. I. R. 1936 Lahore 587

AGHA HAIDAR, J.

Ram Rakha Mal — Plaintiff — Appellant.

v.

Harnarain Ram Chand and another — Defendants — Respondents.

Second Appeal No. 1935 of 1935, Decided on 17th February 1936, from decree of Dist. Judge, Hoshiarpur, D/- 24th July 1935.

(a) Deed—Construction—Crude document—Each party trying to put his own interpretation—Interpretation promoting substantial justice should be put upon it.

Where the document in question is a crude one and each party is trying to put its own interpretation upon it, the Court should put that interpretation upon it which would promote substantial justice and not deprive a party of what is justly due to him. [P 589 C 1]

(b) Words and Phrases — "Jama" means only deposit—Banker and customer.

The word "Jama" is very well understood by the people who are conversant with the language used by the Indian Bankers. "Jama" means a deposit and nothing more. [P 589 C 1]

(c) Banker and Customer — Deposit — Implied agreement to repay on demand may be presumed — Suit within three years of demand is in time.

Where money is deposited with a Banker, in the absence of anything to the contrary, an implied agreement to repay on demand must be presumed : 1934 Lah 42 and 1934 Lah 179, *Rel. on.* [P 589 C 2]

And a suit for such amount within three years of demand is in time. [P 589 C 2]

Ram Lal Anand—for Appellant.

Iqbal Singh—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for the recovery of a sum of Rs. 1,355. The trial Court dismissed the plaintiff's suit. The plaintiff went up in appeal and the learned District Judge has allowed the appeal only to this extent : that Ram Chand, one of the defendants, has been held to be liable and the suit has been accordingly decreed against him. As to the rest of the defendants, the decree of the trial Court has been affirmed. The plaintiff has come up to this Court in Second appeal. Kartara, defendant 5, was born on 5th April 1910. While he was about six years old, a deposit of Rs. 800 was made on his behalf with the firm of Harnarain Das-Ram Chand by six persons who are mentioned in Ex. P-1. These six persons appear to be friends and well-wishers of Kartara when he was a child and therefore have figured prominently in the entry Ex. P-1 which forms the subject-matter of the present suit. On 20th June 1932 after Kartara had attained majority he assigned his rights in the deposit to the plaintiff who instituted the present suit on 24th March 1933. The plaintiff has impleaded as defendants (1) the firm of Harnarain Das-Ram Chand, (2) Gurcharan Das, (3) Gurbakhsh Rai son of Harnarain Das (who seems to have died before the suit), (4) Ram Chand, and (5) Kartara. Ram Chand, defendant 4, admitted the plaintiff's claim. Kartara admitted the assignment in his subsequent written statement, pleading at the same time that the previous written statement, which had been placed on the record and in which he had pleaded that the alleged assignment in favour of the plaintiff was fictitious and without consideration had been drawn up without his authority.

The real contesting defendants are defendant 2 and 3, Gurcharan Das and Gurbakhsh Rai. They plead that they had no

knowledge of any deposit and that the document Ex. P-1 referred to a loan and not to a deposit and that the suit was time-barred. It appears that Ram Chand had been paying interest on the deposit of Rs. 800, and the plaintiff's case was that this payment of interest extended the period of limitation for the present suit. Defendants 2 and 3 pleaded that Ram Chand had no authority to make these payments for and on behalf of the firm which had ceased to exist and that therefore the plaintiff's suit cannot be saved from the bar of limitation. The most important document in the case is Ex. P-1. It is an extremely clumsy document and it is difficult to interpret its exact meaning. On a perusal of its general context it appears that on 19th December 1916 a sum of Rs. 800 belonging to Kartara minor, had been deposited by six persons named in the document in the shop of the firm Harnarain Das-Ram Chand. The interest agreed upon was 8 annas per mensem. It was stipulated that interest for a month or more could be realized at any time and that the principal money shall be payable after three years, and that interest shall be payable to Shaman if he brings with him Lachhman or Rewa Singh. These three persons are out of the six, who had originally deposited the money. The document then goes on to provide :

Apart from interest, if principal money, up to a sum of Rs. 100, was to be taken then the six persons mentioned above may come and take it: it could not be given to a single person. Further, they shall have to bring the account book.

The plaintiff contended before the lower appellate Court that the suit was within limitation inasmuch as the case was governed by Art. 60, Limitation Act. He further urged that in any case the period of limitation was saved by the payment of interest on the part of Ram Chand who was a member of the firm Harnarain Das-Ram Chand. The learned District Judge has held that Art. 60 was not applicable and that it was a case of an ordinary loan. He further held that at the time of the actings of Ram Chand on which reliance is placed by the plaintiff for the extension of the period of limitation, the firm had ceased to exist and therefore Ram Chand was not competent by any act of his own to extend the period of limitation against the members of the firm. On these findings he

dismissed the appeal as against defendants 2 and 3. He decreed it against Ram Chand who had admitted the plaintiff's claim. The learned District Judge had formulated two points which arose in the appeal before him, namely :

(1) If the claim was within time ?

(2) To what extent, if any, were Gurbakhsh Rai and Gurcharan Das liable ?

Having dismissed the plaintiff's claim on point 1 with the exception of giving him a decree against Ram Chand, the learned District Judge did not consider it necessary to record any finding on point 2. Ex. P-1, as already stated, is a crude document and a good deal of time of this Court was wasted in reading it over and over again. The learned counsel also tried to put their own interpretation upon the context. In this state of affairs I would put that interpretation upon the document which would promote substantial justice and not deprive the plaintiff of what is justly due to him. As I read the document it is clear to me that the money was put in the firm shop as "jama." Now the word "jama" is very well understood by the people who are at all conversant with the language used by Indian Bankers. "Jama" means a deposit and nothing more. This money was to be retained by the firm for three years certain. This condition is very common because in many cases the depositor is anxious to invest his money for a certain period and the banker is also desirous that he should not be called upon to pay the money at a time which might be inconvenient to him. Thus a fixed period was mentioned in the instrument of deposit so that both parties may know how they stand. There is provision made about the payment of interest and then there is the further provision about the payment of money not exceeding Rs. 100 to three persons already mentioned. This condition was apparently added in order to safeguard the interests both of the firm as well as of the minor. As stated above Kartara has now attained majority and therefore it was open to him or his successors-in-interest to make the demand, and the condition as to the presence of the three persons above named would ipso facto cease to be operative. This demand seems to have been made by means of the notice dated 20th February 1933.

The condition as regards the sum being "payable on demand" may be implied from the course of dealings between the parties and other circumstances of the case vide 15 Lah 242 (1). There is also a judgment of this Court by a learned Single Judge, 147 I C 338 (2). The learned Judge observed that on the finding that there was a deposit with the defendant, in the absence of anything to the contrary, an implied agreement to repay on demand must be presumed. This seems to be a correct way of looking at the matter when we have to deal with a document which is not very clear. In my opinion the demand having been made by means of the notice dated 20th February 1933 the suit must be taken to be within time. The decree against Ram Chand has not been challenged and it would stand. As regards the liability, if any, of Gurcharan Das and Gurbakhsh Rai, defendants 2 and 3, that will have to be decided by the Court below. I therefore allow the appeal, set aside the judgment of the two Courts below on the question of limitation as against defendants 2 and 3 and remand the case for disposal to the lower appellate Court according to law. Costs here and hereinafter shall abide the result. The court-fee paid in this Court shall be refunded.

K.S./R K.

Appeal allowed.

1. Gulab Rai Gujar Mal v. Sandhi, 1934 Lah 42=151 I C 712=37 P L R 56=15 Lah 242.
2. Allah Ditta v. Sadhu Shah, 1934 Lah 179=147 I C 338=35 P L R 91.

A. I. R. 1936 Lahore 589

JAI LAL, J.

Muhammad Ali and another — Plaintiffs—Appellants.

v.

Wazir Ali—Defendant—Respondent.

Second Appeal No. 1452 of 1935, Decided on 19th December 1935, from decree of Addl. Dist. Judge, Lahore, D/- 30th May 1935.

(a) Punjab Land Revenue Act (17 of 1887), Ss. 158 (1) and (2) — Sub-section (1) is not controlled by sub-section (2) — S. 10 applies only if there is determination by Revenue Court to decide question of title itself, and suit is instituted in that Court.

Sub-section (2) is an independent sub-section and is in no way controlled by sub-section (1). Consequently and by virtue of Cl. (17), sub-section (2), the civil Courts have jurisdiction to try questions of title to the property of which partition is sought, in spite of a determination by the Revenue Officer to decide the question

himself. Where however the suit is instituted in civil Court no question of the application of S. 10 arises. S. 10 will apply only if the suit as directed by the Revenue Officer has been instituted in his Court. [P 591 C 2]

(b) Punjab Land Revenue Act (17 of 1887), S. 117 — Direction to institute suit in Revenue Court — Record consigned to record room—Question of application of S. 10 does not arise.

Section 117 does not itself contemplate the institution of a suit in the Revenue Court. Where however a direction has been given by the Revenue Officer to the plaintiff to institute the suit in his Court and has further directed that the record of the proceedings relating to partition be consigned to the record room, no proceedings are pending in his Court, so as to attract the application of S. 10: 146 P L R 1902, *Disting.*; 1933 Lah 412 and 1931 Lah 664, *Ref.* [P 591 C 2]

Barkat Ali—for Appellants.

Mathra Das—for Respondent.

Judgment. — The appellants made an application in the Revenue Court for partition of property alleged to be joint with the respondent. The respondent however denied their title to the property in question and the Revenue Officer passed an order on 27th August 1934, directing the appellants to institute a suit in the civil Court before 1st October 1934. The record of the partition proceedings was consigned to the record room and a direction was added that after the decision of the question by the civil Court the plaintiffs could get the record restored. It seems that the direction of the Revenue Court was that the suit should be filed in his Court acting as a civil Court. This direction was given in pursuance of S. 117, Punjab Land Revenue Act, which provides :

When there is a question as to title in any of the property of which partition is sought, the Revenue Officer may decline to grant the application for partition until the question has been determined by a competent Court, or he may himself proceed to determine the question as though he were such a Court.

Instead of instituting a suit in the Court of the Revenue Officer as directed by him by the order, the appellants instituted a suit in the Court of a Subordinate Judge. This suit having been decreed, an appeal was preferred to the Additional District Judge who accepted the appeal on the ground that the suit was not cognizable by the civil Court by virtue of S. 154, Punjab Land Revenue Act. The learned Additional District Judge relied upon 146 P L R 1902 (1)

and declined to follow a later judgment of this Court reported in 1933 Lah 412 (2), a judgment of a Division Bench. He tried to distinguish the facts of the two cases and considered that the previous authority covered the facts of this case. In 146 P L R 1902 (1) a direction was given by the Revenue Officer as in the present case and the suit, instead of being instituted in the Revenue Court, was instituted in the civil Court : it was held that as the partition proceedings were still pending in the Revenue Court the provisions of S. 12, Civil P. C., applied, i. e. Civil Procedure Code of 1882 which was in force at the time when the judgment was pronounced by the learned Judge of the Chief Court of the Punjab, the analogous section in the present Code is S. 10. The suit was dismissed and a learned Judge of the Chief Court of the Punjab declined to interfere with the decision of the trial Judge. This case was distinguished in 1931 Lah 664 (3), where a Division Bench of this Court held that a suit by an applicant for partition would lie in the civil Court inspite of a direction by the Revenue Officer to the applicant to file it in his Court to enable him to determine the question of title. The facts in this case were that a direction had been given by the Revenue Officer to file a suit in his Court and on the failure of the applicant to file such a suit the Revenue Officer proceeded to effect partition of the land. Subsequently a suit was instituted in the civil Court by the plaintiff for a declaration of the title claimed by her before the Revenue Officer.

It was held that the partition proceedings having terminated, no question of the application of S. 10, Civil P. C. could arise and it was on this ground that the previous judgment of the Chief Court was distinguished. In 1933 Lah 412 (2) a direction was given by the Revenue Officer to institute a suit in his Court and the proceedings relating to partition were consigned to the record room. The plaintiffs however instituted a suit in the civil Court, but in that suit he included property which was not the subject of application for partition. The learned Judges held that the jurisdiction

1. Ghulam Muhammad v. Muhammad Mansur Jan, (1902) 146 P L R 1902.

2. Sukhdeo Singh v. Mathra Singh, 1933 Lah 412=142 I C 606=34 P L R 115.

3. Tirath Ram v. Nihal Devi, 1931 Lah 664=134 I C 299=12 Lah 688=32 P L R 434.

of the civil Court to try the suit was not ousted. The following extract from their judgment indicates the view taken by them :

As to issue 4 the argument in favour of this finding is that as jurisdiction is given to the Revenue Court, the jurisdiction of the ordinary Courts is ousted. S. 117, Land Revenue Act, to which this effect is attributed, does not expressly deprive the ordinary Courts of jurisdiction, and I do not find in the section any such strong implication as would be necessary to effect the result suggested ; in form the section merely enables the Revenue Courts to make such a declaration as the plaintiffs have sought. I may add that in any event the result of holding that the section ousts the jurisdiction of the ordinary Courts can affect the present suit only so far as it applies to the lands of Kamalgarh.

The attention of the learned Judge does not seem to have been invited to S. 158, Land Revenue Act. Now S. 158, Land Revenue Act, reads as follows so far as it is applicable to the facts of the present case :

Except as otherwise provided by this Act (1) a civil Court shall not have jurisdiction in any matter which a Revenue Officer is empowered by this Act to dispose of : (2) a civil Court shall not exercise jurisdiction over any of the following matters, namely :

(xvii) any claim for partition of an estate, holding or tenancy or any question connected with, or arising out of, proceedings for partition, not being a question as to title in any of the property of which partition is sought.

If sub-section (1), S. 158 governs the present case then it seems to me that there is force in the contention of the respondent's counsel that as the Revenue Officer was empowered to dispose of the question of title and he did decide to dispose of such question, the jurisdiction of the civil Court was ousted. If however sub-section (2) is independent of sub-section (1) and is not merely an illustration of that sub-section, Cl. (17) appears to save the jurisdiction of the civil Court so far as the question of title is concerned, because the only questions which are expressly excluded from jurisdiction of the civil Courts are those for partition or any question connected with or arising out of proceedings for partition, but not a question as to title in any property of which partition is sought. In my opinion sub-section (2) is an independent sub-section and is in no way controlled by sub-section (1) and therefore by virtue of Cl. (17) the civil Courts have jurisdiction to try questions of title to the property of which partition is sought in spite of a determination by the Revenue

Officer to decide the question himself. I consider that S. 10, Civil P. C., would only have applied if a suit as directed by the Revenue Officer had been instituted in his Court.

Section 117, sub-section (2) (b) provides that if the question is one over which the civil Court has jurisdiction, the procedure of the Revenue Officer shall be that applicable to the trial of an original suit by a civil Court, and he shall record a judgment and decree containing the particulars required by the Code of Civil Procedure to be specified therein. The section itself does not contemplate the institution of a suit in the Revenue Court, but in the present case a direction was given by the Revenue Officer to the plaintiffs to institute a suit in his Court and as he had in the meantime consigned to the record room the proceedings relating to partition, no proceedings were pending in his Court therefore, S. 10 of the present Civil P. C., does not govern the case and 146 P L R 1902 (1) has no application to the facts of the present case. In the circumstances of the case, the jurisdiction of the civil Court was not barred by anything contained in S. 117 or S. 158, Land Revenue Act, and I accept this appeal and set aside the decree of the Additional District Judge and send the case back to him with direction to dispose of the appeal on its merits. There will be no order as to the costs of this appeal.

V.B./R.K.

Case sent back.

A. I. R. 1936 Lahore 591

AGHA HAIDAR, J.

Mansa Ram—Creditor—Appellant.

v.

Khair Mohammad—Debtor—Respondent.

Misc. First Appeal No. 2041 of 1935, Decided on 12th February 1936, from order of Dist. Judge, Mianwali, D/- 10th August 1935.

Provincial Insolvency Act (1920), Ss. 5, 9—Petition by creditor on ground that debtor has executed collusive mortgage deed—Petition filed within 3 months of the date of execution of the deed—Petition returned by Court on ground of its being not accompanied with mortgage deed—Petition re filed within two weeks along with necessary documents as directed but dismissed as filed more than three months from date of mortgage deed—Order dismissing petition held to be erroneous—Practice of Courts in Punjab

returning complaints and other similar documents when not accompanied by necessary papers deprecated.

The practice prevailing in the Punjab by which Courts return complaints and similar documents which are incomplete or are not accompanied by necessary papers to the parties who file them, is wrong. The procedure, which has no warrant gives rise to endless difficulties in various forms. The cases of returning a complaint or memo of appeal for presentation are different and form a class apart. But generally speaking a document which has once been filed in Court should remain there until proper orders have been passed on it. The document may be rejected or may be accepted but when once it is in the office of the Court it should not be returned. In such cases a counsel would be perfectly within his rights if he refuses to take back the document after explaining in a suitable manner his legal position to the Court.

[P 592 C 2]

A petition by a creditor for getting his debtor declared insolvent, in which it was alleged that the debtor had executed a collusive mortgage with intent to defeat or delay his creditors, and which was presented within 3 months of the execution of the deed, was returned by the Court, on the ground that it was not accompanied by the mortgage deed. The petitioner was directed to re-file the petition along with the necessary papers within two weeks of the order. The petitioner re-filed the petition within the period prescribed by the Court. On an objection being raised that petition had been made more than three months from the date of the mortgage deed, the Court dismissed the petition on that ground:

Held: that the order dismissing the petition was erroneous. The petitioner should not be allowed to suffer from the lax practice of the Court to which the Court had recourse, when it returned his petition. The petition when presented for the first time, being within time, the order passed by the Court could not be used to the prejudice of the creditor, and the presentation of the petition along with the necessary papers related back to the date on which the original application was presented. [P 593 C 1]

V. N. Sethi—for Appellant.

L. M. Datta—for Respondent.

Judgment.—This appeal arises out of certain insolvency proceedings. An application was made by a creditor on 28th January 1935 praying that the debtor may be declared insolvent. In the body of this application it was mentioned that decrees had been obtained against the debtor by petitioning creditors. It was also mentioned that on 30th October 1934 the debtor had executed a collusive deed of mortgage with intent to defeat or delay the creditors. The office made a report that the application was not accompanied by copies of decree-sheets and the mortgage-deed. This report also bears the date, 28th January 1935. On that date the Court returned the appli-

cation to the petitioning creditor so that he might file the necessary papers and it was further ordered that the application should be re-filed within two weeks of the order. On 9th February 1935 the petitioning creditor refiled the application as directed by the Court. At the hearing an objection was taken that inasmuch as the application was made on 9th February 1935 more than three months after the date of the mortgage, namely, 30th October 1934 the application was time-barred. This contention prevailed with the insolvency Judge and he dismissed the application on this ground. The petitioning creditor has come up to this Court in appeal.

I may observe here that a wrong practice prevails in this province by which Courts return complaints and similar documents which are incomplete or are not accompanied by necessary papers to the parties who file them. This procedure which has no warrant gives rise to endless difficulties in various forms. The cases of returning a complaint or memo of appeal for presentation are different and form a class apart. But generally speaking a document which has once been filed in Court should remain there until proper orders have been passed on it. The document may be rejected or may be accepted, but when once it is in the office of the Court it should not be returned. In such cases a counsel would be perfectly within his rights if he refuses to take back the document after explaining in a suitable manner his legal position to the Court. This was not done in the present case and in my judgment the Court was not justified in returning the application to the petitioner. The Court would have been within its rights to demand copies of certain documents on which the petitioner relied within a fixed period and if he had failed to do so the Court might have taken such action as the law permitted. Now, in the present case the petition was presented by the creditor within a period of three months from the date of the mortgage-deed i. e. 30th October 1934. The Court returned it to the petitioner and required him to file certain necessary copies. It further gave him time within which to comply with the orders of the Court. The petitioner obeyed the orders of the Court and filed his application within a period of two weeks.

In my opinion under these circumstances the petitioner should not be allowed to suffer from the lax practice to which the Court below had recourse while returning the application to the petitioner. I asked the learned counsel for the respondent to show me any provision of insolvency law under which it was incumbent upon the petitioner to file certain documents along with his petition but he has not been able to do so. Under these circumstances, I am of opinion, that the order of the Court below dismissing the application is erroneous. The application when made on 28th January 1935 was within time and the order which the Court made should not be used by that Court to the prejudice of the petitioner and the presentation of the petition with the necessary copies on 9th February 1935 must relate back to the date on which the original application had been presented. I, therefore, set aside the order of the Court below and remand the case to that Court for disposal of the application according to law. Parties to bear their own costs.

R.M./R.K. *Order accordingly.*

A. I. R. 1936 Lahore 593

BHIDE, J.

Mt. Jamna Devi—Appellant.

v.

Official Receiver, Campbellpur—Respondent.

Misc. First Appeal No. 1347 of 1935, D/- 11th December 1935, from order of Dist. Judge, Attock, D/- 16th July 1935.

Provincial Insolvency Act (1920), S. 4—Gift of small portion of property effected more than two years before adjudication—Property of insolvent worth great deal more on date of gift and debts in insolvency subsequently incurred—Gift cannot be deemed to be fraudulently made.

Where an insolvent makes a gift of a small portion of his property under a registered deed of gift more than two years before the adjudication, and the property of the insolvent was worth great deal more on the date of gift and most of the debts in insolvency are incurred after that date, the gift cannot be deemed to be made fraudulently with object of defeating creditors. [P 593 C 2]

Shamair Chand—for Appellant.

Nihal Singh—for Respondent.

Judgment.—This is an appeal from the order of the District Judge of Attock declaring that a gift effected by the insolvents Mul Chand and Sewa Ram, in favour of Mt. Jamna Devi, wife of Mul

Chand, was fraudulent and as such void as against the Official Receiver. An application was made under S. 4, Provincial Insolvency Act, as the gift had been effected more than two years before the adjudication. The sole point for decision in appeal is whether the gift in question had been made fraudulently in order to defeat the creditors.

The gift was of a small room, 4 yards by 4 yards in dimensions, and was made as a provision for Mt. Jamna Devi in her old age. At the date of the gift the insolvent Mul Chand had occupancy land, 31 kanals 16 marlas in area, and a shop. The shop had been mortgaged for Rs. 500 but was eventually sold for Rs. 1,000 and it must therefore be presumed that the equity of redemption at any rate was worth Rs. 500. According to the evidence on the record goods in the shop may be worth about Rs. 1,000. One Hazrat Shah also owed a sum of Rs. 1,500 to the insolvent Mul Chand and a promissory note executed by Hazrat Shah is on the record. The two witnesses produced by the Official Receiver seem to have very little knowledge of the financial status of the insolvent at the time when the gift was made. The third witness produced by the Official Receiver was Mul Chand, one of the insolvents, and his statement does not appear to help the Official Receiver. For according to that statement the debts of the insolvents amounted to Rs. 1,477 while the property held by them was worth a great deal more. The property gifted consisted only of a small kothri as stated above. Most of the debts were incurred after the gift in question and it cannot therefore be said that these subsequent creditors could have been prejudiced in any way by the gift. The gift was made by a registered deed and it must be presumed that they were aware of it. In my judgment it would not be reasonable to infer from the evidence on the record that the gift was made fraudulently with the object of defeating the creditors.

I accordingly accept the appeal and set aside the order of the learned District Judge. I leave the parties to bear their own costs.

V.B./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 594

ADDISON AND ABDUL RASHID, JJ.

Mt. Chiragh Bibi—Defendant—Appellant.

v.

Umar Din and others—Plaintiffs and another—Defendant—Respondents.

Second Appeal No. 270 of 1935, Decided on 25th February 1936, from decree of Addl. Dist. Judge, Lahore, D/- 10th January 1935.

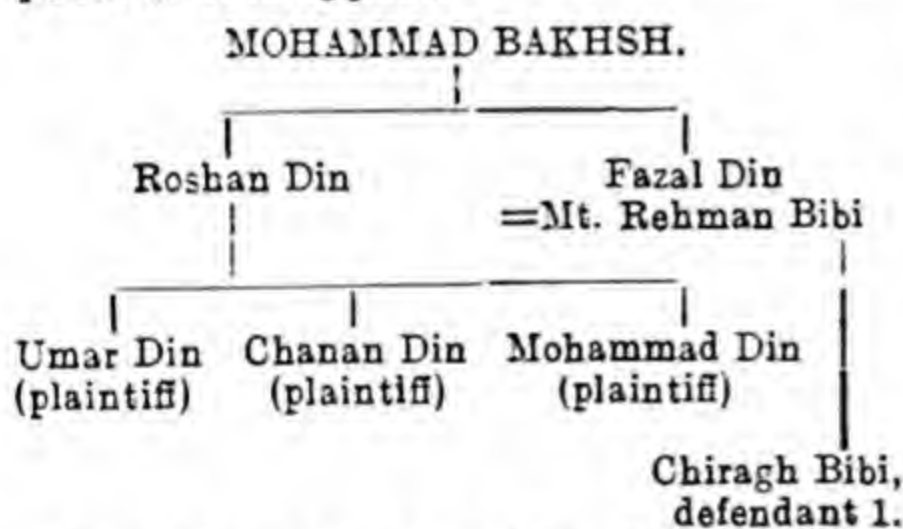
Custom (Punjab) — Arains of Mozang—Daughters have no power to alienate property except for necessity.

Amongst Arains of village Mozang daughters have the same power of alienation of their father's property as a male proprietor and hence they cannot alienate it except for necessity.

[P 594 C 2]

Muhammad Alam—for Appellant.*Hukam Chand Bhasin*—for Respondents (Plaintiffs).

Abdul Rashid, J. — The following pedigree-table is necessary for the purposes of this appeal:



On 16th March 1932, *Mt. Chiragh Bibi*, defendant 1, sold the houses in dispute to *Ahmad Din*, defendant 2, for Rs. 2,500 by means of a registered sale-deed. The plaintiffs who are reversioners of *Mt. Chiragh Bibi* in the third degree instituted the suit, out of which the present appeal has arisen, on 18th March 1933, for a declaration to the effect that the sale of the houses in dispute by *Mt. Chiragh Bibi* in favour of *Ahmad Din* was without consideration and necessity, and that it shall not affect their reversionary rights after the death of *Mt. Chiragh Bibi*. The trial Court held that the parties to the litigation were Arains of village Mozang; that they were governed by agricultural custom; that the property in dispute was ancestral qua the plaintiffs, and that the sale was without consideration and necessity. The suit was however dismissed on the ground that under the Customary law governing the parties, *Mt. Chiragh Bibi*

was the absolute owner of the houses which she had inherited from her father, and that she had unrestricted power of alienation. The plaintiffs preferred an appeal to the learned District Judge, who decreed their claim. Against this decision, *Mt. Chiragh Bibi* has preferred an appeal to this Court. The learned counsel for the appellant mainly relied on the answers to questions 61 and 64 of the Customary law of the Lahore District. Answer 61 shows that amongst Arains in villages in the proximity of Lahore daughters of sonless proprietors exclude agnates. Question 64 is to the following effect:

Question 64.—What is the nature of the interest taken by a daughter in the property which she inherits? Define her rights of alienation, if any, by sale, gift, mortgage or bequest.

Answer 64.—Where daughters inherit by the Mahomedan law or exclude agnates as explained under answer 61, they have full rights of alienation by sale, gift, mortgage or bequest.

The learned counsel for the appellant argued that in view of the provisions of the Customary law quoted above, *Mt. Chiragh Bibi* was an absolute owner of the houses in dispute and the plaintiffs were not entitled to question her alienation. The position taken by the learned counsel was that *Mt. Chiragh Bibi* had fuller powers of alienation than are ordinarily enjoyed by a male proprietor under the Customary law. This argument is devoid of all force. A reference to the *Riwaj-i-am* compiled in Urdu at the settlement of 1916 shows that the words (*Bamisl Aulad Narina*) "like male issue" have been omitted in the English Manual of Customary law from the answer to question 64. The preface to the manual of Customary Law compiled in English in 1916 shows that the English volume is a brief abstract of the vernacular compilation prepared at the time of the settlement. We therefore hold that *Mt. Chiragh Bibi* possessed the same power of alienation as a male proprietor, i. e. she could alienate the houses in dispute for necessity or just antecedent debts as indicated in question 136 of the *Riwaj-i-am* of the Lahore District. The question of consideration and necessity is one of fact in the present case and cannot be agitated in second appeal. It was strenuously urged by the learned counsel for the appellant that *Mt. Chiragh Bibi* has several children and that during the lifetime of these

children, the plaintiffs have no right to bring the present suit, and that their suit being one of a speculative nature was rightly dismissed by the trial Court. It appears however that this plea was never raised by the appellant in her written statement nor was any issue framed on this point. This question cannot therefore be allowed to be raised for the first time in second appeal. We must however make it clear that the declaratory decree granted to the plaintiffs in the present litigation shall not affect the rights of any children of Mt. Chiragh Bibi that may be alive at the time of her death. For the reasons given above, we dismiss this appeal. Parties will bear their own costs throughout.

B.D./R.K.

*Appeal dismissed.***A. I. R. 1936 Lahore 595**

ADDISON AND ABDUL RASHID, JJ.

H. T. Conville and another—Assessee—Petitioners.

v.

Commissioner of Income-tax, Punjab, N. W. F. & Delhi Provinces, Lahore—Respondent.

Civil Ref. No. 55 of 1935, Decided on 6th February 1936, from Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore, D/- 9th July 1935.

(a) Income-tax Act (1922), S. 10 (2) (iii)—Assessee's own capital invested in income-producing business—Interest on capital borrowed for purposes of paying land revenue etc., is not exempted from income-tax under S. 10 (2) (iii).

Section 10 applies to 'business' assessable under the Act and the 'allowance' referred to in sub-s. 2 of S. 10 cannot apply to agricultural income, but only to interest paid in respect of capital, borrowed for the purposes of 'business' assessable under S. 6 of the Act. Therefore money borrowed by the assessee for the purpose of paying land revenue, etc., cannot be exempted from income-tax under the provisions of S. 10 (2) (iii) of the Act. [P 596 C 1]

(b) Income-tax Act (1922), S. 2 (1)—Rent of flour mill is not agricultural income.

The working of the flour mill is not an agricultural purpose. The rent of the site of the flour mill does not fall within any of the other provisions of S. 2 (1) of the Act. It cannot therefore be regarded as agricultural income. [P 596 C 1]

(c) Income-tax Act (1922), Ss. 2 (1), 4 (3) (vi)—Lambardari fees given as remuneration for collection of land revenue is not special allowance within meaning of S. 4 (3) (vi) and S. 2 (1) does not apply to such income.

Section 2 (1) of the Act applies to the case of a person, who gets agricultural income from the use of land by direct operation. It is not applicable to a person who gets certain fees which constitute his remuneration for the work of the collection of land revenue.

[P 596 C 2]

The lambardari fees do not constitute a special allowance, benefit or perquisite specially granted to meet expenses wholly and necessarily incurred in the collection of the revenue and S. 2 (1) has no application to it.

[P 596 C 2]

(d) Income-tax Act (1922), S. 2 (1)—Agricultural income—Scope.

The net profit from commission, charged to tenants for sale of their produce does not fall within definition of agricultural income under S. 2 (1) of the Act. [P 596 C 2]

Radha Kishen—for Petitioners.*Jaggan Nath Aggarwala*—for Respondent.

Abdul Rashid, J.—This is a reference under S. 66 (2), Indian Income-tax Act. The assessee is an unregistered partnership known as "Lessees of the Convillepur Farm," consisting of Mr. H. T. Conville and his son Major L. H. G. Conville. The questions of law formulated by the Commissioner of Income-tax are as follows:

1. When money is borrowed, which would probably not have been borrowed had not the assessee's own capital been invested in an income-producing business, is the interest paid on such borrowing deductible under S. 10 (2) (iii) from the income of that business?

2. Is rent of a mill-site within the definition of agricultural income, S. 2 (1)?

3. Are lambardari fees within the definition of agricultural income, S. 2 (1)?

4. Is the net profit from commission charged to tenants for sale of their produce on their behalf, within the definition of agricultural income, S. 2 (1)?

It appears that the assessee lend money to their tenants, and during the accounting period they received Rs. 4,253 on account of interest on these loans. During the same period they paid interest amounting to Rs. 1,556 to their bankers. The case of the assessee is that they borrowed money from their bankers, in order to pay the land revenue and to meet other agricultural expenses, and that they would not have been obliged to borrow this money had they not made loans to their tenants. On these grounds they seek to deduct Rs. 1,556 on account of interest paid to the bankers from the

sum of Rs. 4,253 which they received on account of interest from their tenants. There is nothing on the record to show that Rs. 1,556 were paid by the assesseees as interest on loans raised for the purpose of making the advances to their tenants which yielded the assessed income of Rs. 4,253 on account of interest. The learned Counsel for the assesseees submitted that the assesseees were carrying on business as "Lessees of Convillapur Farm" and that Rs. 1,556 was the amount of interest paid by them in respect of capital borrowed for the purpose of the business, and that this sum was, therefore, exempt from the payment of income-tax under S. 10 (2) (iii), Income-tax Act.

Section 4, which is the main charging section in the Act, provides that the Act shall apply to all income, profits or gains, as described or comprised in S. 6, from whatever source derived, accruing or arising, or received in British India. Sub-S. (3) of S. 4 enumerates the classes of income to which the Income-tax Act shall not apply. Agricultural income is one of these classes of income. It is obvious therefore that agricultural income is totally excluded from the operation of the Income-tax Act, and that the sources of income enumerated in S. 6 cannot include agricultural income. S. 10 therefore applies to "Business" assessable under the Act, and the "allowance" referred to in sub-s. (2) of S. 10 cannot apply to agricultural income, but only to interest paid in respect of capital borrowed for the purposes of the "Business" assessable under S. 6 of the Act. We are therefore of the opinion that the money borrowed by the assesseees for the purposes of paying land revenue, etc., cannot be exempted from income-tax under the provisions of S. 10 (2) (iii). Agricultural income is defined in S. 2 (1) of the Act. The rent of the site of a flour mill cannot be regarded as rent or revenue derived from land which is used for agricultural purposes. The working of a flour mill is not an agricultural purpose. The rent of the site of the flour mill does not fall within any of the other provisions of S. 2 (1) of the Act, and we are therefore of the opinion that it cannot be regarded as agricultural income. It is contended by the learned counsel for the assesseees that the income received from Lambardari fees comes within the exemption specified

in S. 4 (3) (vi) of the Act, which runs in the following terms :

Any special allowance, benefit or perquisite specifically granted to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit.

A Lambardar is given remuneration for collecting land revenue at the rate of Rs. 5 for every 100 rupees of land revenue collected by him. If he carries on the collection personally, he may not incur any expenses at all. If he employs some other person for the collection or if he has got to travel considerable distances he may incur some expenses. In the present case Lambardari fees amounted to Rs. 688. The Income-tax Officer has allowed an expenditure of Rs. 350 and has included the sum of Rs. 338 only as income from Lambardari fees. It is clear that the Lambardari fees do not constitute a special allowance, benefit or perquisite specifically granted to meet expenses wholly and necessarily incurred in the collection of the revenue. S. 2 (1) of the Act applies to the case of a person who gets agricultural income from the use of the land by direct operation. It is not applicable to a person who gets certain fees which constitute his remuneration for the work of the collection of the land revenue. The learned counsel for the assesseees contended that the assesseees undertake to sell the produce of the tenants either to Government or in the market, and that the commission which is charged really represents the expenses incurred by the assesseees for clearing, storing and drying the produce of the tenants before it is marketed. The Income-tax Office has held however that only Rs. 400 were incurred as expenses for cleaning, drying, etc., by the assesseees, and he has therefore allowed these expenses out of the income of Rs. 2,403 derived by the assesseees from commission charged on the disposal of tenants' produce. The net profit from commission does not fall within the definition of agricultural income under S. 2 (1) of the Act. For the reasons given above, we answer all the four questions referred by the Commissioner of Income-tax in the negative. Parties will bear their own costs in this Court.

V.B.B./R.K.

Reference answered.

A. I. R. 1936 Lahore 597

ADDISON AND ABDUL RASHID, JJ.

Harnand Rai-Harbhagat Rai — Assessee—Petitioners.

v.

Commissioner of Income-tax, Punjab — Opposite Party.

Civil. Ref. No. 61 of 1935, Decided on 23rd January 1936, from order of Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore, D/- 2nd October 1935.

Income-tax Act (1922), S. 10 (2) (ix)—Assessee firm advancing large sums of money to contractor — Accounts between parties settled and certain amount found to be due — Debtor agreeing to make payments by cheques recovered from Government—Debtor absconding without making full payment — Loss held to be loss pertaining to money lending business and not loss of capital invested in contractor's business—Debt held to have become bad debt three years after adjustment of accounts and held liable to be allowed under S. 10 (2) (ix).

The assessee firm had advanced large sums to a contractor from Kabul and had to recover Rs. 24,388 from him. It was agreed between the parties that the assessee firm should be paid by the debtor on receipt of cheques from the Government. If the cheques were less than the amount or in excess, the less or the excess was to be divided between the parties. A small amount was recovered bringing the balance to Rs. 21,678 and then the contractor absconded without paying any more cheques. There was no evidence on record showing that the amount advanced was not a loan but was capital invested in the contractor's business:

Held: that the loss was loss pertaining to money lending business of the assessee firm and was not a loss of capital invested in the contractor's business: [P 597 C 2; P 598 C 1]

Held further: that the debt became a bad debt three years after the adjustment of the account between the parties and that allowance should have been made for the debt under S. 10 (2) (ix) by the Income-tax authorities.

[P 598 C 1]

A. R. Khosla—for Petitioners.*Jagan Nath Aggarwal*—for Opposite Party.

Order.—The following two questions were referred to this Court under S. 66 (2), Income-tax Act, on behalf of the firm *Harnand Rai Harbhagat Rai*, Multan, by the Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore:

1. Whether there was proper and material evidence before the Income-tax authorities to disallow Rs. 21,768 claimed as a bad debt in the account of *Haji Sikandar Khan*. 2. Whether, on the

facts of the case S. 26 (1) or S. 25 (3) was applicable.

It was claimed in the assessment of 1931-32 that the sum of Rs. 21,768 should be allowed as a bad debt. The Income-tax Officer disallowed the claim on the grounds that it was a partnership loss which had not been proved, and that the debt had not yet become bad in the relevant account year, that is 1930-31. An appeal was preferred against this decision, but eventually the amount was left over for future consideration under S. 33. The claim was repeated during the assessment of 1932-33 but it escaped the notice of the Income-tax officer who passed no orders on it. It was however before the Assistant Commissioner in appeal. He disallowed the claim and the matter then came before the Commissioner. Large sums were undoubtedly borrowed by one *Haji Sikandar Khan* from the assessee firm. The final adjustment between them took place on 10th July 1928, when a sum of Rs. 24,388 was found due by *Haji Sikandar Khan*. The parties came to an agreement about this to the effect that this sum would be repaid to the assessee firm by *Haji Sikandar Khan* on receipt of cheques from the Government: if the cheques were less than the amount or in excess of the amount the less or the excess was to be divided between them, that is to say, if the cheques came to more than Rupees 24,388 the assessee firm was to get half the excess, and if they were less the assessee firm was to bear half the loss. A small amount was recovered by cheques bringing the total balance down to Rs. 21,768, and then *Haji Sikandar Khan*, who was a contractor and had come from Kabul, went back to Kabul without paying any of the other cheques received from Government.

The Commissioner is of opinion that the nature of the advances without any security, and without any stipulation for interest, conclusively suggests a contractual relationship between the assessee and the debtor. He was further of opinion that this received corroboration from the language of the final agreement which I have already given. He therefore came to the conclusion that this loss was a loss of capital belonging to the assessee firm which had been invested by it in *Haji Sikandar Khan's* business. He was also of opinion that the loss was not

allowable under S. 10 (2) (ix) as it was not a loss pertaining to the money lending business and did not take place in the relevant year but in 1928. On the record we find no evidence to establish that this was not a loan but capital invested in Haji Sikandar Khan's business. The final agreement does not help to prove this. The assessee firm knew that it was not likely to get more than the Government cheques as Haji Sikandar Khan belonged to Kabul and not to Multan where he was doing contract work. By the agreement in question it stood to gain if the Government cheques were more than the debt due; and if they were less they had in any case little or no chance of recovering the balance. The other evidence consists of the accounts and no inference can be drawn from them. We therefore hold that there was no evidence before the Income-tax authorities to establish that this was not a loss pertaining to the money lending business but was a loss of capital invested in Haji Sikandar Khan's business.

Further it cannot be said to have become a bad debt in 1928. Haji Sikandar Khan absconded, it is true, in that year, but the assessee firm had three years to make up their mind as to whether it was worth while suing him. It was not therefore till 10th July 1931 that it could be said that this was a bad debt. Had he come back before that, and started contracting business in India, the assessee firm would probably have sued him for the amount, but it would have undoubtedly been premature to wipe out this debt as bad prior to 10th July 1931. It became a bad debt actually in the account period under discussion, namely on 10th July 1931, and an allowance should have been made for it under S. 10 (2) (ix) by the Income-tax authorities. For these reasons we answer question 1 in the negative. The counsel appearing for the assessee firm stated that he no longer pressed the matter raised in question 2. It is not therefore necessary for us to give a reply to it. We think in this case that the assessee firm should get its costs from the Commissioner.

R.M./R.K.

*Answer accordingly.***A. I. R. 1936 Lahore 598**

MONROE, J.

Asa Nand—Defendant—Appellant.

v.

Gian Chand—Plaintiff—Respondent.

Second Appeal No. 88 of 1935, Decided on 5th December 1935.

Evidence Act (1872), S. 35—Age—Entries in school register are of little value.

Entries in school registers are of little value as evidence of age. [P 598 C 2]

M. C. Mahajan and *Rattan Lal Chawla*—for Appellant.*M. C. Sud*—for Respondent.

Judgment.—This suit based on a promissory note executed by the defendant was dismissed at the trial Court on the ground that at the date of execution of the note the defendant was a minor: on appeal the District Judge reversed this decision and held that the defendant was then a major and was liable on the note. Though the sole question involved is one of fact, learned counsel for the defendant has argued that the discussion of the evidence by the learned Judge is unsatisfactory and contains an error: this has not been contested and both parties have agreed to my deciding this question of fact, after seeing the original register of births of Multan, which I have done. The defendant's case that he is a minor has been supported by the production of a school register in which the date of his birth is shown as 24th March 1911: he has also produced his maternal uncle, Ishar Das, as a witness. Against this the plaintiff has shown that on 18th May 1930, the defendant gave evidence in a case that he was then 20 years old. The entry in the register of births for Multan, if it is an entry of the birth of the defendant, shows that he was born on 15th November 1909. Most of this evidence is of little value; it has not been clearly established that the entry in the register of births relates to the defendant: and I am in hearty agreement with the learned District Judge that entries in school registers are of little value as evidence of age: the defendant's uncle's evidence too cannot be trusted. As the onus of proof was on the defendant, and we have his own statement on oath which negatives his assertion that he was a minor at the date of the execution of the note, I agree with the result at which the District Judge arrived. I dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

* A. I. R. 1936 Lahore 599

BHIDE, J.

Muhammad Ismail and others — Objectors—Appellants.

v.

Secretary of State—Defendant — Respondent.

First Appeal No. 1780 of 1935, Decided on 20th February 1936, from order of Dist. Judge, Lyallpur, D/- 10th July 1935.

(a) Land Acquisition Act (1894), S. 23 (2) —Provisions for payment of 15 per cent are mandatory.

Provisions under S. 23 (2) for payment of 15 per cent for the compulsory acquisition in addition to the market price are mandatory.

[P 600 C 1]

* (b) Land Acquisition Act (1894), S. 23 (1)—Market value must be determined with reference to date of notification—It cannot be reduced by Government announcing in advance intention to acquire and taking possession.

The market price must be fixed with reference to the date of the notification under S. 4 irrespective of the previous possession of the plot by Government and its effect, if any, on the market-price. The Government should not reduce the compensation payable for compulsory acquisition by merely announcing in advance its intention of acquiring a piece of land and thus throwing a "cloud" on its market price, before issuing notifications required by the Act.

[P 600 C 1]

(c) Land Acquisition Act (1894), S. 23 (1) — Market value need not necessarily be determined on present disposition.

The market value of property should be determined not necessarily according to its present disposition, but laid out in the most lucrative and advantageous way in which the owner could dispose of it: 2 Cal 103; 10 Bom 585; 1925 P C 91 and 1931 Lah 207, Rel. on.

[P 601 C 1]

(d) Land Acquisition Act (1894), S. 23 (2) —Sale of lands influenced by religious and charitable motives or at much earlier time is no criterion for determining market value.

A sale of land for the purpose of a mosque for a nominal sum obviously influenced by religious and charitable motives or a sale at a much earlier date than the notification is no criterion for the market value of another plot on the basis of its most lucrative disposition.

[P 601 C 2]

(e) Land Acquisition Act (1894), S. 23 (2) —Possession by Government with intention of acquisition—Notification and acquisition after eight years—Owner benefited by such delay—No compensation for prior possession is necessary.

The market price of the land in 1925 when the Collector took possession with the intention of acquisition was far less than what it was in 1933, when the notification under S. 4 was issued and the owner had been bene-

fited greatly by the delay in the notification and the compensation being fixed with reference to the latter date as a result :

Held: that no further compensation for prior possession was necessary to meet the ends of justice. [P 602 C 1]

Held further: that compensation for possession prior to the date of the notification would scarcely fall within the scope of these proceedings. [P 602 C 1]

Shuja-ud-Din—for Appellants.

Ram Lal—for Respondent.

Judgment.—This is an appeal arising out of proceedings under the Land Acquisition Act. An area of 18 marlas belonging to the appellant Mohammad Ismail was acquired for the purpose of the Lahore-Lyallpur Road. It appears that possession was taken by the Government in anticipation of acquisition some time in 1925, though the preliminary notification relating to the acquisition under S. 4 of the Act was not issued till long afterwards, i. e. till 29th August 1933. Notification under S. 6 of the Act was issued on 10th October 1933. The appellant claimed compensation at the rate of Rs. 1,000 per marla, on the ground that his land was very favourably situated at the junction of two roads, viz. the Lahore-Lyallpur Road and the Sharakpur-Sheikhpura Road and was valuable as a suitable site for shops, petrol pumps, etc. The Collector admitted in his award the favourable situation of the plot in question, but considered the amount claimed by the appellant to be extravagant and awarded compensation only at the rate of Rs. 30 per marla, with 15 per cent for compulsory acquisition and also granted interest at 6 per cent per annum on the amount for the period of occupation prior to the actual acquisition. The amount due to the appellant on this basis worked out to Rs. 937-11-4. The appellant objected to this award and therefore a reference was made to the District Judge under S. 18, Land Acquisition Act. Before the District Judge the appellant only claimed Rs. 200 per marla. The District Judge found that the plot was suitable as a building site for shops and found the market price of the whole area to be Rs. 2,000 on the basis of 20 years rental for the shops in the neighbourhood. He, however, felt some difficulty in assessing the market price of the plot in dispute, as possession had been taken in 1925, and

the land was since then under "the cloud of compulsory acquisition." He, therefore, deducted 50 per cent. from the market price arrived at by him, and granted Rs. 1,000 only as compensation to the appellant. He refused to grant any interest for the preceding period of occupation or even 15 per cent for compulsory acquisition, as required by the Act. The learned Judge left the parties to bear their costs. From this decision Mohammed Ismail has appealed and cross-objections have been filed on behalf of the Secretary of State for India in Council with regard to the enhancement of the award as well as the order relating to costs.

The learned District Judge seems to be clearly in error in refusing to give 15 per cent. in addition to the market price as fixed by him. The provisions of the Act are mandatory in this respect (vide S. 23 (2) and the learned Government Advocate frankly stated that he did not support the learned District Judge's award on this point. I am further of opinion that the learned District Judge was also in error in arbitrarily deducting 50 per cent. on account of what he called "the cloud of compulsory acquisition" hanging over the land since 1925. The market value of the land in this case must, I think, be considered apart from the effect thereon, if any, of the expected acquisition by Government. Although possession had been taken in 1925, there could be no certainty about the acquisition until the necessary notifications under the Act had issued and there is no evidence to show what effect, if any, the possibility of acquisition had on the market. It seems, moreover, obviously unfair that the Government should be able to reduce the compensation payable for compulsory acquisition by merely announcing in advance its intention of acquiring a piece of land and thus throwing a 'cloud' on its market price, before issuing notifications required by the Act. I find no authority in support of the view taken by the learned District Judge and the learned Government Advocate also did not attempt to support it. I accordingly hold that the market price must be fixed with reference to the date of the notification under S. 4, irrespective of the previous possession of the plot by Government and its effect, if any, on the market-price.

The learned Government Advocate, however, contended that the market price arrived at by the learned District Judge was altogether excessive and the price fixed by the Collector was more than adequate. It was not denied that the plot in question is advantageously situated at the junction of two important roads, where there is a motor-lorry stand in the neighbourhood and where some shops have sprung up in recent years, and two petrol pumps have also been put up. But it was urged that the demand for such purposes has been already exhausted and the market price of the plot in dispute should be assessed on the basis of its value as agricultural land. It was contended further that even if the plot was considered to be a building site the market price awarded by the Collector was more than sufficient.

It appears from the evidence that the rent paid for the very small areas leased for the petrol pump is very high. There are already two pumps in the locality and there is no reason to think that there is any further demand for petrol pumps. I, therefore, think that the rental of the sites of petrol pumps should be excluded from consideration. As regards shops however, I see no adequate ground to hold that the demand for sites for shops has exhausted itself. There is no evidence on the record to show what sort of shops are in demand in the locality, and whether there is or is not any demand for more shops of a similar or different kind.

In view of the fact that several shops have been built in the locality in recent years and the advantageous position of the plot near the junction of two main roads, it was, I think, for the respondent to prove by clear evidence that the demand for building sites for shops had exhausted itself by 1933, when the notification under S. 4 issued as contended by the learned Government Advocate. But I find no such evidence on the record. I do not, therefore, think that it would be fair to treat the land in dispute as agricultural for the purpose of assessment of its market value. Indeed the Collector himself assessed it as a building site on the basis of the prevailing market value for residential sites in the neighbourhood of Sharkpur. But I do not think the latter rates also can form a

good criterion in the circumstances of the case. The plot is situated at some distance from the 'abadi', and there is no prospect, so far as one can see, of residential houses being built on or near the plot in dispute at present. Its potential value chiefly arises owing to its suitability for shops administering to the needs of the heavy traffic on the roads. It is well established that market value of property in such cases should be determined not necessarily according to its present disposition, but laid out in the most lucrative and advantageous way in which the owner could dispose of it: cf. 2 Cal 103 (1); 10 Bom 585 (2); 6 Lah 69 (3) and 12 Lah 117 (4), etc. In the present instance, the most lucrative disposition of the property would apparently be to sell or let it for purposes of shops. The learned District Judge has assessed the market price on the basis that the appellant could have put up a couple of shops on the plot of the same type as have sprung up in the neighbourhood in recent years, and this seems to be fair and reasonable. There is perhaps no likelihood, so far as one can see, of a series of shops being built on this plot with any prospect of profit at present, but there seems no reason why the appellant should not be able to put up even a couple of shops on the plot with such prospect. In fact, the probability is that he would have put up such shops, if Government had not taken possession in 1925.

The learned District Judge has assessed the market value on the basis of the rental of a shop on one marla of land on the opposite side of the road, which was yielding an income of Rs. 48 to Rs. 64 per annum according to the evidence of Din Mohamed (P. W. 2). The learned District Judge took the average yield at Rs. 50 per annum for the site of each shop and took the market price to be equivalent to twenty years' rental, i. e., Rs. 2,000. He deducted 50 % on account of the "cloud of acquisition" hanging over the land, but the arbitrary deduction seems unjustifiable for reasons

1. Premchand v. Collector of Calcutta, (1876) 2 Cal 103.
2. Collector of Poona v. Kashinath Khajgiwala, (1886) 10 Bom 585.
3. Narsingh Das v. Secy. of State, 1925 P O 91=96 I C 556=52 I A 138=6 Lah 69.
4. Secy. of State v. Ohuni Lal, 1931 Lah 207=181 I C 364=32 P L R 821=12 Lah 117.

already stated. Din Mohammed (P. W. 2) has mentioned two other instances of shops yielding an income of as much as Rs. 19 per mensem. These are however pakka shops which cost about Rs. 800 or Rs. 900 according to the witness. Din Mohammed stated that the prevailing rate of interest is 12 to 18 per cent per annum. Deducting interest at the average rate of 15 per cent on Rs. 800 the annual income for a shop would come to about Rs. 100. This is nearly double the figure, on the basis of which the learned District Judge assessed the market price. These shops, it may be noted, are situated in a less favourable position than the plot in dispute (vide shops at L on Exhibit P. C).

There are no instances of sale of sites for shops in the neighbourhood. The learned Government Advocate has referred to two sales of land in the neighbourhood deposed to by witness 5 for the respondent. One of these was a sale of 3 kanals 13 marlas of land for Rs. 99 in the year 1932 for the purposes of a mosque. The price in this case was nominal (a little over a rupee per marla) and the transaction appears to be exceptional and obviously influenced by religious and charitable motives. The other was a sale of a large area of 118 kanals 7 marlas for Rs. 6,351-5-0 for the purpose of the Government High School in 1926. This transaction is also of a different type and of a much earlier date than the notification. I do not think these sales can afford any criterion for the market value of the plot in dispute on the basis of its most lucrative disposition in the circumstances of the cases. The plot in dispute has an exceptionally advantageous position for the purposes of shops and in view of the evidence discussed above it seems to me fair that Rs. 2,000 should be taken as the market price of the whole area of 18 marlas. The appellant is also entitled to 15 per cent. on this amount in addition, i. e. Rs. 300, on account of compulsory acquisition. I accordingly hold that the appellant is entitled to Rs. 2,300 as compensation.

The learned counsel for the appellant contended that the appellant should also be awarded 6 per cent. interest on the above, for the occupation of the land for about 8½ years prior to the award. I do not think this contention is justifiable in the circumstances. The market price of

the land in 1925, when the Collector took possession, must have been far less than what it has been found to be in 1933, when the notification under S. 4 issued. The appellant has been benefited greatly by the delay in the notification and the compensation being fixed with reference to the latter date as a result. I do not think any further compensation for prior possession is necessary to meet the ends of justice. Moreover, compensation for possession prior to the date of the notification would scarcely fall within the scope of these proceedings. I accept the appeal to the extent of raising the compensation payable to the appellant to Rs. 2,300. The appellant will get his costs in this Court. As a result, the cross-objections filed on behalf of the respondents fail and must be dismissed with costs.

K.S./R.K.

*Appeal accepted.** **A. I. R. 1936 Lahore 602**ADDISON, AG. C. J. AND DIN
MOHAMMAD, J.*Probynabad Stud Farm, Montgomery—*
Assessee—Petitioner.

v.

Commissioner of Income-Tax, Punjab
—Respondent.

Civil Ref. No. 12 of 1934, Decided on 9th July 1935, from reference of Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore, D/- 15th March 1935.

(a) **Income-Tax Act (1922), S. 2 (1)—‘Dharat’ income is agricultural income.**

‘Dharat’ which means weighing charges levied by the landlord on the tenants in addition to the rent is agricultural income and is exempt from assessment. [P 602 C 2]

* (b) **Income-tax Act (1922), S. 4 (3) (i)—Stud farm—No trust-deed—Officer Commanding operating on Stud fund given discretion in disbursement—Money spent for non-charitable purposes—Fund held not exempt from income-tax under S. 4 (3) (i).**

There was no trust-deed in the case of the stud farm whose income was assessed. The Officer Commanding was given discretion to disburse the fund as he thought fit and from the accounts in previous years, it was found that the money had been spent for bonuses paid to the regiment's farewell to commander-in-chief, and also a wedding party:

Held: that these disbursements would not justify the conclusion that the property was held in trust wholly for charitable purposes and as there was no specification of any part for any charitable purpose, the trust failed as a charitable trust for want of certainty as to its

objects and that defect could not be cured so long as the Officer Commanding insisted on his discretion in the matter: *Case law discussed.*

[P 604 C 2, P 605 C 1]

M. C. Mahajan and Kirpa Ram Bajaj
—for Petitioner.

J. N. Aggarwal and Sarv Mitar Sikri
—for Respondent.

Din Mohammad, J.—This is a reference under S. 66 (2), Income Tax Act. The questions referred are as follows:

1. Whether the Probynabad Stud Farm is an assessee under the Income Tax Act.
2. If so, is its income not exempt from taxation within the meaning of S. 4 (3)(i)?
3. Whether the expenses from dharat (weighing charges) is not agricultural income as defined by S. 2 (1) (b) (ii) of the Act.
4. Whether the expenses claimed against dharat income are not a permissible deduction under the Act?

The reference originally came on for hearing before a Division Bench of this Court composed of Jai Lal and Skemp, JJ. The Judges answered question No. 1 in the affirmative and without discussing question Nos. 3 and 4, remanded the case to the Commissioner for a further statement on the use to which the profits received from the Probynabad Stud Farm were put, so as to be able to pronounce definitely on question No. 2. The supplementary statement having been received, we have now to decide questions Nos. 2, 3 and 4.

We may take up questions 3 and 4 first, as they proceed on a very simple ground. ‘Dharat’ means weighing charges which in this case are levied by the assessee from the tenants of the lands in addition to the rent which he receives from them. It is admitted that they form part of an agreement entered into with the tenants in that behalf. S. 2 (1) defines agricultural income which includes

the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market.

In our view the dharat income clearly falls within the provision of this sub-clause, and is, therefore, exempt from the provisions of the Income Tax Act. In this view of the case, question 4 does not arise. The main controversy in this case has raged round question 2. It is contended on behalf of the assessee that the income received from the Probynabad

Stud Farm is covered by S. 4 (3) (i) which exempts

any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes the income applied, or finally set apart for application thereto.

On behalf of the Commissioner, however, it is urged that the Farm is not a trust, much less a charitable trust, and, therefore, its income is not exempt from the operation of the Income-tax Act. It may be remarked at once that there is no trust deed relating to this trust, nor does the instrument of lease executed between Government and the Officer Commanding Probyn's Horse define the purpose for which the lease of land was granted; all that is contended on behalf of the Stud Farm is that it is a trust by implication or what is known in law as an implied trust. The objects of this trust as stated by the Commissioner of Income-tax are as follows:

The income derived from agriculture, securities and other sources is utilised to finance the breeding of horses. The main object of the institution is to provide remounts for the regiment and the improvement of horse breeding in India. The majority of the horses thus bred are supplied to the Army Department on payment and stallions and brood mares are also imported. Any stock found unsuitable as remounts are sold publicly.

As stated above, the case was remanded to determine from the account books of the Farm, the nature of disbursements made by it during the last 10 years, and the Commissioner has appended to his statement an annexure showing the details in respect thereof. This being the only material available and there being no deed in writing, we are compelled to form our opinion as regards the application of the income received from the Stud Farm from this document alone. In support of his contention, counsel for the assessee has relied on Tudor on Charities 1929 edition, p. 40, 1891 A C 531 (1) at p. 583, (1905) 2 Ch D 60 (2), (1894) 3 Ch D 265 (3), (1909) 2 Ch D 410 (4) and

1. Income-tax Commissioners v. John Frederick Pemsel, (1891) A C 531=61 L J Q B 265=55 J P 805=65 L T 621.
2. In re Good Harrington v. Watts, (1905) 2 Ch D 60=74 L J Ch 512=21 T L R 450=58 W R 476=92 L T 796.
3. In re Strathedem, (1894) 3 Ch D 265=63 L J Ch 872=42 W R 647=71 L T 225.
4. In re Donald: Moore v. Somerset, (1909) 2 Ch D 410=59 S J 673=101 L T 377=78 L J Ch 761.

25 T L R 753 (5) of the year 1909. It may be necessary, therefore to examine these authorities to find out whether they are applicable to the facts of the present case or lay down any such proposition as is urged on behalf of the assessee. Tudor on Charities at p. 40 says as follows:

Although patriotic purposes are not necessarily charitable, a bequest to the Chancellor of the Exchequer to be appropriated by him to the benefit and advantage of Great Britain was a valid charitable gift. . . . The relief of taxation for setting out soldiers is one of the objects included in the preamble, and generally the maintenance of efficiency among soldiers is a charitable purpose. For example, bequest to a volunteer corps, territorials, militia or yeomanry for their general purposes, a prize for some unspecified object to be competed for among cadets, or to an officers' mess for a library and a fund out of which to renew the books, or to a regiment for promoting sport for the benefit of its members, are charitable. On similar grounds, a gift to the National Rifle Association to be expended in teaching shooting at moveable objects was held good.

It may be remarked in this connection that this particularly refers to what is known in English Law as the Statute of Elizabeth. In 1891 A C 531 (1) at p. 583, Lord Macnaghten remarked as follows:

No doubt the popular meaning of the words 'charity' and 'charitable' does not coincide with their legal meaning; and no doubt it is easy enough to collect from the books a few decisions which seem to push the doctrine of the Court to the extreme, and to present a contrast between the two meanings in an aspect almost ludicrous. But still it is difficult to fix the point of divergence and no one as yet has succeeded in defining the popular meaning of the word 'charity.' . . . 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

In (1905) 2 Ch D 60 (2), a testator gave his residuary personalty upon trust for the officers' mess of his regiment, to be invested and the income to be applied in maintaining a library for the officers' mess for ever, any surplus to be expended in the purchase of plate for the mess. It was held that the gift of residue to maintain a library and to purchase plate for the officers' mess being for a general public purpose tending to increase the efficiency of the Army and aid taxation was a good charitable bequest. In (1894) 3 Ch D 265 (3) it was held that a gift by will for the benefit of a volunteer corps

5. In re, Susannah; D. Barker; Sherington v. Deans Chapter of St. Paul's Cathedral, (1909) 25 T L R 753.

was a charitable bequest. In (1909) 2 Ch D 410 (4), a testator devised and bequeathed the residue of his estate to trustees upon trust for sale and out of the proceeds to pay inter alia a legacy to the Officer Commanding the Northamptonshire Militia for the mess of that regiment or for the poor of the regiment. It was held that it was a good charitable gift and was payable to the Officer Commanding the unit of the Army Reserve which represented the Northamptonshire Militia. In 25 T L R 753 (5) it was remarked that a gift to the Union Jack Club would have been a good charitable gift on the ground that the Club tended to improve the condition of soldiers. In the first place, all these decisions have been pronounced under the English Statute, and secondly, they contemplate a regular trust which is enforceable at law and an express legacy enjoyed by the trust. Unfortunately, these conditions do not prevail here and, therefore, these decisions have no direct bearing on the question before us.

On behalf of the Commissioner, reliance has been placed among others on 32 E R 947 (6), 8 Tax Cas 286 (7) and 125 I C 879 (8). In 32 E R 947 (6) it has been held that a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve, cannot be supported as a charitable legacy. In 8 T C 286 (7) it has been laid down that inasmuch as the settlor possessed under the deed of settlement power to execute an appointment in favour of purposes that were not charitable, the deed did not create a trust for charitable purposes only within the meaning of S. 105, Income Tax Act (1842), and S. 37 (1) (b), Income Tax Act (1918), although ultimately powers were exercised by the settlor in favour of charity. In 125 I C 879 (8), where the income of certain trust property vested in the head of a community and was applicable according to the terms of the deed of trust for carrying on the agricultural, industrial, commercial and other pursuits of the said community and for such donations for charitable or religious purposes,

etc., as the then spiritual head and after him the spiritual head for the time being may deem fit, it was held by their Lordships of the Privy Council that the income from the trust property was not exempt from income-tax under S. 4 (3) (i), Income-tax Act.

A glance at the annexure appended to the supplementary statement submitted by the Commissioner of Income-tax will clearly indicate that the decisions relied upon by the respondent are clearly applicable to the case before us. We find that in the year 1924 a huge sum of Rs. 1,74,518 was paid as bonus to the regiment. Similarly in the years 1929 and 1930 sums to the extent of Rs. 6,000 odd and Rs. 3,500 odd, respectively, are shown as unparticularised. In 1931, Rs. 23,113 appear to have been spent on "farewell to the Commander-in-Chief." In 1926 the Mess car account took away Rs. 2,944. In 1931, Rs. 698 had been spent on a wedding party. These disbursements will not justify the conclusion that the property is held in trust wholly for charitable purposes, nor can it be said to be so held in part as this question has been finally set at rest by the pronouncement of their Lordships of the Privy Council in 125 I C 879 (8). The following passage from the judgment of their Lordships may be quoted with advantage :

Nor is it suggested that any part of the property is set aside for any charitable or religious purposes, so that it can be identified as appropriated exclusively to such purposes.

It is conceded by the assessee that no such setting apart or specification of the property has taken place in this case and in these circumstances it will not be possible to hold that even the second part of Cl. (1), sub-section (3), S. 4, would apply. Further, it is admitted that the element of discretion of the Officer Commanding who operates on the Stud Farm Fund in making these disbursements as he thinks fit, is not altogether excluded. This will bring the Farm within the mischief of the rule enunciated by 32 E R 947 (6). However benevolent or liberal the objects of a trust may be, so long as the trustee has any discretion left in the matter, the trust cannot be supported as a charitable legacy. We are alive to the fact that most of the objects of the Stud Farm are no doubt charitable even within the technical sense of the term, but we are regretfully constrained to remark

6. *Morice v. Bishop of Durham*, (1805) 32 E R 947.

7. *Rex v. Special Commissioner of Income-tax*, (1921) 8 T C 286.

8. *Mahomed Ibrahim v. Commissioner of Income-tax, Nagpur*, 1930 P C 226=125 I C 879=57 I A 260=26 N L R 256 (P C).

that so long as the trust is not given a legal shape, by eliminating the element of discretion vesting in the Officer Commanding, it will not be able to claim the benefit of the exemption provided for in the Income-tax Act.

Counsel for the assessee has relied on 42 All 395 (9), and has argued that mere breaches of trust by the trustee will not vitiate the trust and the object of the trust will remain the same as intended by its founder. Be that as it may, this principle of law does not help him nor does the decision relied upon by him lay down any such proposition of law which may be of any practical use to him in this case. The trust here fails as a charitable trust for want of certainty as to its objects and that defect cannot be cured so long as the Officer Commanding insists on his discretion in the matter. The object being laudable, we consider that it will be quite in the fitness of things if with a view not only to secure an exemption under the provisions of the Income-tax Act but also to bring it on a legal footing, the Officer Commanding will give his considered thought to the matter and look into the desirability of reducing the terms of the trust to writing, so as to make them as definite and certain as the law requires. For the reasons given above, we will answer question No. 2 in the negative. In view of the peculiar circumstances of the case we will make no order as to costs.

K.S./R.K

Questions answered.

9. Sri Thakurji v. Sukhdeo Singh, 1920 All 63 = 58 I C 583 = 42 All 395 = 18 A L J 890 (F B).

A. I. R. 1936 Lahore 605

ABDUL RASHID AND ADDISON, JJ.

Mehar Chand — Defendant — Appellant.

v.

Pritam Singh and others—Plaintiffs — Respondents.

Second Appeal No. 1674 of 1935, Decided on 7th January 1936, from decision of Dist. Judge, Rawalpindi, D/- 22nd July 1935.

Compromise—Admissibility in evidence — Compromise not recorded under O. 23, R. 3, Civil P. C.—Deed is registrable.

Even though a suit is dismissed in accordance with the terms of a deed of compromise, if that compromise has not been recorded under

the provisions of O. 23, R. 3, Civil P. C., the deed is not exempt from registration under S. 17 (2) (vi), Registration Act: 1927 Lah 865, Foll.; 1930 Lah 855 and 1919 P C 79, Ref. [P 606 C 2]

Achhru Ram—for Appellant.

J. W. Fairlie—for Respondents.

Abdul Rashid, J.—On 18th June 1913 Ladha Singh brought a suit against his brother Labh Singh and his brother's sons Pritam Singh and Teja Singh for possession of a shop and goods worth Rs. 16.4.0. On 26th August 1913 this suit was compromised. The defendants Pritam Singh and Teja Singh agreed to pay Rs. 140 to Ladha Singh on or before 1st October 1913, and if they made the payment they were to be declared owners of the shop in dispute. If, on the other hand, they failed to pay the sum of Rs. 140 by 1st October 1913, the shop was to be regarded as the property of Ladha Singh. The written compromise also contained a clause which runs as follows: "*Muzhir mudai ainda koi jaedaq muntaqil nahin karega.*" After the written compromise had been tendered in Court, the statements of the parties were recorded. Pritam Singh and Teja Singh stated that they would pay Rs. 140 to Ladha Singh before 1st October, and after the payment they would be entitled to be declared the owners of the shop in dispute, but that if they did not pay, the shop in dispute would be regarded as the property of Ladha Singh. Ladha Singh made a similar statement. The plaintiff and the defendants did not take any reference in their statements to the clause in the written compromise restraining Ladha Singh from alienating his property in future. After recording the statements of the parties the trial Court delivered the following judgment:

Bamanzari i sulah-nama degree dakhlyabi dukan mandarja naqsha barue sharait mundarja sulah nama behaq mudai banam muda.i-ale sadar howe.

The decree runs in the following terms:

It is ordered that by means of the acceptance of the compromise a decree for possession of the shop in dispute be passed in favour of the plaintiff on the condition that if the defendants do not pay Rs. 140 to the plaintiff till 1st October 1913, the suit of the plaintiff will stand decreed.

In the decree-sheet also no reference was made to any condition restraining the plaintiff from alienating any property in future. On 13th February 1933,

Ladha Singh made a gift of one house and land measuring 16 kanals 14 marlas in favour of Mehr Chand. The suit, out of which the present appeal has arisen, was instituted by Pritam Singh on 20th June 1934, for a declaration to the effect that the gift by Ladha Singh, defendant 1 in favour of Mehr Chand defendant 2, shall not affect his reversionary rights. As Teja Singh did not join his brother Pritam Singh as a plaintiff he was made a pro forma defendant. The trial Court held that the parties were governed by Hindu Law, that Ladha Singh, defendant 1, and Labh Singh, the father of the plaintiff, had partitioned their property long before 1913, that the gift was accompanied by possession and that the plaintiff could not challenge this gift. It was also held that as the compromise had not been acted upon, the term in the compromise restraining Ladha Singh from making any alienation in future was not binding upon him. On these findings the plaintiff's suit was dismissed. Pritam Singh preferred an appeal to the learned District Judge and the only point agitated before the lower appellate Court was that the gift was not valid as Ladha Singh, defendant 1, had agreed by means of the compromise dated 26th August 1913, not to alienate his property in future.

The learned District Judge accepted this contention and decreed the plaintiff's suit. Against this decision Mehr Chand, donee, defendant 2, has preferred an appeal to this Court. As mentioned above, the previous litigation related to the possession of a shop and goods worth Rs. 16-4-0. Neither the property which forms the subject-matter of the present suit nor any other property belonging to Ladha Singh was concerned in the previous litigation. The written deed of compromise was followed by the statements of the parties and in none of these statements was any reference made to the clause in the written deed of compromise restraining Ladha Singh from alienating his property in future. Neither the judgment nor the decree of the lower Court make any reference to this clause. In fact, the decree-sheet only reproduces one condition of the compromise deed which is, that if Rs. 140 are not paid by Pritam Singh and Teja Singh before 1st October 1913, the shop in dispute would be declared to be the property of Ladha

Singh. In these circumstances, we are of the opinion that the provisions of O. 23, R. 3, were not carried out by the Court in the previous litigation. The Court ought to have ordered the compromise to be recorded and ought to have passed a decree in accordance with its terms so far as it related to the suit. Their Lordships of the Privy Council in 47 Cal 485 (1) made the following observations as to the manner of recording a compromise which deals with other matters besides the property in suit :

A perfectly proper and effectual method of carrying out the terms of this (rule) would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit or it could introduce the agreement in a schedule to the decree ; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement. This, in fact, is what the decree did in the present case. It may be that as a decree it was incapable of being executed outside the lands of the suit but that does not prevent it being received in evidence of its contents.

It has been held in 100 I C 783 (2) that even though a suit is dismissed in accordance with the terms of a deed of compromise, if that compromise has not been recorded under the provisions of O. 23, R. 3, Civil P. C., the deed is not exempt from registration under Section 17 (2) (vi), Registration Act. Reliance was placed by the learned Counsel for the respondents on 1930 Lah 855 (3). That case however is not of much assistance to the respondents, as in the present case it does not appear that the term "restraining alienation" was ever present to the mind of the Court when it recorded the judgment or signed the decree-sheet. This term, as mentioned above, finds no place in the statements of the parties, the judgment or the decree-sheet. In order that it may be said that a compromise relating to extraneous matters has been recorded by a Court, it must be shown that the Court, brought its judicial mind to bear on the question that the compromise contains matters which do not form the subject-matter of

1. Hemanta Kumari Debí v. Midnapure Zamin-dari, 1919 P C 79=53 I C 534=46 I A 240=47 Cal 485.
2. Labh Singh v. Gurbakhsh Singh, 1927 Lah 865=100 I C 783=28 P L R 143.
3. Jai Lagi v. Alliance Bank Simla, 1930 Lah 855=128 I C 300.

the litigation pending before it. We therefore hold that the clause "restraining alienation of his property by Ladha Singh" never became a step in a judicial proceeding. This clause dealt with immoveable property exceeding Rs. 100 in value.

The compromise in this respect is therefore inadmissible in evidence for want of registration. For the reasons given above, we accept this appeal, set aside the judgment and the decree of the learned District Judge and restore that of the trial Court. The parties will bear their own costs throughout.

B.D./R.K.

*Appeal allowed.***A. I. R. 1936 Lahore 607**

YOUNG, C. J., AND MONROE, J.

Sital Das and others—Appellants.

v.

Punjab Sindh Bank, Ltd., Lyallpur—Respondent.

First Appeal No. 2277 of 1934, Decided on 28th November 1935.

Mortgage—Costs of suit—Prior mortgagee suing his mortgagor impleading puisne mortgagee—Puisne mortgagee contesting claim—Costs can be saddled on puisne mortgagee.

A mortgagee sued on his mortgage the mortgagor impleading therein the puisne mortgagees as defendants. The puisne mortgagees contested the claim of the prior mortgagee. In the decree passed in the above suit costs were passed against all the defendants. It was contended that as it was a mortgage suit costs could not be saddled on the puisne mortgagees:

Held: that S. 35, Civil P. C., is clear that the Court has discretion in the matter of costs. There is no principle of law which make it wrong or improper for a Court to saddle with costs the real contesting defendants to a suit. The discretion is absolute. In a case where the puisne mortgagees, the real contesting defendants, are made liable for costs together with the other defendants, there is nothing improper in law in such an order: 1933 Rang 335, Dissent. [P 608 C 1]

*Iqbal Singh and Krishna Swarup—*for Appellants.

*M. C. Mahajan and Daulat Ram—*for Respondent.

Young, C. J. — This is a first appeal from the decision of the learned Subordinate Judge, first class, at Lyallpur. The plaintiffs were mortgagees of certain property and they sued the mortgagors for enforcement of the mortgage. Defendants 5 and 6 were puisne mortgagees. In their deed it was recited that the plain-

tiffs had a prior mortgage. When the plaintiffs proceeded to enforce their mortgage the mortgagors had no real interest left in the property. The amount that they had borrowed on the property was far more than the property could produce. The puisne mortgagees in an application for a receiver disputed the right of the prior mortgagees to possession of the factory. They also asserted that they themselves had a first charge on the property wholly contradictory to their own deed under which they held a mortgage. The matter was fought nominally by the mortgagors who put in the same written statements as the puisne mortgagees, but there can be no doubt whatever that the real contesting defendants in this case were defendants 5 and 6. The learned Subordinate Judge passed a decree in favour of the plaintiffs and made an order for costs against all the defendants including defendants 5 and 6. Defendants 5 and 6 alone filed an appeal. Defendants 1 to 4 were apparently satisfied. This alone shows who the real contesting defendants were in the case.

The defendants tried to have the appeal heard on a ten rupee stamp. When the matter came up before a Bench of this Court it ordered that the defendants should pay a court-fee upon the ordinary valuation of the property. The appellants, however, have failed to pay the court-fee on this basis and they have petitioned this Court to allow the appeal to be heard simply on the question of costs for which they have paid the necessary court-fee. The whole question now is whether the Judge in the lower Court had jurisdiction to make the order he did make making defendants 5 and 6 liable for the costs.

Counsel for the appellants has argued that in a mortgage suit the property must bear the costs. That is a proposition which no one will dispute. He also quoted an authority, 1933 Rang 335 (1), which apparently supports his contention that in a case where there is a mortgagor, and a puisne mortgagee sued, the mortgaged property would normally bear the costs but that there was discretion in the Court to make the puisne mortgagee pay costs but only to the extent of the extra costs occasioned by the puisne mortgagee's defence. We have

1. Dawson Bank, Ltd., v. Oppenheimer, 1933 Rang 335=148 I C 255.

considered this proposition and with great respect we do not see upon what principle of law the authority limits the discretion of the Judge trying the suit. S. 35, Civil P. C., is clear that the Court has discretion in the matter of costs. There is no principle of law, with which we are acquainted which makes it wrong or improper for a Court to saddle with costs the real contesting defendants to a suit. The discretion is absolute. In this case the real contesting defendants have been made liable for costs together with the other defendants and there is nothing improper in law in such an order. In fact, in our opinion, on the facts of this case the learned Judge would have been failing in his duty if he had not saddled the present appellants with costs. For these reasons we dismiss the appeal with costs.

B.D./R.K.

*Appeal dismissed.***A. I. R. 1936 Lahore 608**

YOUNG, C. J. AND MONROE, J.

Harkishan Lal—Applicant.

v.

Peoples Bank of Northern India, Ltd.
—Opposite Party.

Misc. Civ. Ori. Petn. No. 120 of 1935, Decided on 17th December 1935, from order of Chief Justice, D/- 19th November 1935.

(a) **Letters Patent (Lahore), Cl. 9**—"Suit" includes proceedings in insolvency.

The word "suit" in Cl. 9 should be interpreted widely and includes proceedings in the insolvency Court, and the High Court under its extraordinary powers has jurisdiction to transfer a proceeding in insolvency from the lower Court to itself for disposal: 1926 *Lah* 199 and 1928 *Mad* 1091, *Ref.* [P 609 C 1]

(b) **Provincial Insolvency Act (1920), Ss. 3 and 5 (2)**—S. 3 does not exclude extraordinary civil jurisdiction of High Court.

Section 3 merely enacts that the ordinary jurisdiction in insolvency shall be in the District Court. It does not exclude the extraordinary civil jurisdiction of the High Court.

[P 609 C 2]

(c) **Provincial Insolvency Act (1920), S. 5 (2)**—"Subject as aforesaid," meaning.

"Subject as aforesaid" means subject to the ordinary civil jurisdiction of the District Court in insolvency matters, that is in all proceedings in insolvency the proceedings must commence in the District Courts. [P 609 C 2]

(d) **High Court — Jurisdiction** — Existing jurisdiction cannot be taken away by legislature without express words.

No existing jurisdiction in a High Court can be taken away by the legislature without the

use of express terms or by praying in aid a necessary implication. [P 609 C 2; P 610 C 1]

(e) **Provincial Insolvency Act (1920), S. 3**—S. 3 does not take away jurisdiction of High Court to transfer insolvency proceedings to itself.

Before the Provincial Insolvency Act came into existence the High Court of Judicature at Lahore had jurisdiction to transfer proceedings in insolvency Court to itself for disposal, and since there is no deprivation of the High Court of its jurisdiction in express terms in S. 3 there cannot be any necessary implication that the jurisdiction in the High Court has been taken away. [P 609 C 2; P 610 C 1]

Fakir Chand Mital for *Ajit Ram*—for Applicant.

Nawal Kishore and *Bhagwat Dayal*—for Official Liquidator, Peoples Bank of Northern India, Ltd.

Young, C. J.—The point raised in this application is one of interest as it concerns the jurisdiction of the High Court. On 18th November 1935, the Official Liquidator of the Peoples Bank of Northern India filed a petition in the Court of the insolvency Judge praying that Lala Harkishan Lal should be declared insolvent. On the next day the Official Liquidator filed an application under Cl. 9, Letters Patent, and Ss. 24 and 151, Civil P. C., for the transfer of that insolvency petition to the High Court for disposal. On this application an order was made by a single Judge of this Court transferring the said petition. Lala Harkishan Lal subsequently filed an application praying this Court to vacate that order on the ground that it was ultra vires. It may here be said that para. 6 of Lala Harkishan Lal's application contains scandalous matter — allegations against the honesty of officers of this Court—allegations wholly without any foundation in fact. We order that para. 6 be struck out. Counsel for Lala Harkishan Lal argues that the transfer order is without the jurisdiction of this Court. He prays in aid the terms of S. 9, Letters Patent, which are as follows:

And we do further ordain that the High Court of Judicature at Lahore shall have power to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court subject to its superintendence.

It is argued that the word "suit" in Cl. 9 will not cover proceedings in the insolvency Court. It is further argued that S. 3 (1), Provincial Insolvency Act, which reads as follows:

The District Courts shall be the Courts having jurisdiction under this Act,

excludes the jurisdiction of the High Court, that is, that the High Court has no jurisdiction to hear and determine a proceeding in insolvency. It is further argued that where the legislature wishes to give insolvency jurisdiction to a High Court it has done so in express terms such as in the Presidency Courts and in the Rangoon High Court. The last point is not difficult. This Court does not claim "ordinary" jurisdiction but extraordinary jurisdiction on its appellate side.

With regard to the argument based on S. 9, Letters Patent, we consider that the word "suit" should be interpreted widely, and that the word "suit" in the Letters Patent does include a proceeding in the insolvency Court. We are confirmed in this view by consideration of S. 4, Provincial Insolvency Act, itself. Section 4 (1) clearly contemplates proceedings in the nature of suits in the Insolvency Court in insolvency matters. There is no doubt that proceedings in an Insolvency Court operate as *res judicata* and at p. 54 of Mulla's Insolvency Act, which is based upon authority, it is said that in proceedings in the Insolvency Court the same procedure should be adopted as in suits. In this connexion we may also refer to the Government of India Act, S. 107. That is the section which gives superintendence to the High Court over all Courts for the time being subject to its appellate jurisdiction. S. 107 (b) enacts that the High Court may direct the transfer of any suit or appeal from any such Court to any other Court of equal or superior jurisdiction. The word "suit" in this section has been interpreted in 1926 Lah 199 (1), to apply to the transfer of proceedings under the Legal Practitioners Act. We are satisfied, therefore, that the word "suit" in the Letters Patent ought not to be narrowly construed. We agree with the observation of Lord Campbell, a distinguished Lord Chief Justice of England, that where jurisdiction was subject to doubt it is the duty of a High Court to seize it. But in this case we do not think there is any doubt.

The next point argued was that S. 3, Provincial Insolvency Act, excludes the jurisdiction of the High Court. We do

not agree. In our opinion S. 3 (1) merely enacts that the ordinary jurisdiction in insolvency shall be in the District Courts. It does not exclude the extraordinary civil jurisdiction of the High Court. We are confirmed in this view by a consideration of the old Civil P. C. of 1882. Under S. 344 of that Code the District Court had jurisdiction to hear and determine insolvency matters. The exact words were: "Every such application shall be made to the District Court." Obviously this could not have excluded the jurisdiction in the High Court which was expressly given under S. 25, which is equivalent to S. 24 of the present Civil P. C. When the Legislature thought fit to have a special Provincial Insolvency Act, we are satisfied it merely meant in S. 3 to give the District Court the same authority as the old Civil Procedure Code gave it. When we consider S. 5 (2) Provincial Insolvency Act, this appears to be clear. This section lays down that "subject as aforesaid" (to the provisions of this Act) "the High Court shall have the same powers and shall follow the same procedure as it has with regard to civil suits." "Subject as aforesaid" means in our opinion, subject to the ordinary civil jurisdiction of the District Court in insolvency matters, that is, in all proceedings in insolvency the proceedings must commence in the District Courts in the same way as in the Allahabad High Court the original jurisdiction in matrimonial matters under the Indian Divorce Act is in the lower Court but the High Court undoubtedly can transfer cases to be disposed of in the High Court under its extraordinary civil jurisdiction. This point is made still clearer by a reference to S. 2 (b) Provincial Insolvency Act, where "District Court" is defined. It says, "District Court" means the principal civil Court of original jurisdiction in any area, etc. We agree that in the matter of original jurisdiction the District Courts have exclusive jurisdiction.

Lastly, there can be no doubt that before the Provincial Insolvency Court came into existence, the High Court of Judicature at Lahore did have jurisdiction to transfer proceedings in the Insolvency Court to itself for disposal. See Ss. 25 and 344, Civil P. C. of 1882. It is well-settled law that no existing jurisdiction in a High Court can be taken

1. Lakshmi Narayan v. Ratni, 1926 Lah 199 = 93 I O 700 = 27 Or L J 476 = 27 P L R 225. 1936 L/77 & 78

away by the Legislature without the use of express terms or by praying in aid a necessary implication. There certainly is no deprivation of the High Court of its jurisdiction in express terms in S. 3, Provincial Insolvency Act, and, from what we have said above, it is equally clear that there cannot be any necessary implication that the jurisdiction in the High Court has been taken away by the terms of the said section. We have been referred to the two decisions of Single Judges, of Rangoon which we do not think really touch the point we have to consider. We have been referred also to 52 Mad 57 (2), but the only point in that case that appears at all relevant to this enquiry is that the learned Judge in that case came to the conclusion that the word "suit" in a similar clause in their Letters Patent included a proceeding in insolvency.

We, therefore, decide that this High Court under its extraordinary powers has jurisdiction to transfer a proceeding in insolvency from the lower Court to this Court for disposal. The official Liquidator will have his costs. As the case was one of first impression and of a difficult nature we fix the costs at Rs. 250 (Rupees two hundred and fifty). The second application is necessarily dismissed.

V.B./R.K. *Application dismissed.*

2. Goculdass Jamnadass v. Sadasiva Iyer, 1928 Mad 1091=114 I C 352=52 Mad 57=55 M L J 671.

A. I. R. 1936 Lahore 610

ADDISON AND ABDUL RASHID, JJ.

Basanti Debi and another—Decree-holders—Appellants.

v.

Official Receiver, Estate of Ghulam Rasul—Judgment-debtor—Respondent.

Letters Patent Appeal No. 22 of 1936, Decided on 14th April 1936, from judgment of Jai Lal, J., D/- 9th January 1936, reported as 1936 Lah 508.

Decree—Construction—Property attached before judgment by order of Court—Attachment to continue till decision of case—Parties entering into compromise and inserting clause to the effect that attachment was to continue in case of default in payment—Default taking place—Held that clause created no charge on property in dispute.

The decree-holders attached before judgment the property of the judgment-debtor. Subsequently the parties entered into a deed of com-

promise whereby the judgment-debtor promised to pay a certain sum to the decree-holder. A clause to the effect that attachment was to continue was also inserted in the compromise deed. The default having taken place, it was contended that such a clause had created a charge on the property in dispute:

Held: that the clause in the deed was inserted in order to keep the attachment before judgment effective and could not create a charge on the property in dispute: 1929 Oudh 539 and 32 Bom 386, *Disting.* [P 611 C 2]

Mehr Chand Mahajan and Tasaddug Hussain—for Appellants.

Darbari Lal and Fayyaz Hassan Shah—for Respondent.

Abdul Rashid, J.—On 20th March 1933 Mt. Basanti Devi and Mt. Kishan Piari brought a suit against Ghulam Rasul for recovery of Rs. 9,244 on the basis of a promissory note. On 11th July the plaintiff presented an application for attachment before judgment in respect of four squares of land belonging to the defendant. On 7th August the trial Court issued an order of attachment in respect of these four squares in the following terms: "Warrant qurgi qabl az faisla ta faisla muqadma jari ho." On 25th October a written deed of compromise was filed in Court whereby Ghulam Rasul undertook to pay Rs. 9,000 by 25th April 1934 to the plaintiffs in full satisfaction of their claim, and in case of default undertook to pay the whole of the amount claimed with costs and future interest. Cl. 2 of the deed of compromise was in the following terms:

Murabajat muda-alia jo bazaria adalat qurg ho chuke hain ta adaigi kul raqm digri maruq samjhe jainge.

A decree was passed by the Court in terms of the compromise. On 9th June 1934 an application was made by the decree-holders to register the compromise and the compromise was ultimately registered on 14th January 1935. In the meantime Ghulam Rasul had presented an application for being adjudicated an insolvent on 21st April 1934. The order of adjudication was passed on 14th December. A default having been made by Ghulam Rasul in the payment of Rupees 9,000 in accordance with the terms of the compromise an application was made by Mt. Basanti Devi and Mt. Kishan Piari for execution of the decree based on the compromise. It was stated in this application that the decree-holders had a lien on the four squares of land belonging to the judgment-debtor by virtue of the

condition in the compromise that the same shall be considered to be under attachment till the satisfaction of the decree, and it was prayed that these squares may be sold in the execution of the decree for the benefit of the decree-holders. A notice was issued to the Official Receiver in whom the property of Ghulam Rasul had vested owing to his having been adjudicated an insolvent. The Official Receiver denied that the decree-holders were secured creditors and this question was decided by the executing Court in favour of the Official Receiver. Against this decision, the decree-holders preferred an appeal to this Court. This appeal having been dismissed by a learned single Judge, the decree-holders have preferred the present appeal under Cl. 10, Letters Patent.

The only question for decision in this case is whether by virtue of Cl. 2 of the deed of compromise a charge or lien had been created in respect of the land referred to in the deed of compromise. It was contended by the learned counsel for the appellants that Cl. 2 of the deed of compromise amounted to an undertaking by the judgment-debtor that he will not alienate his squares of land in any manner till the entire decretal amount had been paid off. It was urged that originally the land in dispute had been placed under attachment till the decision of the case by order of the trial Court and that as this attachment was going to terminate, the parties by their own act created an attachment in respect of the same property. The contention of the learned counsel was that if an attachment is created by the act of parties, it implies that the parties undertake not to alienate that property in any manner and that such an undertaking not to alienate the property till the decretal amount is paid, creates a charge on the property so placed under attachment by act of parties to the extent of the decretal amount. Reference was made in this connexion to 121 I C 81 (1) and 32 Bom 386 (2). In our opinion, the contention of the learned counsel for the appellants is unsustainable. The property in dispute was attached before judgment by an order of

the Court, and it was definitely stated that this attachment will continue only till the decision of the case. When the compromise was entered into, it was realised that the property would shortly be released from attachment. In order to prevent any change in the status of the parties or in the liability of the land to attachment the parties definitely stated in the compromise that the squares belonging to the defendant which had been attached through Court shall be considered to be under attachment till the payment of the entire decretal amount. By means of this clause, it was intended to ensure that the property in dispute will remain under attachment as before. The words of Cl. 2 of the deed of compromise are clear and unambiguous and it is not open to the Court to hold that there is any ambiguity which needs explanation when the language of the document is clear on the face of it. The fact that the appellants opposed the insolvency application preferred by Ghulam Rasul shows that they never regarded themselves as secured creditors. In the present case, the execution of the decree had been deferred for six months according to the compromise, and it was in order to keep the attachment before judgment effective that Cl. 2 was inserted to the effect that the property shall be considered to be under attachment till the payment of the entire decretal amount.

For the reasons given above, we agree with the learned single Judge that the expression used in the deed of compromise leave no doubt that in the present case there was no question of a charge in the contemplation of the parties when they entered into the compromise. We, therefore, dismiss this appeal. The parties shall bear their own costs in this Letters Patent appeal.

R.W./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 611

JAI LAL, J.

Muhammad Ishaq—Defendant—Appellant.

v.

Mt. Sairan—Plaintiff and others—Defendants—Respondents.

Second Appeal No. 1329 of 1935, Decided on 5th December 1935, from decree of Dist. Judge, Jullundur, D/- 27th May 1935.

1. Narain Das v. Murlidhar, 1929 Oudh 539=121 I C 81=6 O W N 903.

2. Janardana v. Anant, (1908) 32 Bom 386=10 Bom L R 525.

Mahomedan law—Divorce — Divorce in writing and customary form—No notice to wife legally necessary.

If a divorce is in writing and in customary form, no notice of it to the wife is legally necessary. [P 612 C 1]

Muhammad Munier—for Appellant.

Shamair Chand — for Respondent (Plaintiff).

Judgment.—It is conceded that if the divorce was in writing and in customary form, no notice of it to the wife was legally necessary. I think it must be assumed under the circumstances disclosed in this case that there was a divorce in writing in customary form specially because the appellant did not go into the witness-box to contradict the plaintiff's evidence and to explain the contents of the documents which were specially within his knowledge, the document not having been produced. Moreover, I consider that the wife having filed the present suit for a declaration that she had been divorced must be presumed to have notice of the divorce; but the appellant's counsel contends that the notice should be within a reasonable time. Indications are that the fact of the divorce became known to all concerned immediately after the second marriage of the appellant and I am doubtful if this plea is open to the husband who has been proved to have divorced the wife. I dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1936 Lahore 612

AGHA HAIDAR, J.

Dhala Bahlak—Plaintiff—Appellant.

v.

Dhala Lakhan and others—Defendants—Respondents.

Second Appeal No. 1143 of 1935, Decided on 30th January 1936, from decree of Dist. Judge, Gujranwala, D/- 24th April 1935.

(a) **Pre-emption—Suit for—Transfer whether sale—Person executing agreement in favour of certain person in consideration of their financing and helping in carrying on litigation in respect of certain land, to transfer portion to them in event of being successful—Land so transferred subsequently—Transaction amounts to sale and is subject to right of pre-emption.**

Where a person in consideration of certain person financing and helping him in carrying on a litigation with regard to certain land in dispute, executes an agreement in their favour that in the event of success he would transfer a portion of the land to them and on being

successful in the litigation does so transfer the land, the transfer amounts to a sale, the consideration being the money which the transferees had spent and the time and the trouble which they had expended and were going to devote for the benefit of the vendor in order to bring the litigation which he had started to a successful termination. The transaction being a sale is subject to right of pre-emption: 54 P R 1889; 29 P R 1893; 2 P R 1903; 23 P R 1906 and 7 All 626 (F B), Ref.; 1926 Oudh 196 and 368, *Disting.* [P 615 C 2]

(b) **Precedents—Punjab—Courts in Punjab should as far as possible follow case law in Punjab when it is uniform and based on sound legal principles.**

It is desirable that the case-law of the Punjab, especially if it has the merit of uniformity and is otherwise based upon sound legal principles, should, as far as possible, be followed so that the Court below as well as the litigants might know exactly what is the settled law on a particular subject in the Province. [P 615 C 2]

(c) **Practice—New plea—Highly technical point not raised in Courts below and in grounds of appeal—High Court can disallow appellant to raise it in second appeal—But if question is of importance and one purely of law apparent on face of record High Court may allow argument on it.**

Where a highly technical point is not raised by the appellant either in the lower Courts or in the grounds of appeal before the High Court it is open to the High Court, in second appeal, not to allow the appellant to raise it for the first time. [P 616 C 1]

Where, however, the question is of importance, the High Court may allow the parties to argue on the point especially if it is a pure question of law apparent on the face of the record and does not depend upon the evidence. [P 616 C 1, 2]

(d) **Civil P. C. (1908), O. 41, R. 4—Pre-emption suit—Pleas raised by vendees defendants common to all—Appeal by one of them—Appeal alleged to have been filed under O. 41, R. 4—Appellant is entitled to appeal in his own name—Success of appeal enures for benefit of all vendees.**

Where in a suit for pre-emption, the pleas raised by the vendees-defendants are common to them all and only one of them appeals from the decree in the suit, but the memorandum of appeal clearly mentions O. 41, R. 4 according to which the appeal is filed in the name of only one of the vendees, and the other vendees defendants are advisedly impleaded as respondents, it is competent for one of the vendee-defendants to appeal in his own name even though the interests of the other vendees defendants are not inseparable from the interest of the appellant and the success of the appeal enures for the benefit of the appellant as well as his co-vendees-respondents: 30 Cal 429; 28 Mad 132 and 30 Mad 470, *Rel. on*; 6 Rang 29 (P C); 1928 All 746 and 1934 Pat 524, *Disting.*; 44 I O 762, *Commented upon.* [P 616 C 2; P 617 C 1]

Barkat Ali, Asad Ullah Khan, Muhammad Amin and Muhammad Aslam Khan—for Appellant.

Mukand Lal Puri—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. The trial Court decreed the suit on payment by the plaintiff of a sum of Rs. 1,100 which the Court found to be the market value of the pre-empted land. One of the vendees went up in appeal and the lower appellate Court allowed the appeal and dismissed the plaintiff's suit and further went on to hold that the market price of the land was Rs. 9,600. The plaintiff has come up to this Court in second appeal.

Sardara, defendant 1, (vendor) had a dispute over certain land with Khanu and others. The area of that land was about 42 kanals. Sardara had no funds and was not, therefore, in a position to fight the case successfully against Khanu and others: Sardara approached defendants 2 to 5, Maulu and Dhala, sons of Lakhan, Ghulam and Nathu (vendees) and asked them to finance the suit which he intended to bring. They promised to help him and afterwards spent money on his behalf and obtained copies of the important documents which helped Sardara in his litigation. While the litigation was in progress Sardara and defendants 2 to 5 (vendees) entered into an agreement, Ex. D-1, dated 4th March 1932, which was duly registered. In this agreement Sardara recited how defendants 2 to 5 had been prosecuting the case for him by paying counsel's fee, defraying the expenses of court-fees and summoning witnesses, and that a sum in the region of Rs. 400 and Rs. 500 had already been spent by them up to the date of the agreement. It was also pointed out that further expenses were likely to be incurred in the shape of payment of extra court-fee, which the executant would be unable to pay, and that the case was likely to go up to the High Court in appeal. It was stipulated that in the event of success defendants 2 to 5 would be entitled to one-fourth of the land in suit and that if the suit failed defendants 2 to 5 shall be entitled to recover the costs from the executant.

On 9th May 1932 the suit was decreed in favour of Sardara. There was an appeal to the District Judge which was dismissed on 31st May 1932. Sardara, having thus perfected his title to the land for which he had been litigating, made a report to the Patwari on 11th August 1932 in which he stated that he

had transferred 8 kanals of land (field No. 1093) to defendants 2 to 5 in equal shares in consideration of the money that they had spent in prosecuting his claim.

On 15th August 1932 Sardara made a formal application to the revenue authorities in which he mentioned that he had obtained possession of the land as a result of the decree dated 9th May 1932 and that in accordance with the agreement he had given 8 kanals of land (=file No. 1093) to Dhala and others, defendants 2 to 5), and in order to have mutation sanctioned he prayed that entries in the names of Dhala, Maulu, Nathu and Ghulam may be effected and that the statements of the parties may be recorded. On the same day Sardara (vendor) appeared before the revenue officer and stated that, according to the agreement dated 4th March 1932, he had completely sold the land in favour of Dhala, Maulu, Ghulam and Nathu in equal shares and had delivered possession. On behalf of the vendees Dhala made a statement to the same effect and admitted that he along with Maulu, Ghulam and Nathu had obtained possession in equal shares of the land in Khasra No. 1093. On 1st February the mutation was accordingly effected in the names of the vendees. On 1st February 1933 the present suit was instituted by the plaintiff alleging that the transaction detailed above amounted to a sale and that he was entitled to pre-empt the land on payment of Rs. 1,100 the price of the land in suit, according to its market value at the time of sale.

The main defence, with which we are concerned in the present appeal, was that the transaction relied upon by the pre-emptor was not a sale and therefore the present suit for pre-emption was not maintainable. It was also pleaded that the sale consideration was not Rs. 1,100 but Rs. 9,600 as the value of the land had considerably increased on account of its inclusion in the abadi. The trial Court decreed the plaintiff's claim on payment of Rs. 1,100. Dhala, son of Makhan, one of the four vendees, went up in appeal and the lower appellate Court held that the transaction between the transferor and the transferees, which formed the basis of the present suit for pre-emption, did not amount to sale and therefore the plaintiff's suit must be dismissed. He also held that the market price of the

property was Rs. 9,600 and that the plaintiff could pre-empt only on payment of this sum in case the transaction relied upon by him turned out to be a sale.

The plaintiff has come up to this Court in second appeal and I am indebted to the learned counsel for the parties for the extremely able arguments which they addressed to the Court. Mr. Barkat Ali, the learned counsel for the appellant, argued that the transaction relied upon by the plaintiff was really a sale and that it was not necessary that the consideration for the transfer of the land should have been paid in the form of cash only. He relied upon 54 P R 1889 (1). This case arose out of a suit for pre-emption and the Court had to construe the provisions of S. 9, Punjab Laws Act No. 4 of 1872. In that case Mt. Bakhto had entered into agreement with Sheikh Ibrahim that if he brought a suit on her behalf and succeeded in recovering certain land, she would in consideration of his services and the money expended by him in prosecuting the suit, transfer to him half the land in dispute. The suit was brought and was successful and Mt. Bakhto carried out her agreement and transferred half the land to Sheikh Ibrahim. A suit was brought to pre-empt this transfer. It was pleaded that the transaction did not amount to sale, but the learned Judges held that money actually spent by Sheikh Ibrahim on the suit together with the time and trouble spent by him which were equivalent of money, all constituted price as the term is used in S. 77, Contract Act. They further held that the price need not be confined to cash consideration only. They therefore arrived at the conclusion that the transaction was a sale and therefore liable to pre-emption.

In 29 P R 1893 (2) it was held that money and some land given for a permanent transfer of land amounted to a sale transaction within the meaning of S. 9, Punjab Laws Act. It was observed by the learned Judges that the transfer of land for Rs. 100 was sale and that the parties to the transaction by agreeing that the price should be Rs. 100 and a brass lota could not alter the true charac-

ter of the transaction. In 2 P R 1903 (3) it was held that an assignment of immovable property for money plus favours plus past services was a sale within the meaning of S. 9, Punjab Laws Act, and the learned Judges distinctly repelled the contention that the price should, in order to give rise to a right of pre-emption under the Punjab Laws Act, only be money.

In 23 P R 1906 (4) a learned single Judge of the Chief Court of the Punjab had to deal with a case in which consideration was stated to be natural love and affection, past services and part payment of the debt due by the transferors and a promise to pay the balance. On a review of authorities the learned Judge came to the conclusion that the transaction in suit was a sale within the terms of S. 9, Punjab Laws Act, though part of the consideration was money paid and to be paid by the transferee for the benefit of the transferor, and the addition of past services and natural love and affection all constituted the price at which the pre-emptor was to take the land in suit. It must be noted that 54 P R 1889 (1) had been followed throughout in these cases. In this connexion it would not be out of place to refer to the Full Bench decision of the Allahabad High Court reported in 7 All 626 (5). The learned Judges had to consider the question whether the plot of land in exchange can be treated as a price (qimat) of another plot of land within the terms of the pre-emption clause of a certain wajib-ul-arz. The learned Chief Justice held that the word 'qimat' used in the context was not confined merely to money but equivalent of value. Mahmood, J., made the following observations:

We observe with respectful consideration that the word 'qimat' which is of Arabic origin must be interpreted in the sense given to it by the Mahomedan law, and that is undoubtedly not the technical meaning of the English word 'price.' In the law of pre-emption 'qimat' includes not only money but other kinds of property capable of being valued at a definite sum of money.

The law of pre-emption was introduced in India by the Mahomedans and

1. Haji Muhammad v. Mt. Bakhto, (1889) 54 P R 1889.

2. Gul Muhammad v. Khan Ahmed Shah, (1893) 29 P R 1893.

3. Kishen Singh v. Jai Kishen Das, (1903) 2 P R 1903=53 P L R 1903.

4. Ali Bakhsh v. Sobha Singh, (1906) 23 P R 1906=107 P L R, 1906.

5. Niamat Ali v. Asmat Bibi, (1885) 7 All 626 =1885 A W N 183 (F B).

technical expressions used in books of Mahomedan law on the subject have in one form or other been incorporated in the law of pre-emption in this country whether that law is codified or not. Therefore the interpretation put upon the word 'qimat' or 'price' in the Allaha-bad Full Bench case noted above, has a direct bearing upon the question raised in the present case. Reliance was placed by the Courts below upon 1930 Lah 141 (6). This was a second appeal and the Courts below had arrived at a finding that the consideration for the transfer of the holding consisted mainly of past services. The attention of the learned Judge was invited to 54 P R 1889 (1) by the counsel for the appellant.

The learned Judge observed that the case seemed to be in favour of the appellant but did not appear to have been followed in any subsequent decisions. In the end the learned Judge recorded the finding that the real consideration for the sale was services rendered and it was not disputed before him that a transaction cannot be considered to be a sale for the purpose of the Pre-emption Act, unless the consideration consisted mainly, if not wholly, of cash. It is to be regretted that the attention of the learned Judge was not drawn to the cases in which 54 P R 1889 (1) was consistently followed in the Chief Court. Even as it is, the decision supports the contention of the appellant inasmuch as in the present case part of consideration in the agreement Ex. D/1 is specified as a substantial sum in the neighbourhood of Rs. 400 or Rs. 500. Two Oudh cases have been cited before me by counsel for the respondents' namely, 92 I C 757 (7) and 93 I C 114 (8). In these cases the learned Judges naturally felt themselves constrained to interpret the provisions of S. 54, T. P. Act. They held that:

It is necessary for a transaction to amount to a sale that there should be a price paid or promised or part-paid and part-promised, which means that the price must be stated or ascertained at the time of the deed.

As the price could not be ascertained because part of the consideration of the transfer consisted of costs of litigation,

6. Ali Akbar Shah v. Ghogar Shah, 1930 Lah 141=120 I C 683=31 P L R 838.

7. Ram Pher Singh v. Sheo Saran Singh, 1926 Oudh 196=92 I C 757=3 O W N 188.

8. Rachoha Ram v. Paltan, 1926 Oudh 868=93 I C 114.

it was held that the price was not ascertainable at the date of the exchange. On this line of reasoning the pre-emption suits failed. We in the Punjab are not trammelled with the strict language of S. 54, T. P. Act, where sale is defined. Of course for a transfer of the land in the Punjab or elsewhere there must be a price or consideration and in the present case we have a number of cases decided by the Chief Court of the Punjab where the word 'price' has been interpreted in a liberal and generous manner and not according to the cast iron frame of S. 54, T. P. Act, which does not apply to the Punjab. Furthermore, in my humble judgment, it is desirable that the case-law of the Punjab, especially if it has the merit of uniformity and is otherwise based upon sound legal principles, should, as far as possible, be followed so that the Courts below as well as the litigants might know exactly what is the settled law on a particular subject in the Province. I am therefore of opinion, having regard to the nature of the transaction, the transfer in favour of the vendees was a sale and the consideration was the money which the vendees had already spent and the time and trouble which they had expended and were going to devote for the benefit of the vendor in order to bring the litigation which he had launched to a successful termination.

Mr. Barkat Ali challenged the finding of the lower appellate Court as regards the price. His argument was that on 11th April 1933 the Pleader for the defendants vendees had made a statement before the Court that the land in dispute was at the time of making the statement worth Rs. 5,000 or Rs. 7,000, but when the agreement (Ex. D/1) was executed, the price of the land was hardly Rs. 1,000; though now that the land has been included in the abadi, the prices have increased. On 16th June 1933, the plaintiff himself stated that the land in suit was worth Rs. 60 per marla, and that this was its market price. Dhala, vendor, also stated that the price of the land is not less than Rs. 10,000. The lower appellate Court considered these admissions and discarding them as mutually destructive relied upon Exs. D. W. 4-1 and 2 and D. W. 4-7 which were copies of sale-deeds of the land adjacent to the land in suit. Five of these sale-deeds were completed on

24th May 1932 and two on 27th May 1932 and on their basis the price was Rs. 9,600. In this connexion it may be noted that the registered agreement, as already pointed out, is dated 4th March 1932 and the report made by Sardara to the Patwari is dated 11th August 1932. And what is even more important, according to para. 1 of the plaint, the sale took place on 11th August 1930. Under these circumstances, I think the lower appellate Court was justified in not pinning down the defendant to the statement of his pleader made on 11th April 1933 but adopted the right course of ascertaining the price upon the basis of the admission of the plaintiff himself dated 16th June 1933 coupled with the samples provided by the sale transactions embodied in Exs. D. W. 4-1 and 2 and D. W. 4-7. I therefore take it that Rs. 9,600 was the price of the land, and this being a finding of fact based upon evidence is binding upon this Court in second appeal.

A contention was raised by the learned counsel for the appellant that, inasmuch as only one of the vendees, namely Dhala, son of Makhan, had filed the appeal to the lower appellate Court, and his co-vendees, namely Maulu, Ghulam and Nathu, had not joined him but were merely impleaded as defendants, the Court below should have decreed the appeal to the extent of one-fourth share of the appellant only and should not have disturbed the decree which the plaintiff had obtained against the other three vendees in the trial Court which had not been appealed against and which had therefore become final as between the plaintiff and the non-appealing vendee defendants. This contention was not raised either in the lower appellate Court or in the grounds of appeal in this Court and in second appeal it might have been open to this Court not to allow the appellant to raise this highly technical point for the first time. So far as the right of the appellant to maintain his suit is concerned, the matter is not of any importance now because I accepted the contention of the appellant. But as regards the question of consideration, the question is of importance and I therefore allowed the counsel for both parties to argue the point, especially as it was a pure question of law apparent on the face of the record and did not depend upon

evidence. The learned counsel for the appellant relied upon 6 Rang 29 (9), 51 All 63 (10), 1934 Pat 524 (11) and 44 I C 762 (12). With the exception of the last case, all the other cases deal with the provisions of O. 41, R. 33, Civil P. C., and therefore have no application so far as the present case is concerned. In 44 I C 762 (12) which was a case under O. 41, R. 4, Civil P. C., it was laid down that :

In a case in which one only of several defendants appeals, the result of the appeal will enure to the benefit of the other defendants only if the interests of the other defendants are inseparable from the interests of the defendant appellant.

Although this expression of opinion, as it stands, is entitled to respect, it may be pointed out that in spite of the fact that there is a considerable body of case-law on the subject, no cases are mentioned in the judgment of the learned Judges. Furthermore, the language of O. 41, R. 4 does not suggest the restriction which the learned Judges have sought to introduce by the qualifying words "if the interests of the other defendants are inseparable from the interests of the defendant appellants." O. 41, R. 4 is clearly worded and in unambiguous language lays down that where there are more plaintiffs or more defendants than one in a suit and the decree proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree and the appellate Court may reverse or vary the decree for the benefit of all the plaintiffs or defendants as the case may be. In the present case the pleas in defence raised by the vendees defendants were common to all of them and, what is more important, the memorandum of appeal clearly mentions O. 41, R. 4 according to which the appeal was filed in the name of only one of the vendees and the other vendee defendants were advisedly impleaded as respondents. In these circumstances, it was perfectly competent to the appellant in the Court below to appeal in his own

9. Chokalingam Chetty v. Seethai Achi, 1927 P C 252=107 I C 237=6 Rang 29=55 I A 7 (P C).

10. Rukia v. Mewa Lal, 1928 All 746=111 I C 751=26 A L J 1139=51 All 63.

11. Ram Prasad Singh v. Mohan Mandal, 1934 Pat 524=150 I C 784.

12. Manendra Koor v. Sat Narain Lal, 1917 Pat 152=44 I C 762=3 Pat L J 166.

name and the success of the appeal naturally ensured for the benefit of the appellant as well as his co-vendees respondents.

In this view I am supported by a very respectable body of judicial opinion to be found in 30 Cal 429 (13), 28 Mad 122 (14) and 30 Mad 470 (15). In the last mentioned case referring to the analogous S. 544, old Civil P. C., the learned Judges observed that the decision appealed against should have proceeded on any ground common to all and that there was nothing in the section to warrant the importation of any qualification. I therefore overrule the contention of the learned counsel for the appellant on this point. The result therefore is that the plaintiffs' appeal is allowed on condition that the plaintiff appellant shall pay the sum of Rs. 9,600 in the Court of the learned District Judge within a period of two months in default whereof the suit shall stand dismissed with costs. The appellant shall bear his costs throughout, in case the price is paid and the appeal succeeds.

R.M./R.K.

Appeal allowed.

13. Ram Kamal Shaha v. Ahmad Ali, (1903) 30 Cal 429.
14. Annamalai Chettiar v. Pitchu Ayyar, (1905) 28 Mad 122=15 M L J 28.
15. D. Subbaya v. P. Subbaya, (1907) 30 Mad 470=17 M L J 119 (F B).

A. I. R. 1936 Lahore 617

TEK CHAND AND DALIP SINGH, JJ.

Lal Chand and others—Appellants.

v.

Megha Ram and others—Respondents.

First Appeal No. 2262 of 1934, Decided on 13th December 1935, from decree of Sub-Judge, Third Class, Pakpattan, D/- 27th August 1934.

Civil P. C. (1908), Sch. 2, paras 16, 17 and 19—Para 16 is made applicable and no appeal lies against decree passed on award under para 17 except so far as it is at variance with award.

Paragraph 16 is applicable to proceedings under para. 17 so that where following on an award arrived at under para. 17, the Court delivers judgment and passes decree, no appeal from such a decree lies except in so far as the decree is at variance with the award: 25 P R 1902 (P O); 9 P R 1913 and 1914 Lah 145, Foll. [P 617 C 2; P 618 C 1]

J. N. Aggarwal and S. L. Puri—for Appellants.

Achhru Ram and Inder Dev—for Respondents.

Dalip Singh, J.—A preliminary objection has been taken in this appeal that no appeal lies. The facts are that an agreement to refer to arbitration was filed in Court under para. 17, Sch. 2, Civil P. C., and the Court proceeded to refer the case to arbitrators who gave their award on 29th June 1934. Ten days were allowed for the parties to file objections to the award. No such objections were put in within the time fixed. Thereafter on 27th August the Court proceeded to judgment and passed a decree in accordance with the award. This judgment is printed at p. 21 of the paper-book and the decretal form at p. 23 of the paper-book. Four persons, Lal Chand, Jesa Ram, Hira Ram and Pokhar Das, against whom certain sums had been decreed for payment, have appealed to this Court. The short question is whether on a decree following an award arrived at under para. 17, Sch. 2, an appeal lies from it except in so far as the decree is at variance with the award. It is clear that in the case of a pending suit no such appeal would lie under the terms of para. 16 of the same schedule. It is equally clear that in the case of an award without the intervention of a Court no appeal would lie under the terms of para. 21 of the same schedule, and under para. 19 all the foregoing provisions, i. e., all the provisions from paras. 1 to 16, are made applicable to proceedings under para. 17 so far as they are consistent with any agreement filed under that paragraph. The learned Counsel for the appellant contends that para. 16 is not so made applicable. For this proposition he has no authority, and the rulings, 9 P R 1913 (1) and 28 P R 1914 (2), are directly against him.

He has relied on 117 P R 1916 (3), but that was a case where there was no decree following the award the learned District Judge having set aside the award altogether. That case, therefore, is of no help to the appellant. The principle is really laid down in the Privy Council ruling reported as 25 P R 1902 (4). I

1. Jagan Nath v. Nanak Chand, (1913) 9 P R 1913=16 I O 996.
2. Wall Muhammad v. Bahawal Baksh, 1914 Lah 145=21 I O 925=28 P R 1914=14 P L R 1914.
3. Ram Jawaya v. Devi Ditta, 1916 Lah 89=34 I O 192=117 P R 1916=70 P L R 1917.
4. Ghulam Jilani v. Muhammad Hassan, (1902) 25 P R 1902 (P C).

would, therefore uphold the preliminary objection that no appeal lies. The next contention of the learned Counsel was that an appeal would lie even if para. 16 applies because no time was given to file objections to the award. The award was filed on 29th June 1934, and ten days' time, as stated above, was allowed to the parties. On 6th July it would seem that the records of the case were sent for by the High Court, but it is obvious that the presence or absence of the record could have no bearing on the omission to file any objections to the award, for such objections could only relate to the conduct of the arbitrators on which no light would be thrown by the record of the Court. There is therefore no force in this objection also. It is also clear that there is no ground for revision which was the last plea urged by the learned Counsel for the appellants. I would therefore uphold the preliminary objection and dismiss the appeal with costs.

Tek Chand, J.—I agree.

V.B./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 618

BHIDE, J.

Muhammad Sadiq and another—Petitioners.

v.

Mt. Sami-ul-Nissa and others—Respondents.

Civil Revn. No. 328 of 1934, Decided on 9th December 1935, from order of Senior Sub-Judge, Delhi, D/- 8th April 1934.

(a) Civil P. C. (1908), S. 115—Proceedings abated—Order of restoration and order refusing to grant review of same constitute 'case' within S. 115.

The order of restoration, as well as the order refusing to grant review of the same relating to an application for restoration of the proceedings dismissed in default, constitute a 'case' within the meaning of S. 115: 1926 *Lah* 379, *Foll.* [P 619 C 1]

(b) Abatement—Revival of proceedings—Partition decree—Appeal by R—Pending appeal, application by R for demarcation—S objecting and filing application—Both R and S absent on date of arguments—R's application dismissed for default—R died and appeal abated—S applying for revival of proceedings—Court held had no jurisdiction to revive proceedings.

There was a final decree for partition, from which an appeal was preferred by one R. During pendency of this appeal R applied for demarcation; and a commissioner was appointed for the purposes. S also made a similar applica-

tion and raised objections. A report was made by the Commissioner and after recording evidence a date was fixed for arguments. Both parties being absent application by R was dismissed for default. In the meanwhile R died and the appeal also was held to have abated as a result. S applied for revival of above proceedings:

Held: that the Court had no jurisdiction to revive these proceedings in the circumstances of the case. S's application, which was sought to be revived, was only in the nature of objections to proceedings taken on the application of R. When the latter was dismissed for default there was no foundation left for these objections. [P 619 C 1]

Bhagwat Dayal—for Petitioners.

M. C. Mahajan and Shamair Chand—for Respondents.

Order.—The material facts bearing on this petition for revision are as follows: There was a final decree for partition of certain properties, from which an appeal was preferred to this Court by one Rahim Bakhsh alias Abdul Wahab. During the pendency of this appeal, an application was made to this Court by the appellant praying that an injunction may be issued to the respondents restraining them from making alienations or building on the portions allotted to the different co-sharers, as any such action might result in irreparable loss to the appellant. The prayer was granted in certain respects and it was directed inter alia that if the parties wanted to make any new buildings or alter the existing building, this should be done only with the permission of the trial Court and subject to such conditions as might be imposed by it (vide order of this Court dated 3rd February 1927). Rahim Bakhsh applied on 27th July 1931 for demarcation of certain properties with a view to building thereon and a Commissioner was appointed for the purpose. Mt. Sami-ul-Nissa who had also made a similar application raised objections and put in several applications but no orders were passed thereon. A report was made by the Commissioner and after recording evidence a date was fixed for arguments. But both parties being absent the application of the Rahim Bakhsh was dismissed in default and the proceedings were consigned to the record room on 14th March 1933. It appears that Rahim Bakhsh had died in the meantime and the appeal in the High Court was also held to have abated as a result.

On 18th April 1933, Mt. Sami-ul-Nisa applied for revival of the above proceedings. The present petitioners objected to the revival of these proceedings, as Mt. Sami-ul-Nisa's objections could not be heard when the original application of Rahim Bakhsh in connection with which the objections had been raised had been dismissed and even the appeal which gave rise to these proceedings had abated. The objection was overruled and the proceedings were restored to the file on 8th November 1933. An application for a review of this order was dismissed on 8th April 1934. A preliminary objection was raised that the petitioners had only applied for revision of the order dated 8th April 1934, and that this order being interlocutory, the petition was not maintainable. I do not think there is any force in this contention. A reference to the grounds for revision shows that both orders were sought to be attacked, viz., the order of restoration, dated 8th November 1933, as well as the order refusing to grant a review of the same; and copies of both these orders were attached to the petition for revision. These orders relate to an application for restoration of proceedings dismissed in default and appear to me to constitute a 'case' within the meaning of S. 115, Civil P. C.: 7 Lah 161 (1).

On merits, I do not see how the lower Court can be held to have had any jurisdiction to revive these proceedings in the circumstances of the case. Mt. Sami-ul-Nisa's application, which is sought to be revived by her was only in the nature of objections to proceedings taken on the application of Rahim Bakhsh. When the latter was dismissed in default, there was no foundation left for these objections. The learned counsel for the respondents urged that the petitioners had made some encroachments on the properties in question during these proceedings; but if they have done it, it is not in consequence of any action of the Court. For admittedly no order was passed by the Court on the points at issue. If the petitioners have made any unlawful encroachment, the respondent can seek her remedy in Court. The petitioners' counsel's contention that the learned Subordinate Judge had no jurisdiction at all to go on with these proceedings after

the abatement of the appeal also appears to me to be correct. The order of the High Court, dated 3rd February 1927, in pursuance of which the Court was acting, was intended to operate only during the pendency of the appeal. I accept the petition with costs and set aside the orders of the learned Subordinate Judge, dated 8th November 1933, and 8th April 1934, referred to above.

V.B.B./R.K. *Petition accepted.*

A. I. R. 1936 Lahore 619

YOUNG, C. J. AND JAI LAL, J.

Secy. of State—Petitioner.

v.

Ch. Jamalud-Din and others—Opposite Parties.

Civil Revn. No. 560 of 1935, Decided on 31st January 1936, from order of Sub-Judge, Second Class, Lahore, D/- 29th July 1935.

Revision—Competency—Suit by ratepayer against Municipal Committee for injunction restraining defendant from paying salary of officer of committee on ground of his appointment being ultra vires, by reason of his term of office having been illegally extended by Ministry for Local Self-Government—Secretary of State for India applying to be impleaded as party—Application rejected by trial Court—Order held to be improper and open to revision—Secretary of State held to be proper party, being directly affected by result of suit.

Where a Court does not apply its mind to the real dispute in the case and wanders into discussion of extraneous matters and disallows an application by a person who is directly affected by the result of the suit, to be impleaded as defendant, and, directs him to seek his remedy by separate suit and thus fails to apply the well-recognized rule that one object of impleading parties is to avoid multiplicity of suits, its order cannot be sustained and is open to revision. [P 621 C 1]

Certain persons claiming to be the rate-payers of a Municipality instituted a suit against the Secretary of Municipal Committee for a perpetual injunction against the defendant restraining him from paying a certain sum as pay and allowance to an executive officer of the committee on the ground that he was not a legally appointed servant of the Municipality, his term of office, having been illegally extended by the Ministry for Local Self-Government. The Secretary of State for India applied to be impleaded as a defendant in the suit contending that he was directly affected by the result of the suit, as the object of the plaintiff was to have the orders of the Government set aside by challenging their validity. The Court refused the application of the Secretary of State for India to be impleaded as party and decreed the suit on confession of judgment by the Municipal Committee. It

1. Piroj Shah v. Darib Shah, 1926 Lah 379=95 I C 124=7 Lah 161=27 P L R 321.

appeared that the suit was a collusive suit to get round the orders of the Government by improper means :

Held : that the order of the Court refusing to implead the Secretary of State for India could not be sustained. The Local Government and, therefore, the Secretary of State, was directly affected by the result of the suit as it was the legality of the action of the Government in appointing and renewing the appointment of the officer that was the real matter in controversy in the suit and was a proper party to the suit. [P 621 C 1]

Ram Lal—for Petitioner.

S. C. Chatterji for *Municipal Committee, Lahore*—for Opposite Parties.

Order.—This is a petition for revision by the Secretary of State for India in Council against an order of Mr. Maqbul Ahmad, Sub-Judge, Second Class, Lahore. It arises under the following circumstances :

Ch. Jamalud-Din and two others claiming to be ratepayers of Lahore instituted a suit against the Secretary, Municipal Committee, Lahore, in the Court of the Sub-Judge, Second Class, Lahore, for a perpetual injunction against the defendant restraining him from paying Rs. 1,200 per mensem as pay and Rs. 100 per mensem as conveyance allowance to R. B. Lala Shankar Das, Executive Officer of the Committee, after 8th July 1935, on the ground that he was not a legally appointed servant of the Municipal Committee of Lahore. It was alleged that R. B. L. Shankar Das had originally been appointed by the Municipal Committee as Executive Officer for three years, but his term had been illegally extended by the Ministry for Local Self-Government, Punjab. This action of the Punjab Government was described to be ultra vires and calculated to cause grave loss to public interest. It was further alleged that the Municipal Committee was under the influence of the Minister for Local Self-Government, Punjab, and, therefore, "has not taken any action on the demand made by the plaintiffs to treat the extension of the term of the Executive Officer as void and illegal."

The Secretary of State for India in Council made an application to be impleaded as a defendant in the suit alleging that the original appointment of the Executive Officer had been made by the Ministry for Local Self-Government in the Punjab by virtue of powers vested in it under the Punjab Municipal (Exe-

cutive Officer) Act 1931 and that the term of R. B. L. Shankar Das had also been renewed by the Government in exercise of its authority under the same Act. It was alleged that the real object of the plaintiffs was to have the orders passed by the Government set aside by challenging their validity and therefore the Secretary of State for India in Council was directly affected by the result of the suit. This application was resisted by the plaintiffs. In the meantime the Municipal Committee had decided to confess judgment in the suit and an application to that effect was made by Mr. S. C. Chatterji, counsel for the Municipal Committee, to the Sub-Judge, which is as follows:

Sir.—The undersigned begs to submit that he has received the following instructions from the Municipal Committee, Lahore, through its Secretary, Agha Muhammad Safdar, B. A., LL B.:

Please note that the Committee in its meeting held to-day have decided that the case should not be defended, that Legal Adviser should confess the judgment, and that the parties should bear their own costs, and in accordance therewith the undersigned on behalf of the defendant confesses judgment in the case but prays that the parties should be left to bear their own costs.

On 29th July 1935 the Subordinate Judge refused the application of the Secretary of State for India in Council to be impleaded as a party to the suit and decreed it on confession of judgment leaving the parties to bear their own costs. It is from this judgment of the Subordinate Judge that this petition for revision has been presented in this Court. The plaintiff-respondents have not appeared before us though notices of this petition have been served upon them, but the Municipal Committee has appeared through Mr. S. C. Chatterji, who, however, has stated that he is merely watching the proceedings on behalf of the Municipal Committee. The facts on which the Secretary of State for India in Council applied to be impleaded as a defendant and which are not denied before us are mentioned in the application which was made to the Subordinate Judge and also in the petition for revision presented in this Court. An examination of these two documents leaves no doubt that the contention of the learned Government Advocate is correct that the plaintiffs are really attacking and challenging the orders of the Local Government in the guise of

a suit for injunction against the Municipal Committee, and that, if the Secretary, acted under the orders of the Municipal Committee in confessing judgment, the Committee or some of its members who do not like the appointment of an Executive Officer are in collusion with the plaintiffs and have therefore confessed judgment in this suit. In its present form therefore the suit seems to be collusive and an abuse of the process of the Court. In any case there can be no manner of doubt that the Local Government and therefore the Secretary of State for India in Council is vitally interested in and affected by the result of this suit. The Municipal Committee as appears from the attitude adopted by it in this suit has been impleaded as a bogus party and indications are that it is, or at least some of its members are, behind this suit and the real plaintiffs in this case. They have made a reprehensible attempt, and unfortunately a successful one in this case, to use the Subordinate Judge to get round the orders of the Government by improper means.

It is the legality of the action of the Government in appointing and renewing the appointment of Rai Bahadur Lala Shankar Das as Executive officer that is the real matter in controversy in the suit. It is therefore with surprise that we notice that the Subordinate Judge has declined to implead the Secretary of State for India in Council as a defendant on an application having been made by the Government Pleader to that effect. As it is the learned Subordinate Judge has refused to apply his mind to the real dispute in the case and has wandered into a discussion of extraneous matters. In leaving the petitioner to seek his remedy by a separate suit he has failed to apply to this case the well recognised rule that one object of impleading parties is to avoid multiplicity of suits. We therefore accept this petition set aside the decree of the Subordinate Judge and remand the case to the Senior Subordinate Judge of Lahore for disposal as in our opinion the attitude of the Subordinate Judge as disclosed by his proceedings necessitates the transfer of the case to another Judge. The Senior Subordinate Judge shall implead the Secretary of State for India in Council as a defendant and then shall proceed with the trial of the suit in accordance with law. In our opinion the plaintiff-respon-

dents must bear the costs of the Secretary of State for India in Council heretofore incurred both in this Court and in the Court of the Subordinate Judge. The Municipal Committee shall bear its own costs of these proceedings.

R.M./R.K.

Petition allowed.

*** * A. I. R. 1936 Lahore 621**

ADDISON AND SALE, JJ.

Haji Ali Jan—Petitioner.

v.

Commissioner of Income-tax, Punjab—Respondent.

Civil Misc. Petn. No. 665 of 1932, Decided on 27th June 1934.

(a) Income-tax Act (1922), S. 66—Income-tax Officer is sole arbitrator on question of possibility of deducting income, profits and gains from method of accounting employed by assessee—Correctness is question of fact which cannot be challenged by application under S. 66.

The Income-tax Officer is the sole arbitrator on the question of the possibility of deducting the income, profits and gains of the assessee from the method of accounting employed by him. The correctness of the opinion of the officer under these circumstances is a question of fact which cannot be challenged by means of an application under S. 66 of the Act: 1926 *Lah 446, Foll.* [P 622 C 1, 2]

(b) Income-tax Act—Interpretation—Assessment can be attacked only in manner prescribed by Act.

The Income-tax Act is a special enactment which gives the authorities specific powers for purposes of assessment and these powers can only be attacked in the manner prescribed by the Act. [P 623 C 1]

(c) Income-tax Act (1922), S. 30—Order under sections not mentioned in S. 30 are not appealable and are final.

Section 30 provides for appeals against certain specific orders and it necessarily follows that orders passed under sections which are not mentioned in S. 30, are not appealable and are therefore final in the sense that they cannot be re-opened at any subsequent stage. [P 623 C 1]

* * (d) Income-tax Act (1922), Ss. 30, 26-A and 66—Question arising out of refusal to register firm under S. 26-A—Order is final and Commissioner cannot refer to High Court under S. 66.

Under S. 30 before it was amended in November 1939, it is not open to the Commissioner to refer to the High Court under S. 66 a question arising out of a refusal to register a firm under S. 26-A because the order is at that time, not appealable under S. 30, and therefore final: 1931 *Oal 682*; 1932 *Oal 409* and 4 *IT O 178, Disting.*; 1930 *Sind 301, Not Foll.* [P 623 C 1]

Kishen Dayal and Shuja-ud-Din—for Petitioner.

J. N. Aggarwal—for Respondent.

Sale, J.—This is an application by Haji Ali Jan against the refusal of the Income-tax Commissioner to state a case for reference to this Court under S. 66 Income-tax Act. In the course of proceedings relating to the assessment of the petitioner for the year 1931-32, he applied to the Income-tax Officer to be treated as a registered firm under S. 26-A Income-tax Act. The Income-tax Officer rejected this application and on 15th October 1931, the Assistant Commissioner declined to entertain an appeal against this order on the ground that no appeal lay under S. 30 of the Act. The assessment was made by the Income-tax Officer acting under the proviso to S. 13 of the Act. The accounts produced by the assessee contained his trading account for two years, i. e., from 1st April 1929 to 31st March 1931; but no profit and loss account was prepared for the previous twelve months, 1st of April 1930 to 31st March 1931 on which by law the assessment had to be based. The accounts produced disclosed a net profit of Rs. 39,280 for two years; and as there was no evidence to show that out of this total profit half the sum was earned in each year the Income-tax Officer acting under the proviso to S. 13 computed the difference between Rs. 39,280 and Rupees 14,490 (as assessed in 1930-31) as the income for the year under review.

Lala Kishan Dayal has urged that two questions of law arise from these facts on which the Commissioner should be required to make a reference. The first point, is that the Income-tax Officer was not justified in taking more than one year's profit into account in the assessment for the year under review. This point arises out of the method adopted by the Income-tax Officer of computing the profits for one year. As stated by the Commissioner, the Income-tax Officer was compelled to act under the proviso to S. 13 of the Act, because the profits could not be properly ascertained from the trading account produced by the Commissioner which covered the period of two years. There was thus undoubtedly material for the exercise of the Income-tax Officer's discretion. As held by a Bench of this Court in 2 I T C 180 (1) the Income-tax Officer is the sole arbi-

trator on the question of the possibility of deducting the income, profits and gains of the assessee from the method of accounting employed by him. The correctness of the opinion of the officer under these circumstances is a question of fact which cannot be challenged by means of an application under S. 66 of the Act.

The second point urged is the question in the circumstances of this case the petitioner should be declared a registered firm under S. 26-A of the Act. The Assistant Commissioner refused to entertain the appeal against an order refusing registration, as no such appeal is provided for by S. 30 of the Act. It is true that the law has been altered by an amendment of the section made in November 1933; but we have held in other similar references under S. 66 Income-tax Act, that according to S. 30, as it stood before the amendment in November 1933, no appeal lay against an order refusing registration under S. 26-A of the Act and no reference is therefore maintainable to this Court arising out of the rejection by the Income-tax authority of an application to register under S. 26-A.

Mr. Kishan Dayal has in this connection invited our attention to 1930 Sind 301 (2) and has urged on the authority of this ruling that a question of law is involved. He has also referred to 58 Cal 1005 (3), 1933 Cal 409 (4) and 4 I T C 178 (5). In these latter cases the Income-tax Commissioner appears to have referred suo motu to the High Court, the question arising out of the refusal of the Income-tax authorities to accept an application for registration under S. 26-A. The question of the maintainability of such a reference under S. 66 of the Act was not considered in these cases and accordingly no argument in favour of the maintainability of such a reference can be based on these authorities. It was, however, held in 1930 Sind 301 (2) that a question of law does arise out of a refusal of the Assistant Commissioner to accept an application for registration. The learned Judicial Commissioner ob-

2. Bulchand Keshovdas v. Commissioner of Income-tax, Bombay, 1930 Sind 301=128 I C 678.
3. In re Ramlal Murlidhar, 1931 Cal 682=134 I C 1056=58 Cal 1005 (S B).
4. Hari Das v. Commissioner of Income-tax, Bengal, 1932 Cal 409=139 I C 497 (S B).
5. Kikabhai v. Commissioner of Income-tax, C. P. & Berar, (1929) 4 I T C 178.

1. Gokal Chand Jagannath v. Commissioner of Income-tax, Punjab, 1926 Lah 446=94 I C 128=2 I T C 180.

served that, in the particular case before him, question of law did arise out of the order of the Assistant Commissioner as his assessment was on the assumption that the assessee firm was an unregistered firm. It may be that no appeal was given by the Act from an order refusing to register a firm, but on the analogy of appeals from decrees in Civil Suits there is no reason why objection could not be taken to the order of refusal in the appeal against the assessment which was founded on it.

Mr. Kishan Dayal adopts a similar argument in this case and urges that in an appeal from a final assessment the Assistant Commissioner should have gone into the question whether the petitioner had been assessed as a firm of an association of individuals and that his refusal to do so raises a question of law on which the Commissioner should now be directed to state a case for reference to this Court. In our opinion, however, the Income-tax Act cannot be interpreted in the same way as the Civil Procedure Code. The Income-tax Act is a special enactment which gives the authorities specific powers for purposes of assessment and these powers can only be attacked in the manner prescribed by the Act. S. 30 provides for appeals against certain specific orders and it necessarily follows that orders passed under sections which are not mentioned in S. 30, are not appealable and are therefore final in the sense that they cannot be re-opened at any subsequent stage. We disagree with the proposition that an appeal against the final order of assessment justifies the Income-tax Commissioner in re-opening by way of reference to us decisions relating to the method of assessment, which according to the scheme of the Act, are final, merely because the assessment may be founded upon them. We adhere therefore, to our previously expressed view that under S. 30, before it was amended in November 1933, it was not open to the Commissioner to refer to us under S. 66 a question arising out of a refusal to register a firm under S. 26-A because the order was, at that time, not appealable under S. 30, and therefore final. We dismiss the application with costs.

K.S./R.K. *Application dismissed.*

A. I. R. 1936 Lahore 623

COLDSTREAM AND BHIDE, JJ.

Committee of Management of Gurdwaras, Amritsar—Objectors—Appellants.
v.

Narain Singh and others — Respondents.

First Appeal No. 625 of 1932, Decided on 11th February 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 16th January 1932.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 5 and 10—Petitioner not having any right, title or claim to property in dispute—List of objectors published under S. 3—Tribunal cannot examine or adjudicate on claims of objectors—Petitioners establishing lesser right than claimed—Tribunal can declare and define extent of right.

If the petitioners are found to have no right, title or interest in the property concerned in a petition under S. 5 or S. 10, the Tribunal has no authority to examine and adjudicate upon the claims of the objectors who support the claim made in the list presented and published by the Local Government under S. 3, for the only claim before them for disposal under S. 14 is that made in the petition presented under S. 5. But this does not mean that where a petitioner has succeeded in establishing before the Tribunal a lesser right than he claimed in the petition, the Tribunal cannot in its decree define the extent of that right and in so doing declare that the petitioner is not subject to control by the Gurdwara. There is nothing in the Sikh Gurdwara Act prohibiting in such a case the grant of a declaration to this effect: *Appeal No. 2610 of 1929, Foll.; 1933 Lah 1041; 1935 Lah 279 and 813, Ref.* [P 625 C 1]

(b) Sikh Gurdwara — Bangee is sort of hostel for pilgrims — Without formal declaration it can remain inalienable.

A Bunga institution intended to be reserved as a hostel for pilgrims is inalienable although there is no evidence of a formal dedication of it to religious or charitable purposes: 81 P R 1902, *Disapproved*; 1920 Lah 271, *Approved*. [P 627 C 1]

*Charan Singh and Gurcharan Singh—*for Appellants.

*Din Dyal Khanna—*for Respondents.

Coldstream, J. — This is an appeal against a decree passed by the Sikh Gurdwaras Tribunal.

The property in dispute is a building known as the Bunga Pahlwanke in Amritsar. It is situated beside the marble pavement which surrounds the Sacred Tank in the middle of which stands the Golden Temple (Sri Harmandir Sahib) a Notified Sikh Gurdwara and was included in a list submitted in accordance with the provisions of S. 3 of the Sikh

Gurdwaras Act as a property alleged to belong to the Gurdwara. A petition was presented under S. 5 of the Act on behalf of the proprietors of two villages, Pahlwanke and Drazke, in which the right claimed for the Golden Temple was denied and it was asserted that the petitioner's predecessors who built the Bunga several generations ago, and had rebuilt it three years previously, were its owners. The petition was opposed by the Shiromani Gurdwara Parbandhak Committee and the local Committee of Management (Committee of Management of Amritsar Gurdwaras) who pleaded that the Bunga had been built on Temple land in Sikh times for the convenience of pilgrims visiting the Temple, to which it had been dedicated, and by the management of which it was managed and controlled. The local Committee subsequently informed the Tribunal that they did not wish to oppose the petition and the proceedings were continued *ex parte* against that body.

The President and one of the Members of the Sikh Gurdwaras Tribunal found that there was no evidence of dedication and that it was not proved that the authorities of the Golden Temple had exercised superintendence or control over the Bunga. The third member was of opinion that the petitioners were not the owners of the Bunga and that the Management of the Golden Temple had rights of superintendence and control over it. In accordance with the decision of the majority an order was passed declaring that the Golden Temple had no right of superintendence or control or ownership over the Bunga, that the Bunga was founded and was owned by the proprietors of Drazke and Pahlwanke who possessed the rights of controlling and managing the Bunga and of appointing and dismissing the Bungai (the manager of the Bunga) and that the Bunga was inalienable.

Against this order the Local Committee have appealed. It is argued on its behalf by Mr. Charan Singh that the order is *ultra vires* in so far as it declares that the management of the Golden Temple has no rights of superintendence and control over the Bunga, and that it is erroneous because the evidence does not prove the ownership of the petitioners but proves that the Bunga is a trust property dedicated to public use as

a hostel for pilgrims visiting the Golden Temple. It is also argued that the wakf nature of the property is recognised in the Tribunal's declaration that it is inalienable, a declaration inconsistent with the declaration that it is the private property of the petitioners. It is not contended before us that the Bunga belongs to the Golden Temple or that the proprietors of Drazke and Pahlwanke have not the right to manage it. In support of his first argument counsel relies on 1933 Lah 1041 (1), 1935 Lah 279 (2) and 1935 Lah 813 (3). The first of these judgments dealt with a petition under S. 5, Sikh Gurdwaras Act, in which the petitioners claimed, as in the present case, to be proprietors of a bunga which had been included as property of the Golden Temple in a list notified under S. 3. The petitioners were not descendants of the founders of the bunga. The Tribunal had placed on the objectors the burden of proving that the property belonged to the Golden Temple and finding this onus not discharged, and that the petitioners were merely bungais gave a declaration that the Golden Temple had no proprietary rights in the bunga and that the petitioners were bungais. The objectors appealed. In accepting the appeal Addison, J., (Currie, J., concurring) pointed out that the initial onus should have been placed on the petitioners in conformity with the scheme of the Act and that the question whether the property was dedicated to the Golden Temple did not arise as this matter had been compromised in a case between the descendants of the founders of the bunga and the Shiromani Gurdwara Prabandhak Committee and the Local Committee of Management.

In the second case cited the petition was one under S. 10. The petitioners had withdrawn their petition and the High Court held that the tribunal had rightly declined to give the objectors a declaration that the property belonged to the Gurdwara whose property it had been claimed to be in the list published

1. Management Committee Gurdwaras, Amritsar v. Indar Singh, 1933 Lah 1041=147 I C 1142=15 Lah 117=35 P L R 286.
2. Shiromani Gurudwara Prabandhak Committee, Amritsar v. Jagat Ram, 1935 Lah 279=156 I C 1042=16 Lah 968=38 P L R 44.
3. Hazara Singh v. Chet Ram, 1935 Lah 813=160 I C 593.

under the provisions of S. 7 (2), the sole duty of the tribunal being to dispose of the petition before it and there being no power expressly given to the tribunal by the Act to make on the hearing of a petition under S. 10 a declaration that the property in suit belonged to Gurdwara. In the third case also the petition was one under S. 10. Claims by the petitioners to certain encumbered properties had been dismissed by the tribunal who had nevertheless made a declaration that the Gurdwara to which the objectors had asserted the properties belonged had no right, title or interest in them. The High Court on appeal pointed out that there was no provision in the Sikh Gurdwaras Act for the grant of a declaration disallowing the claim of the objectors. In respect of certain other properties the learned Judges in the same judgment accepted an appeal by the objectors against the tribunal's decree in favour of the petitioners. In so doing they themselves recorded a finding that the property belonged to the Gurdwara on whose behalf no petition was before the tribunal.

These rulings are certainly authorities for the proposition that if the petitioners are found to have no right, title or interest in the property concerned in a petition under S. 5 (their position appears to be the same whether the petition is presented under S. 5 or S. 10) the tribunal has no authority to examine and adjudicate upon the claims of the objectors who support the claim made in the list presented and published by the Local Government under S. 3, for the only claim before them for disposal under S. 14 is that made in the petition presented under S. 5. But this does not mean that where a petitioner has succeeded in establishing before the tribunal a lesser right than he claimed in the petition, as in this case he has done, by showing that he has the right to manage the property, the tribunal cannot in its decree define the extent of that right and in so doing declare that the petitioner is not subject to control by the Gurdwara and I can see nothing in the Act prohibiting in such a case the grant of a declaration to this effect. As pointed out in the last of the judgments relied on by the appellants' counsel the tribunal has power partially to accept a petition. It is true that in the present

case the petitioners came forward as owners and not as managers only, but I have no doubt that it was the duty of the tribunal to enquire and discover if the petitioners had any right, title or interest in the Bunga and if a right was found proved to give a declaration describing it. It is relevant here to notice that before issues were struck it was stated on the petitioners' behalf that the Bunga was used by the villagers of Pahlwanke and Drazke who did not wish to alienate it and that there was a Bungai appointed by the villagers. I find support for my view in a case on all fours with the present one, Appeal No. 2610 of 1929, decided by Broadway and Abdul Qadir, JJ., on 10th June 1931 (4). There a Bunga, known as the Jhallianwala Bunga, had been claimed as property belonging to the Golden Temple. Nanak Singh petitioned under S. 5, Sikh Gurdwaras Act, asserting his ownership of the Bunga which he declared had been founded by his ancestors and had been in their possession for many generations. The tribunal struck three issues: (1) Is the petitioner owner of the Bunga? (2) Has the Harmandir Sahib the right of management or control over the Bunga, and if the petitioner fails to prove that he is the owner of the Bunga is he a hereditary irremovable Bungai? The tribunal made a declaration that the petitioner was not the owner of the Bunga, but that he was a hereditary Bungai removable for a good cause and that the Sri Harmandir Sahib had no right of ownership or superintendence or control over the Bunga. The Shromani Gurdwara Parbandhak Committee and the Committee of Management of the Sri Harmandir Sahib appealed, the contention argued being that the tribunal was wrong in declaring that the Golden Temple had no right of superintendence.

The learned Judges of this Court found it to be proved that the object for which the Bunga was founded was to provide accommodation for pilgrims to the Golden Temple, that the villagers of Jhallianwala, whose predecessors had founded the Bunga, were entitled to preferential treatment, but that pilgrims as a whole

4. Committee of Management Amritsar Gurdwaras and S. G. P. O. v. Nanak Singh, Appeal No. 2610 of 1929, decided by Broadway and Abdul Qadir, JJ., on 10th June 1931.

were accommodated and were intended to be accommodated when accommodation was available. On these findings they dismissed the appeal allowing the declaration to stand that the Harmandir Sahib had no right of ownership or of superintendence or control. I would for the reasons indicated above overrule the contention here raised against the declaration that the Golden Temple had no right to control the management of this Bunga. It is not so easy to dispose of the next argument, namely, that the decree is not consisting in declaring first that the Bunga belongs to the proprietors of Drazke and Pahlwanke and secondly that it is inalienable. The petitioners have not appealed against the declaration that it is inalienable. If the Bunga is inalienable it can be so only because it has been dedicated to some particular use and the original proprietors had partly divested themselves of their rights in it. The petitioners cannot therefore be owners of the Bunga in the full legal sense of the term. That a Bunga situated as this building is situated is ordinarily an institution devoted to an object partly religious and partly charitable is now well established. The nature of such a Bunga was described as follows in 9 P R 1917 (5):

Bungas are hostels where pilgrims coming from various parts of India to pay a visit to the Golden Temple stay. These hostels were founded by rich men, especially by the Rajas and were dedicated to the public as wakf property. There was appointed in each Bunga a custodian called a Bungai whose duty was to read the Granth Sahib and arrange for the comfort of pilgrims staying in the Bunga and keep the Bunga in proper order.

In that case it was held that a sale of a Bunga and the right of its management and superintendence was a sale of a religious office for personal gain and that the alienation was therefore invalid. This definition of the nature of a Bunga was accepted in 146 P R 1919 (6), which dealt with a case relating to Nur Mahliya Bunga, the right to control which had been the subject of litigation which came before the Chief Court in 81 P R 1902 (7). That Bunga had been founded by the Sardar of Bhakna whose representative at

the time of the litigation was Sardarni Partab Kaur, the widow of a descendant of the founder. The Bungai of the Bunga, Kishen Singh, claimed to be an independent incumbent of the institution and Sardarni Partab Kaur had sued Kishen Singh successfully to be given possession of it. Kishen Singh appealed. There was no evidence that the building was ever formally devoted to religious purposes for the public benefit. In the course of his judgment dismissing the appeal, Anderson, J., remarked:

According to Hindu law there is a distinction between an absolute dedication of property to religious uses and an imperfect trust. In the case of the latter the nature of the property remains unchanged and its application at the discretion of the founder. Such imperfect trusts are common enough in the Punjab in the case of Serais, and Dharamsalas, and such an institution as the Bunga as to which the dispute has now arisen may very well partake of the same nature.

For the respondents Mr. Din Dayal, who relies mainly on this judgment, contends that the Pahlwanke Bunga is proved to be an institution of the kind described in it, that is to say that it is an imperfect trust, the property remaining that of the founder and its application at his discretion. But it is clear that this was not the view taken by the Division Bench in 146 P R 1919 (6) which decided that this same Nur Mahliya Bunga was a religious and charitable institution and as such could not be alienated in the absence of a custom to the contrary. In view of this decision the remarks of Anderson, J., on which Mr. Din Dayal relies, cannot be regarded as an authoritative pronouncement regarding the nature of Bungas generally. The definition of the nature of a Bunga accepted in 9 P R 1917 (5) and 146 P R 1919 (6) was adopted by Broadway and Abdul Qadir, JJ., in appeal 2610 of 1929 (4) to which reference has been made above and more recently by Addison and Currie, JJ., in 1933 Lab 1041 (1).

In the present case there is nothing to show that the Pahlwanke Bunga is not a Bunga in the ordinary sense of the term, namely, a partly religious, partly charitable institution devoted to the purposes of a hostel and I think that the circumstances that it is called a Bunga, that it abuts on the parkarma of the Golden Temple, that one of the respondents' own witnesses had admitted that it cannot be sold or mortgaged, the petitioner, Vir-

5. Mehr Singh v. Sochet Singh, 1916 Lah 98=35 I C 620=9 P R 1917.

6. Gahl Singh v. Surjan Singh, 1920 Lah 271 54 I C 955=146 P R 1919.

7. Kishen Singh v. Partab Kaur, (1902) 81 P R 1902.

Singh, himself states that the proprietors have no wish to sell or mortgage it, and that it has long been used to accommodate pilgrims visiting the Golden Temple justify the tribunal's decision that it is an institution intended to be reserved as a hostel for pilgrims visiting the Golden Temple, although there is no evidence of the formal dedication of it to religious or charitable purposes. After considering the evidence to which our attention has been drawn I do not find that the tribunal erred in its decision that the Managers of the Golden Temple had not the right of superintendence or control or ownership of the Bunga. For all these reasons, I would accept this appeal so far as to delete the declaration that the petitioners are owners of the Bunga, substituting for the declaration given a declaration that the petitioners have the right to manage the Bunga which is a wakf property dedicated to the use of worshippers at the Sri Harmandir Sahib, and are not subject to control by the managers of that Gurdwara. Having regard to all the circumstances I would leave the parties to bear their own costs throughout.

Bhide, J.—I agree.

B.D./R.K.

Order accordingly.

A. I. R. 1936 Lahore 627

BHIDE AND CURRIE, JJ.

Tej Bhan and another—Defendants—Appellants.

v.

Sita Ram—Plaintiff and others—Defendants—Respondents.

Second Appeal No. 1 of 1933, Decided on 30th October 1935, from decree of Dist. Judge, Rawalpindi, D/- 10th October 1932.

(a) Custom (Punjab)—Brahmins of Kale got of village Jhang Saidan are governed by Hindu law.

Brahmins of Kale got of the village Jhang Saidan in the Rawalpindi District are governed by Hindu law and not by custom.

[P 627 C 2; P 629 C 1]

(b) Custom (Punjab)—Applicability—Brahmins are presumed to be governed by Hindu law.

In the case of Brahmins the initial presumption is that they are governed by Hindu law and the burden of proof lies on the person who alleges that they are governed by custom.

[P 627 C 2]

(c) Custom (Punjab)—No presumption of custom—If custom is not proved personal law applies.

Under the Punjab Laws Act there is no presumption in favour of custom and, if the party

alleges custom the onus lies on him to prove it. If no custom is proved personal law applies: 1917 P C 181 and 110 P R 1906 (F B), *Foll.*

[P 628 C 1]

Mehr Chand Mahajan — for Appellants.

Narotam Singh and Rattan Lal Chawala—for Respondents.

Bhide, J.—The sole point for decision in this second appeal is whether Brahmins of the Kale got of the village Jhang Saidan in the Rawalpindi District are governed by Hindu law or custom. The trial Court held that the plaintiff who relied on custom had failed to establish it. The learned District Judge has reversed this finding on appeal and decreed the plaintiff's suit. The defendants have now preferred a second appeal to this Court with a certificate granted by the learned District Judge on the point of custom involved in the case. There is ample authority for the proposition that in the case of Brahmins the initial presumption is that they are governed by Hindu law and the burden of proof lies on the person who alleges that they are governed by custom: see inter alia 1 P R 1910 (1), 4 Lah 434 (2), 5 Lah 547 (3) and 6 Lah 524 (4). The learned District Judge has however held that the onus was shifted to the appellants in view of the fact that there is a group of villages near Jhang Saidan in which Brahmins of the Kale got are found and the Brahmin residents of some of these villages have been held to be governed by custom. The learned District Judge has referred in this connexion to three copies of judgments produced by the plaintiff marked as Exs. P-12, P-5 and P-17, and a decision of the Punjab Chief Court reported as 56 P R 1909 (5).

These cases however appear to have been decided on their own facts and there is nothing in them to support the view that all the Kale Brahmins in this locality were governed by custom. In Ex. P-12 which relates to Chak Shahdad

1. Mt. Maya v. Gurdit Singh, (1909) 1 P R 1910 = 145 P L R 1909 = 128 P W R 1909.
2. Bashu Ram v. Piare Chand, 1924 Lah 365 = 75 I O 938 = 4 Lah 434.
3. Anant Ram v. Ram Rattan, 1925 Lah 247 = 85 I O 481 = 5 Lah 547.
4. Khazan Chand v. Paras Ram, 1925 Lah 646 = 90 I O 1045 = 6 Lah 524 = 26 P L R 627.
5. Devi Datta Singh v. Dropati, (1909) 56 P R 1909 = 129 P L R 1909 = 2 I O 940 = 96 P W R 1909.

in Rawalpindi Tahsil, the Brahmins concerned were found to belong to a community who not only owned land but had a share in the shamilat and a Brahmin lambardar and a zaildar. In Ex. P-5 also the Brahmin concerned was found to be dependent on agriculture and had no other means of livelihood. This instance relates to village Ghaghrot. In Ex. P-17 the Brahmins of village Tahlian in the Rawalpindi Tahsil were found to have been dependent on agriculture for some generations. In 56 P R 1909 (5) Brahmins of the village Rawal in the Rawalpindi Tahsil were held to be governed by custom. It was remarked in this ruling that the initial presumption was in favour of custom but this view was adversely criticised in some later decisions of the Punjab Chief Court itself, see 125 P R 1908 (6), 56 P R 1909 (5) though published in 1909 is of a date prior to 125 P R 1908 (6), and 1 P R 1910 (1) and cannot be accepted in view of the pronouncement of their Lordships of the Privy Council in 45 Cal 450 (7) in which they endorsed the remarks of Robertson, J. on the question of onus in 110 P R 1906 (8), in the course of which he pointed out that under the Punjab Laws Act there was no presumption in favour of custom, and if a party alleged custom the onus lies on him to prove it. If no custom is proved personal law applies.

In view of the above pronouncement of their Lordships it seems to me doubtful if it is justifiable to presume that a person who would ordinarily be governed by personal law is governed by custom merely because he has taken to agriculture. It may, of course, happen that such a person or his family by long residence amongst agriculturists adopts their customs. But this is a question of fact. If he has done so it should be possible to prove this by positive instances. On the other hand, if no such instances are forthcoming, the presumption would merely be a matter of inference or conjecture and it has been repeatedly held that custom is not a matter of deduction or conjecture but should be established by

positive evidence: vide 12 Lah 286 (9), and authorities cited therein. Apart from this however, the cases relied on by the learned District Judge are distinguishable on facts; for in the present instance we have no compact agricultural village community of Brahmins or any such long association with or dependent upon agriculture alone such as was found to exist in these cases.

The learned counsel for the plaintiff stated that there are nine villages in the neighbourhood of Jhang Saidan in which Kale Brahmins are to be found; but judicial decisions relating to three of them only have been produced by the plaintiff. As against these three there is a decision relating to Brahmins of the village Chira in this very group reported as 62 P W R 1912 (10), in which it was held that those Brahmins were governed by personal law and not by custom. As regards the other villages the plaintiff has merely relied on the oral evidence of a few instances, but this has been found to be worthless by both the Courts below. As pointed out above, the decision in the three judgments relied on by the learned District Judge was based chiefly on the ground that the Brahmins belonged to an agricultural community and were long dependent on agriculture for their livelihood. In the present instance there are only two Brahmin families in the village Jhang Saidan, which is inhabited by Muhammadan Sayyeds. These Brahmin families apparently own no land in the village. Even the land in dispute is situated in a neighbouring village. Bishan Das, who was the owner of the land, was recorded as malik qabza and the land was presumably acquired by purchase or gift by him or some one of his ancestors. It appears from an extract from the revenue records on the file that the father and grandfather of Bishan Das used to cultivate some land. Bishan Das also did so for a time but then took to service. But plaintiff as well as most of his witnesses are or have been apparently dependent largely upon service in Government Departments and not on agriculture for their livelihood. The facts of the present case are thus distinguishable from those of the cases relied upon by the learned

6. Hira Nand v. Harichand, (1908) 125 P R 1908=10 P L R 1909=4 I C 687.

7. Abdul Hussain Khan v. Sona Dero, 1917 P O 181=43 I C 306=45 I A 10=45 Cal 450=12 S L R 104.

8. Daya Ram v. Suhel Singh, (1906) 110 P R 1906=31 P L R 1907=59 P W R 1907 (F B).

9. Muharram Ali v. Barkat Ali, 1930 Lah 695=125 I C 836=12 Lah 286.

10. Fakir Chand v. Ram Chand, (1912) 62 P W R 1912.

District Judge. No connection between the Brahmins of village Jhang Saidan and those of the villages to which the judicial decisions relied upon by the learned District Judge related has been established by any reliable evidence. In the circumstances those decisions cannot be held to be sufficient to shift the burden of proof to the defendant-appellants.

It is significant that not a single instance of custom in the two families of Brahmins residing in Jhang Saidan has been proved. There is thus no direct evidence whatever of their having adopted any agricultural custom. In view of all these facts it seems to me that the decision of the trial Court was correct. I would accordingly accept the appeal and restore its decree with costs throughout.

Currie, J.—I agree.

B.D./R.K.

Appeal accepted.

* A. I. R. 1936 Lahore 629

TEK CHAND AND DALIP SINGH, JJ.

Municipal Committee, Amritsar—Defendant—Appellant.

v.

Ralia Ram and others—Plaintiffs—Respondents.

First Appeal No. 770 of 1934, Decided on 22nd January 1936, from decree of Senior Sub-Judge, Amritsar, D/- 18th December 1933.

(a) Practice—New plea—Question as to when cause of action arises is mixed question of fact and law.

The point that a cause of action did not arise on particular date is a mixed question of fact and law and it is doubtful whether such a question can be raised for the first time in appeal. [P 634 C 2]

(b) Limitation Act (1908), S. 20—Payment of part of debt is sufficient for extension of time—Fact that debt exceeded amount paid can be proved aliunde and need not appear in writing.

All that is required by the plain words of S. 20 is that there should be a payment of a part of the debt due. The fact that there was such a debt and that that debt exceeded the amount paid, are facts which may be proved aliunde. They need not appear in the writing evidencing the part payment. All that has to be shown is that the payment was made towards this existing debt whose amount exceeded the amount paid, and once this is done, then by the words of the statute time is extended. There is no reason to infer a conditional promise to pay any remaining liability: 1982 Lah 212; 28 Cal 592; 1920 Bom 413 and 1921 All 385, Rel. on; 1985 Mad 371, Dissent. [P 636 C 1]

(c) Limitation Act (1908), S. 20—Payment of part of debt "without prejudice" gives fresh limitation.

No words such as "without prejudice" can override the words of the Statute, which lay down that a part payment shall extend limitation, if it is in the handwriting of, or signed by, the person making the payment. Hence where the debtor paid part of debt but mentioned that payment to be "without prejudice," such payment gives a fresh starting point of limitation. The words "without prejudice" merely save the respective rights of the parties with regard to the substantial disputes with respect to the various claims and counter-claims on either side, and do not mean or purport to mean that limitation should not be saved by means of this payment. [P 636 C 2]

* (d) Limitation Act (1908), S. 19—Name of creditor and identity of debt can be proved aliunde—But for seeing whether document is acknowledgment, extraneous evidence is not permissible.

While the name of the creditor and the identity of the debt might be established aliunde for the purposes of seeing whether the acknowledgment is an acknowledgment of liability within the meaning of S. 19, it is not permissible to go outside the document and to read into the document what is not contained in the document itself: 16 Mad 366 and 25 Mad 220 (FB), Expl. [P 637 C 2]

(e) Limitation Act (1908), S. 19—Question as to whether there was acknowledgment by Municipality—Entire record of proceedings including certain resolution and not merely resolution held should be looked into.

The question was as to whether there was an acknowledgment by the Municipality. It was contended for the Municipality that only record of certain resolution could be seen:

Held: that the record of the entire proceedings including the resolution could be looked into for deciding as to whether there was an acknowledgment. [P 637 C 2]

(f) Limitation Act (1908), S. 19—Acknowledgment of outstanding unsettled account is valid.

Wherever there is an acknowledgment of an outstanding account, without more, then there is an acknowledgment of liability to pay the balance due which might be found to arise upon a taking of those accounts and, therefore, an acknowledgment of liability within the terms of S. 19. [P 638 C 1]

The contractors were claiming about a lakh and fifty thousand rupees and the officials of the committee, who had gone into the matter, admitted an account of Rs. 17,000 odd subject to counter-claims on behalf of the committee:

Held: that such a position implied unsettled outstanding account between the parties and that the acknowledgment extended limitation: Case law referred. [P 639 C 2]

(g) Interest—12 per cent held was not unreasonable.

Where at a time when higher rate of interest was prevalent, the trial Court allowed 12 per cent and the conduct of the defendant was also not fair:

Held: that the rate was not unreasonable and that there should be no interference with the lower Court's exercise of discretion.

[P 640 C 2]

J. N. Aggarwal, Shamair Chand and S. M. Sikri—for Appellant.

Badri Das and D. R. Sawhney—for Respondents.

Dalip Singh, J.—The plaintiffs in this case entered into a contract with the Municipal Committee, Amritsar, in June 1921. The actual date of the signature of the President on the contract is 6th June 1921, but it is stated in the body of the contract that the work was supposed to start on 1st June 1921. The work consisted of constructing, or reconstructing with additions, a storm water channel from Amritsar City to Hudiya Nala. There is a map on the record showing a circular portion of the storm water channel running round the city and thence onwards up to the Ferozepore Bridge. This portion, in the record and throughout the dealings of the parties, was referred to as the "city portion" of the storm water channel. From the Ferozepore Bridge onwards to the end the storm water channel runs more or less straight. This portion was referred to as the "city out-fall" portion. The contract is printed at pp. 4 to 7, Vol. 2, of the printed paper book and the conditions attached thereto are printed at pp. 10 to 18 of the same volume.

The original estimate of the expenditure involved in the scheme was Rupees 2,91,410, (see Vol. 2 at p. 53). This amount obtained what is described as the "sanction," of the local Government. The word "sanction," however, appears not to be a correct description of what as a matter of fact happened. It was stated before us that the local Government had agreed to contribute half this amount by way of helping the Municipal Committee in the construction of this very necessary sanitary work. Subsequently, it appears that a revised estimate was prepared which showed the expenditure at about Rs. 3,21,126. The help of the Government was again sought for in this matter, that is to say, the Government were approached to share half the expenses of this larger amount; but it appears that the Government refused to do so. Over and above this storm water channel which was to be constructed according to

certain maps and schemes prepared, Rs. 80,000 worth of "extra work" appears to have been done by the contractors under the orders of the Municipal Engineer. The work appears to have had connexion with the storm water channel but was not included in the original plan: see Vol. 2, at p. 54.

The President objected to this work having been undertaken without formal resolutions of the Municipal Committee sanctioning this extra work: see Vol. 2, p. 54 et seq., where the President wrote a note giving the entire history of the storm water channel and pointing out that the Municipal Engineer had no business to have ordered the extra work, most of which, it appears, had already been completed without obtaining proper sanction and following the proper procedure. The President ordered that a full detail of the existing liability should be given and no new works not included in the original estimate should be taken in hand till further express written orders from him: see p. 56, para. 4. At p. 57 appears a resolution of the Amritsar Municipality with reference to this matter. This resolution is dated 22nd January 1924. Therein the President moved that the Municipal Engineer be told that he should have adopted procedure according to the rules and that he should be warned in future not to act without adopting the proper procedure. Finally, it was resolved that the contractor Lala Ralia Ram should be asked to furnish an account of his claims and the President's resolution was carried. The contractor was given an extension of time up to 30th April 1924 in view of the fact that the contract had not been finished within the time specified; but the delay was not due to the contractor's default. Upon this the contractor appears to have stated that it was not his fault that the delay had occurred and though he was glad to obtain an extension up to 30th April 1924, he could not carry on the work until the Municipal Committee paid him for the work which he had already done. He appears for this to have relied on para. 7 of the conditions of the contract printed at p. 12. Upon this point the contractor's interpretation of this paragraph has always been that if he undertook to carry out works estimated to cost more than 1,000 rupees, then he was bound to receive intermediate payments up to the

extent for which the work might be approved or passed by the Municipal Engineer and that this was a necessary and essential term of the contract. The interpretation of the clause has not been contested before us by the learned counsel for the Municipal Committee, but it has been contended that this was not an essential or necessary part of the contract. It appears that upon the contractor's objection that money had not been paid to him, which was due to him, the Municipal Engineer was called upon to report as to the facts and at p. 59, Vol. 2, in a report dated 26th January 1924, addressed to the President, the Municipal Engineer wrote as follows:

According to Accountant's figures the contractor has been paid Rs. 2,82,000 and for some Rs. 32,000 worth works have been done.

He also stated that a sum of Rs. 11,500 was due from the contractor for material supplied. He suggested that if the General Committee approved, the sum of Rs. 8,000 should be refunded out of the security deposited by the contractor in order to enable him to carry on the work and that the said sum should be recovered by deduction from subsequent bills. Upon this the contractor was asked to submit his claim and at pp. 61 to 64 of the same volume the contractor, on 9th February 1924, submitted his claim, in which over and above the Rs. 32,000, allowed to him by the Municipal Engineer, he claimed further sums which in all amounted to Rs. 1,21,718. Subsequently (p. 73, Vol. 2), he claimed that after this date he had done additional work worth roughly about Rs. 40,000 and he again claimed that the work was being unduly delayed for lack of funds as he had not been paid any of these large outstanding sums amounting, according to him, to more than one and a half lakhs. The date is 5th June 1924 and a detail of the work is given at p. 78 of this volume and again at p. 80.

Upon this, 6th June 1924, the Engineer wrote to the Secretary stating that while he could not say whether the contractor's claim for Rs. 40,000 more extra work was justified or not, but certainly, he had done work with several thousands, apparently after the date 9th February 1924. He admitted that the contractor was in difficulty as regards funds and must have money to go on with. Thereafter, it was resolved that the contractor should submit his account and the Municipal Engi-

neer should report upon the claim so made. The Municipal Engineer and the Secretary's combined report is printed at p. 87, Vol. 2, and in this report after dealing with the contractor's claims as shown at pp. 61 to 64, already referred to, they appear to have admitted that a sum of Rs. 17,447 was at least due to the contractor and submitted this report with their recommendation to the Works Sub-Committee of the Municipal Committee. The works Sub-Committee appears to have accepted the sum recommended in the joint report as appears at p. 16, Vol. 3. Upon this a resolution was passed in the Municipal Committee on the 26th of June printed at p. 93 of Vol. 2. The resolution refers to the president's note which is printed at p. 92. It appears from this president's note that the entire estimated sum of Rs. 2,91,410 had already been spent in making payments to the contractor with the exception of a small balance of Rs. 3,564-14-3. The president recommended that until the sanction of the Government was obtained for a larger amount, this sum was all that was available for payment to the contractor in respect of his claims which appeared, as the matter then stood, to be admitted by the Officers of the committee to the extent of at least Rs. 17,000 or thereabouts.

It was therefore resolved by the Municipal Committee that Rs. 9,000 be sanctioned for payment to Lala Ralia Ram without prejudice to the claims and rights of the parties, namely Rs. 7,000, for payment to the Central Bank of India, and out of the remaining Rs. 2,000 Rs. 1,195-1-6 be paid to the Reformatory Settlement and Rs. 804-14-6 to Lala Ralia Ram, contractor, in person and that the President be authorised to allot the additional sum, that is, the difference between the Rs. 9,000 and Rs. 3,564-14-3 which was all the money that was available under this head to any other head that he thought proper. It was recognised that the sanctioned estimate would thereby be exceeded, but it was resolved that this should be paid in anticipation of sanction to the revised estimate. Cheques were accordingly drawn for the three amounts specified in the resolution on 1st July 1925 and appear to have been handed over to the contractor on 3rd July 1925. At any rate, this date, namely 3rd July 1925, has not been con-

tested before us. It is an admitted fact that the work was stopped on 30th June 1924 when all of it, with the exception of a small amount worth about Rs. 10,000, had been completed by the contractor.

It appears that the sum of Rs. 804, which was to be paid personally to the contractor, was attached in execution of some decree against the contractor by order of the Court and was therefore never actually paid to the contractor but was handed over on his behalf to the Court under orders. The contractor therefore continued to be without any funds to carry on the work. He had already served a notice on the Municipal Committee on 7th March 1924, alleging that various sums were due to him and that he was being pressed by his own creditors and the Municipal Committee would be responsible for interest on this sum. On 18th September 1925, he again sent a notice through a lawyer claiming 12 per cent. interest unless his dues were paid within one month. Nothing appears to have happened upon this notice and finally the plaintiff brought a suit in forma pauperis, which is printed at p. 100 of Vol. 2, on 12th March 1927. The prayer to bring the suit in forma pauperis was rejected on 3rd December 1927 and on 4th February 1928 the contractor again wrote a letter printed at p. 108 of Vol. 2, suggesting a reference to arbitration to decide his claim against the Municipal Committee. This was supported by nineteen Municipal Commissioners who endorsed the suggestion as being a fair and reasonable one and recommended that arbitration should be adopted. These names and remarks are printed at pp. 108 to 110 of Vol. 2. Upon this a resolution was formally moved in the Committee, i. e. resolution No. 645 printed at p. 112, on 22nd June 1928, in which arbitration was moved to be adopted as the method of settlement of the claim. After some discussion the committee adjourned but met again on the same date in the evening when the following resolution was passed:

Be it resolved that in order to finally settle all the claims of facts and law between the Committee on the one hand and Lala Ralia Ram and Sain Dass on the other, the disputes may be referred to the arbitration of an arbitrator to be named by the Committee.

Before this resolution was passed, papers were read before this Committee, which are mentioned at the beginning of

the proceedings in para. 650, at p. 111, Vol. 2, namely, the report of the Municipal Engineer and the Special Sub-Committee regarding the construction of the storm water channel, along with the letter dated 22nd June 1928 from Lala Sain Das contractor, agreeing to the arbitration as requested by Lala Ralia Ram, whose letter had been read in the morning, as shown at p. 112, para. 645 of the proceedings. With some dissentients the resolution recorded above was carried. Thereafter, at p. 113, resolution No. 662, dated 2nd July 1928, appointed Mr. R. H. Crump, Deputy Commissioner, to act as arbitrator and in case of refusal by him, Mr. Hughes, Superintending Engineer, Canals, was appointed arbitrator and it was resolved that an agreement of reference to arbitration be drawn up by the legal adviser in consultation with the President. The Deputy Commissioner referred the matter back to the committee for re-consideration in a letter printed at p. 7, Vol. 3, dated 9th August 1928, under S. 231 (d), Municipal Act. He pointed out that according to the report of the officials of the Municipal Committee the contractor Ralia Ram had already been overpaid, that he had left work unfinished though he had promised to complete it in ten months according to the contract and that, in the circumstances, the Municipal Committee could not reasonably subject the rate-payers' money to arbitration. Thereupon (at p. 115, Vol. 2) resolution No. 1082 was passed by the Municipal Committee, Amritsar, on 17th August 1928.

All the previous papers referred to were read and the Deputy Commissioner's letter was considered. It was resolved that a sub-Committee consisting of three members of the Municipal Committee, Sardar Sewa Singh, Lala Kesho Ram, and Mian Hisam-ud-Din, be appointed to report whether anything was due to the contractor from the Committee. The sub-Committee proceeded to examine the matter and submitted a majority report on 2nd April 1931, (printed at pp. 134 to 140 of Vol. 2), after a lapse of more than two years. The dissenting note of M. Hisam-ud-Din is printed at pp. 10 to 15, Vol. 3. M. Hisam-ud-Din refused to consider the evidence in the case or the contractor's claim on the short ground that the contractor had left the work un-

finished and therefore in view of his own breach of contract he could not possibly claim anything. The other members, however, thought that a certain amount was due to the contractor. No total amount is given but generally they appear to have accepted the Municipal Engineer's and the Secretary's report for the items allowed therein and to have added other items including the security deposit of Rs. 10,000. Thereafter, the original Municipal Committee was itself dissolved and no action appears to have been taken on the sub-Committee's report. Therefore, the plaintiffs brought the present suit on 22nd June 1931, claiming Rs. 91,226 as principal and Rs. 76,858 as interest, the total amount claimed being Rs. 1,68,084 as shown in their amended plaint (Vol. 1, pp. 6 to 8). The details of this principal amount claimed were given in Sch. A attached to the original plaint, which is printed at pp. 1, 2 and 3, Vol. 1.

Two other plaintiffs were joined with the two original contractors, namely Ralia Ram and Sain Das. It was alleged that the two others, namely Sundar Das and Prem Nath, had subsequently been added as partners to the firm. After some delays a court-fee on full one lakh of rupees was paid and in para. 8 (b) of the amended plaint the plaintiffs stated that as they were unable to pay the court-fee on the entire amount due, namely Rs. 1,68,084 and as an indefinite sum valued for the purposes of the suit at Rs. 100, therefore they reduced their claim to one lakh of rupees only. They alleged that a breach had been committed by the Municipal Committee on 30th June 1924, which gave the starting point of limitation and the cause of action to the plaintiffs. They alleged in para. 10 that limitation was saved by part-payment of the principal made on 3rd July 1925, namely the sum of Rs. 9,000, which has already been referred to, that resolutions Nos. 645, 650, 662 and 1082, also already referred to, further extended limitation, and that the defendant had fraudulently prevented the plaintiffs from filing a suit on 2nd July 1928, by agreeing to nominate an arbitrator. The said agreement was fraudulent on the part of the defendants and was only meant to delay the institution of the suit and this fraud became known to the plaintiffs on 22nd or 23rd July 1928, and

hence again the suit was within time as also by reason of resolution No. 1082 of 17th August 1928, by which the matter had been referred to a special sub-Committee for report.

Various pleas were raised by the defendant committee which do not now concern us, but it is sufficient to point out that they led to three preliminary issues which are printed at p. 17, Vol. 1. Issues 2 and 3 were decided against the defendant by the learned trial Court and have not been agitated in appeal before us. Issue 1 was the question of limitation which will be dealt with subsequently. The trial Court however held issue 1 also against the defendant and proceeded then to frame issues on the merits, which are printed at pp. 54 and 55, Vol. 1. The parties proceeded to trial on these issues and in a long and painstaking judgment, printed at pp. 171 to 223 of the paper-book, the learned trial Judge decided all the issues in favour of the plaintiffs and passed a decree for the full amount of one lakh of rupees claimed, with costs and interest at the rate of six per cent from the date of the institution of the suit up to the date of decree and also for six per cent future interest on the principal amount, namely Rs. 91,226 from the date of decree till realization in full. The Municipal Committee has appealed and the plaintiffs-respondents have put in cross-objections, printed at p. 226, Vol. 1.

The first and the most important question that arises for decision in the Committee's appeal is the question of limitation, namely whether the suit is not time-barred. It was contended by the learned Counsel for the appellant that of the various items mentioned in Sch. A at pp. 2 and 3 of the paper-book, the first item of Rs. 32,000 fell under Art. 115, Lim. Act; so also did item 2 of Rupees 33,500. Item 3 of Rs. 1,410 fell under Art. 56. Item 4 of Rs. 4,925 fell under Art. 115. Item 5 of Rs. 38,157 fell under Art. 56. Item 6 of Rs. 4,200 and item 7 of Rs. 300 fell under Art. 115. Item 8 of Rs. 2,704 fell under Art. 56. Item 9 of Rs. 4,950 fell under Art. 115. Item 10 of Rs. 880 fell under Art. 56. Item 11 of Rs. 10,000 due on account of security deposit fell, according to him, under Art. 115. Item 12 of Rs. 3,000 fell under Art. 56, Lim. Act. As the period under both these articles is three years, accord-

ing to him, it mattered little which article was applied, provided the date of the starting point was taken, as alleged by the plaintiffs themselves in their plaint, as 30th June 1924. He contended therefore that the entire suit was barred by limitation. So far as the plaintiff's plea in the plaint was concerned, namely the extension of time claimed in para. 10 of the plaint, his contention was that no such extension was due under any of the sections under which it was claimed.

Before proceeding however to deal with the arguments on this point, it is necessary to dispose of a contention which was raised in reply by the learned Counsel for the respondents. This argument was based on two rulings reported in 1935 Lah 775 (1) and 1934 All 458 (2). The argument appears to be as follows : It was a mistake for the plaintiffs to assert in the plaint that time ran from 30th June 1924. Time did not run from that date at all, but could only run either from the date when a final bill was prepared, or possibly on a final refusal to make full payment under the terms of the contract. Para. 3 of the contract (p. 5, Vol. 2), and para. 7 (at p. 12) were relied upon for this contention as also the written statement itself at p. 8, Vol. 1. Time, according to the contention of the learned Counsel, only began to run from the date of refusal to consider the Sub-Committee's report by the Municipal Committee. The learned Counsel admitted that there was no specific refusal and therefore no specific date ; but, according to him, an inference could be drawn from the conduct of the Municipal Committee in refusing to consider their own Sub-Committee's report and refusing to reply to the plaintiffs' demand that it should be considered. According to him therefore at any reasonable time after the submission of the report of the Sub-Committee it might be inferred that a definite refusal to consider it had been made by the Municipal Committee and this had happened in 1931, shortly before the institution of the suit. Hence, according to him, there could be no question of limitation in the matter at all.

The learned Counsel's contention was based on the two decisions which have already been referred to. It is unnecessary to go at any great length or with strict attention into the principles underlying the two rulings named. It is sufficient for the purposes of this case to point out that those two rulings are entirely distinguishable on the patent fact that in both of them the work had been completed, and the question that arose for decision was : when payment became due for a completed work. It was held on the terms of the contracts on the records of those cases, which are not mentioned in the body of the reports that the time for payment only arose when a final bill had been drawn up by the person or official in charge of drawing up such a document and when it had either been accepted or rejected by the corporation concerned.

Here the matter is totally different. The work was admittedly not completed, and the plaintiffs' own case was that a breach of the contract had taken place on 30th June 1924. Now a breach of contract, it appears to me, must give rise to a cause of action and the very fact that the work was stopped, without being completed, would, in the absence of anything to the contrary, show that there had been a breach of the contract on the date when the work was so stopped. It was for this reason that both the plaintiffs as well as the defendant fixed 30th June 1924 as the starting point of limitation : the plaintiffs alleging that the breach was due to the defendant's action and the defendant alleging that the breach was due to the plaintiffs' action in stopping the work and not carrying it to completion without due cause. These being the pleadings throughout and the point now raised, namely that the cause of action did not accrue until 1931, being obviously a mixed question of fact and law, it is doubtful whether the learned counsel was within his rights in raising it for the first time in appeal. The contention of the learned counsel was that a mixed question of fact and law could be raised in appeal if all the necessary facts were on the record. Even this contention, it appears to me, is not entirely substantiated on the record. The learned counsel finally relied on para. 3 of the contract at p. 5, Vol. 2. The clause reads as follows :

1. Secy. of State v. Gajjan Singh, 1935 Lah 775=160 I C 739.

2. District Board Allahabad v. Baijnath Prasad, 1934 All 458=151 I C 731=1934 A L J 55.

On the completion of the work or on the determination of this agreement, final measurements will be made and the accounts shall be adjusted accordingly.

The following words are not relevant for the purposes of this discussion. It is clear that the work was not completed nor could the agreement be said to have been determined in the sense contemplated in the contract in Cl. 7, at p. 6. In any event, it would have been a question of fact, whether final measurements were or were not made and whether if those were made and the parties had not adjusted accounts, that and that alone should furnish the cause of action. As pointed out already, it seems to me that a cause of action had undoubtedly accrued on 30th June 1924. It is not clear whether final measurements, as distinct from a final bill, were ever made or not, the attention of the parties not having been directed to this particular point. On both these grounds, therefore I would repel the contention of the learned counsel for the respondents. I may here also refer to a contention of the learned counsel for the respondents that whatever might be the Articles of the Limitation Act applicable to the other items given in Sch. A of the plaint, the Article applicable to item 11, Rs. 10,000 due on account of security deposit, was not Art. 115 as contended by learned counsel for the appellant, but Art. 145, Limitation Act, which runs as follows :

Against a depository or pawnee to recover moveable property deposited or pawned, thirty years from the date of the deposit or pawn.

The learned counsel contended that this was a case of a deposit of moveable property and that therefore as there was a specific article applicable, Art. 115, which is only a general Article applicable in the absence of any other Article, could not apply and the proper Article to apply is Art. 145. This Article would, if applicable, undoubtedly bring this particular item of Rs. 10,000 within limitation. The learned counsel for the appellant in reply, on the authority of various rulings, namely' 108 I C 49 (3), 2 Lah 376 (4), 4 P R 1919 (5), 37 Mad 175 (6), which on

8. Narain Das v. Municipal Committee, Delhi, (1928) 108 I C 49.

4. Mahomed Ghasito v. Siraj Uddin, 1922 Lah 198=66 I C 490=2 Lah 376 (FB).

5. Dahpia v. Lahbu Ram, 1919 Lah 822=47 I C 592=4 P R 1919.

6. Balakrushnadu v. Narayanaswami, 1914 Mad 51=24 I C 852=37 Mad 175.

appeal is reported as 22 I C 60 (7), and 41 All 643 (8), contends that the words "moveable property" in the Article do not include money but refer only to specific moveable property recoverable in specie. On the other hand, the learned counsel for the respondents relied on 12 Cal 113 (9), where however the point was not really decided, but in particular on 6 C L J 535 (10) and 55 I C 515 (11), which approved of this ruling. There is no doubt a conflict between the various High Courts on the point in question. The contention appears to be as follows: Moveable property includes money. There is no reason why it should be excluded in Art. 145 when the words "moveable property" are not qualified by any such word as "specific" as is done in Art. 89, and that this being so, Art. 145 excludes the application of Art. 115 wherever there is a deposit of any kind whatsoever whether of specific moveable property or unspecified moveable property including money. There is some force in this argument. The other view appears to be that the word "depository" in the Article should be construed with reference to the Roman Law idea of a depositum, namely, a specified thing which is deposited and the juxta position of the word "pawnee," which only implies specific moveable property and obviously excludes money or any unspecified moveable property is pointed to. There is some force also in this contention, but it appears to me that it is unnecessary, in view of our decision on the other point, to go into the question and decide this point.

The next point that arises in the case is whether the lower Court was justified in extending time by reason of the payment of Rs. 9,000 by three cheques, as already mentioned, on 3rd July 1925; in other words, whether this amounts to a partial payment within the terms of S. 20, Limitation Act. S. 20, Limitation Act, on this point runs as follows :

7. Balakrushnadu v. Narayanaswami, 1914 Mad 4=22 I C 60.

8. Kalyan Mal v. Kishan Chand, 1919 All 102=55 I C 45=41 All 643=17 A L J 888.

9. Upendro Lal Mukhopadhyaya v. Collector of Raj Shabhyi, (1886) 12 Cal 113.

10. Gobind Prasad v. Chairman Patna Municipality, (1907) 6 C L J 535.

11. Nanda Lal Bose v. Ashutosh Ghose, 1920 Cal 167=55 I C 515.

Or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf.

By the amending Act 1 of 1927 the proviso attached has been amended and an acknowledgment of the payment so made must appear in the handwriting of, or in writing signed by, the person making the payment. Upon this point the contention of the learned counsel for the appellant has turned largely upon a discussion of the English law which is summarised by Rustomji at p. 211 of his *Law of Limitation in India*, Edn. 4, and various English cases, the leading case being printed in 1 Sm L C 651 (Edn. 12) (12). The principle underlying these cases, which has been adopted in 1935 Mad 371 (13), appears to be that the reason why a partial payment extends limitation is by the implied acknowledgment that there is something more to pay, and the inference that arises, if nothing more is said, is that an honest man will discharge the liability arising, from which may be inferred a promise to pay the remaining amount due. It appears to me, with all deference to the learned Judges who decided the Madras case, that it is quite unnecessary in this country, where there is a statutory law governing the matter, to go into the reasons for the Common law rule in England, or to make any deductions from the Statute law in England, which is differently worded. All that is required by the plain words of the Indian Statute is that there should be a payment of a part of the debt due. The fact that there was such a debt and that that debt exceeded the amount paid, are facts which may be proved aliunde. They need not appear in the writing evidencing the part payment. All that has to be shown is that the payment was made towards this existing debt whose amount exceeded the amount paid, and once this is done, then by the words of the Statute time is extended. There is no reason to infer a conditional promise to pay any remaining liability. This view receives support from a ruling of our own Court reported in 13 Lah 448 (14) at p. 451. The ruling

approves of two other rulings, 23 Cal 592 (15) and 44 Bom 392 (16), where a similar view appears to have been taken. 43 All 216 (17), at p. 219, also takes the same view. I have, therefore, no hesitation in repelling this contention of the learned counsel for the appellant.

The next contention bearing on this very point was that in the resolution the words "without prejudice" were used. It was contended on the strength of certain English rulings, therefore, that this payment could not be used to extend the period of limitation. Apart altogether from the fact that the English rulings refer to letters, etc., headed "without prejudice," which were in the nature of offers made to settle disputes between the parties, and this resolution is nothing of that kind at all, it appears to me that no words such as "without prejudice" can override the words of the Statute, which lay down that a part payment shall extend limitation, if it is in the handwriting of, or signed by, the person making the payment. Moreover, I am of opinion, on a proper consideration of the circumstances of this case, that the words "without prejudice" were used not to exclude this payment from being used to extend limitation, but were used in view of the fact that while the contractors claimed a sum of nearly one and a half lakhs, the responsible officials of the committee admitted only a sum of Rs. 17,447 and further alleged that sums were due to the committee by the contractors on account of various breaches committed by them. The words, therefore, merely saved the respective rights of the parties with regard to the substantial disputes with respect to the various claims and counter claims on either side, and did not mean or purport to mean that limitation should not be saved by means of this payment. At that point of time the question of limitation could not possibly have entered the heads of any of the persons concerned, for this payment was made on 3rd July 1925, and the cause of action had admittedly arisen only on 30th June 1924. I have therefore no hesitation in

12. Whitcomb v. Whiting, 1 Sm L C 651 (Edn. 12).

13. Appaswami Pillai v. M. Muthurian, 1935 Mad 371=157 I C 259=68 M L J 73.

14. Bharat National Bank v. Bishan Lal, 1932 Lah 212=135 I C 673=13 Lah 448=33 P L R 42.

15. Ambrose Summers In re, (1896) 23 Cal 592.

16. Sakharam Manchand v. Keval Padamsi, 1920 Bom 413=56 I C 429=44 Bom 392=22 Bom L R 313.

17. Curlender v. Abdul Hamid, 1921 All 335=59 I C 941=48 All 216.

repelling this contention of the learned counsel for the appellant and I would hold that the payment of Rs. 9,000 was the payment of a debt within the terms of the Limitation Act and that a fresh starting point of limitation was therefore afforded from 3rd July 1925.

The next point is whether a further starting point of limitation arose under an acknowledgment of liability within the terms of S. 19, Lim. Act, as pleaded by the plaintiffs, by reason of certain resolutions of the Municipal Committee specified in para. 10 of the plaint. The only relevant resolutions, as conceded before us, are contained in paras. 645 and 650 of the proceedings of the committee, printed at pp. 112 and 111, Vol. 2. These paragraphs are dated 22nd June 1928. At p. 112, in para. 649, there is a record that the letter of Lala Ralia Ram, contractor (printed at p. 108, Vol. 2), suggesting a reference to arbitration, was read and a resolution thereon was moved by Sardar Sewa Singh. There was some opposition to this resolution and as it was getting late, the committee adjourned to 3-30 p. m., without coming to any final decision on the matter. In para. 650 (printed at p. 111, Vol. 2), the record shows that the joint report of the Municipal Engineer and the works sub-committee (printed at pp. 87 to 90, Vol. 2) was read as well as a letter from Lala Sain Das, the co-contractor, (which is not in the printed record but is on the record), which agreed to the suggestion of arbitration. Upon this a resolution was moved by Sardar Santokh Singh, which runs as follows :

Be it resolved that in order to finally settle all the claims of facts and law between the committee on the one hand, and Lala Ralia Ram and Sain Das on the other, the disputes may be referred to the arbitration of an arbitrator to be named by the committee.

This amended resolution was accepted by the original mover and was finally carried. The question is whether these documents contain an acknowledgment of liability within the terms of S. 19, Lim. Act. The learned counsel for the respondents first of all contended that in order to find out the nature of "the disputes" and "the claims of facts and law" between the committee and the contractors and to see whether the resolution contained an acknowledgment, it was possible to go beyond the terms of the document and to look to extraneous evi-

dence to ascertain what those disputes were. For this purpose he relied on two rulings in particular 16 Mad 366 (18) and 25 Mad 220 (19), wherein it was held that the name of the creditor and the identity of the debt could be established apart from the document containing the acknowledgment of liability. It seems to me however that on a correct reading of 25 Mad 220 (19), while the name of the creditor and the identity of the debt might be established aliunde, the ruling holds that for the purposes of seeing whether the acknowledgment is an acknowledgment of liability within the meaning of S. 19, it is not permissible to go outside the document and to read into the document what is not contained in the document itself (see in particular p. 232 of this ruling). I have therefore no hesitation in repelling this contention of the learned counsel for the respondents.

But the question remains as to what is the document, which contains the acknowledgment of liability. Now it seems to me clear, after considering the matter and after hearing both the learned counsel on the point involved, that the document containing the acknowledgment of liability is not the mere record of the resolution which was finally accepted by the Municipality but is the entire paragraph containing the proceedings of the Committee, of which the resolution itself forms only one part. Therefore, it seems to me that the document containing the acknowledgment is really the whole of paras. 645 and 650 of the proceedings of the Committee, dated 22nd June 1928. These paragraphs by express reference incorporate in themselves certain other documents, namely the letter of Ralia Ram, the joint report of the Municipal Engineer and the Works Sub-Committee, and the letter of Lala Sain Das. Therefore in interpreting the words of the resolution "the claims of facts and law" and the "disputes," it can be clearly seen that there was an unsettled outstanding account between the Committee and Lala Ralia Ram and Sain Das. This is clear from the report of the Municipal Engineer, the Secretary and the Works Sub-Committee. There-

18. Uppi Haji v. Mammavan, (1893) 16 Mad 366=8 M L J 191.

19. Narayana Aiyar v. Venkataramana Iyer, (1902) 25 Mad 220 (F B).

fore the resolution properly construed in the light of the document which contains the resolution, contains an admission that there was an outstanding unsettled account between the Committee and Ralia Ram and Sain Das, and this was the matter which was to be referred to arbitration. The learned counsel for the appellant has contended on the authority of 40 Mad 701 (20), 6 Ch App 822 (21), 33 Cal 1047 (22) and 48 I C 89 (23) (a Division Bench ruling of the Madras High Court), that assuming that there was any acknowledgment of liability by reason of the acknowledgment of an unsettled account, this acknowledgment was coupled with a condition, namely an implied promise to pay only such sums as were found due by an arbitrator on this unsettled account and nothing else, and that therefore as the condition of reference to arbitration failed, there was no acknowledgment of liability at all within the terms of S. 19.

On the other hand, the learned counsel for the respondents contended on the authority of 33 Cal 1047 (22), 1928 Sind 45 (24), 2 I C 370 (25) and 10 Mad 259 (26), that this acknowledgment of an unsettled account amounted to an acknowledgment of liability to pay whatever might be found due by either party on account being taken, and that therefore there was an acknowledgment of liability within the terms of S. 19, notwithstanding the failure of the arbitration. Here, it may be pointed out before proceeding to deal with this matter, that before the trial Court, it appears to have been successfully contended that S. 18, Limitation Act also applied and that the Municipal Committee had kept the plaintiff from bringing a suit by actions which amounted to a fraud. Before us however this point was expressly given up by the learned counsel for the respondents and

it was not contended, and indeed could not be contended, that S. 18, Limitation Act, had any application to the facts of this case at all.

To turn now to the point that has been stated above, there is no doubt a conflict, as far as I can see, between 40 Mad 701 (20) supported by 48 I C 89 (23) and 1928 Sind 45 (24) supported by 2 I C 370 (25). For the purposes of this case however it is unnecessary to enter into any critical analysis of these rulings. It appears to me that the principles which should guide the Courts in this country have been laid down in the Privy Council ruling 33 Cal 1047 (22), and all that the Courts have to do is to see how far those principles are applicable to the facts of a particular case. In 33 Cal 1047 (22) their Lordships of the Privy Council laid down that wherever there was an acknowledgment of an outstanding account, without more, then it followed that there was an acknowledgment of liability to pay the balance due which might be found to arise upon a taking of those accounts and therefore an acknowledgment of liability within the terms of S. 19. As has been pointed out already, the document in this case, viewed as a whole and read in the light of the documents which are incorporated in it, does contain an admission of an outstanding unsettled account. As has been previously stated, the position appears to have been that the contractors were claiming about a lakh and fifty thousand rupees and the officials of the Committee, who had gone into the matter, admitted an account of Rs. 17,000 odd subject to counter-claims on behalf of the Committee. It seems to me clear that such a position implies an unsettled outstanding account between the parties. Therefore under the principles laid down in 33 Cal 1047 (22), there is in this document an acknowledgment of liability which extended limitation under the terms of S. 19, Limitation Act.

Reliance however has been placed by the learned counsel for the defendant appellant on 6 Ch A 822 (21). It appears to me however that the facts of that case are distinguishable. At p. 824 are contained the two documents on which reliance was placed in that case. The first reads as follows :

We find that we have long since named an arbitrator. You then proposed to let one arbitrator act for both sides; and we were willing

20. *Bollapragada Rama Murthi v. Thamanna Goppayya*, 1917 Mad 892 = 35 I C 575 = 40 Mad 701 = 31 M L J 231.

21. *River Steamer Co., In re*, (1872) 6 Ch A 822 = 25 L T 319 = 19 W R 1130.

22. *Mani Lal v. Seth Rupchand*, (1906) 33 Cal 1047 = 33 I A 165 = 2 N L R 130 (P C).

23. *Narayanaswami Mudali v. Gangadhara Mudali*, 1919 Mad 838 = 48 I C 89 = 37 M L J 353.

24. *Hukmat Singh v. Nenu Mal*, 1928 Sind 45 = 104 I C 572 = 22 S L R 117.

25. *Jesomal v. Bansimal*, (1909) 3 S L R 53 = 2 I C 370.

26. *Sitayya v. Ranga Reddi*, (1887) 10 Mad 259.

to allow the arbitrator we had originally named to act alone. He is a man of the first position and we need not say, wholly unconnected with the parties in the case on which he has never been in the remotest manner consulted. The final arrangements for the reference therefore rest and have long rested with you.

The second document is:

I am directed by the Board of this company to inform you that a paper has been received at this office without letter or explanation of any kind, purporting to be a memorandum of account between you and this company, which is altogether incorrect both in principle and detail, omitting all deductions and credits to which this company are entitled, and which would leave the balance considerably in their favour. I am however authorised to say that this company are still willing, as they have all along been to have all accounts and questions between you and them decided by arbitration according to your contract, and they again call upon you to concur with them in the necessary steps for that purpose.

The rest of the document is immaterial for the purposes of this argument. The argument of the learned counsel for the appellant was that the Privy Council in 33 Cal 1047 (22) had expressly approved of 6 Ch A 822 (21) and that in the latter case there was an acknowledgment that there was an unsettled outstanding account and yet in that ruling it had been held that this document was not an acknowledgment of any liability and therefore no promise to pay could be inferred from it. The argument however loses sight of the words of the documents in question. The first document obviously contains no reference to any unsettled account at all and merely states a desire on the part of the company to refer the matter to arbitration. As rightly pointed out in the ruling, the only promise to pay that could be implied under the terms of this document was a promise to pay whatever the arbitrator might find due. In the second document, there is no doubt a reference to an unsettled account, but it is expressly stated therein that if this account were gone into, then the balance would be in favour of the company. As pointed out therefore in the ruling at p. 830, it is clear that this letter did not contain any admission of a debt. It is true that the letter went on to agree to arbitration for the purpose of settling the dispute; but the only acknowledgment of liability again therefore was to pay whatever an arbitrator might find due, not an acknowledgment that there was anything due under an unsettled account or an acknowledgment

that there was an unsettled account whose balance was unknown. It appears to me therefore that this ruling is clearly distinguishable from the present case, where there was an admission of an outstanding unsettled account without a claim that on a proper taking of accounts the balance would be in favour of the committee. On the other hand, as far as can be made out, the only claim, if any, in this case appears to have been that there was a balance but a smaller balance than that claimed by the contractors due from the committee. In these circumstances therefore it appears to me that, quite apart from the implied promise to pay whatever was found due by an arbitrator, there was an admission of the existence of an outstanding account with at least the possibility or probability of the balance being against the committee. I would therefore hold following the principles laid down in the Privy Council ruling in 33 Cal 1047 (22) that this document contained an acknowledgment of liability within the terms of S. 19 and that it afforded a fresh starting point of limitation from 22nd June 1928.

The only question that now remains to be decided is the article applicable. Before the trial Court it appears to have been contended, and as far as can be made out from the judgment, successfully, that Art. 120 might apply to the facts of the case. Before us it has been admitted by the learned counsel for the respondents that, apart from the question of Art. 145 applying to Item 11 of the schedule, namely Rs. 10,000 deposited by way of security, which has already been dealt with, Art. 115, Lim. Act, would apply. This admission was made with reference to the Full Bench ruling 2 Lah 376 (4) and it appears to me to be properly admitted under that ruling. I have already pointed out that the learned counsel for the appellant relied on Art. 115 for most of the items and Art. 56 for some of the items. Either article would give a period of three years from 22nd June 1928 and as the suit was brought within three years from that date, namely on 22nd June 1931 the suit was within limitation.

The next question that arises for decision is which of the parties is guilty of the breach of contract. Upon this point the contention of the learned counsel for the appellant is as follows: Admittedly the contractors did not finish the work

and that a work in value of about Rupees 10,000 was still left to be completed, when work was finally stopped on 30th June 1924. He contends therefore that as the contract was an "entire contract," (which contention has not been disputed by the learned counsel for the respondents), the breach was on the part of the contractors. To the argument arising under para. 7, printed at p. 12 of Vol. 2, namely that payments had to be made whenever work of more than Rs. 1,000 estimated value was completed and approved by the Municipal Engineer, he contends that, as a matter of fact, the Municipal Engineer gave no such approval and that, in any event, this term was not essential to the contract but was merely a matter of convenience for payments on account between the parties. It seems to me sufficient to dispose of this argument by pointing out that the interpretation put upon this clause by the plaintiffs, namely, that an intermediate payment became due to the contractors whenever they had completed work of the estimated value of Rs. 1,000, was not disputed by the defendant either in the Court below or before us. On the question of fact, as to whether there was sufficient work done or sufficient and good material present at the site approved of by the Municipal Engineer, it is sufficient to refer to the admissions of the Municipal Engineer contained in various documents, in particular in the joint report submitted by him and the Secretary, (printed at pp. 87 to 90, Vol. 2), to which a reference has already been made, and to the other admissions by him with reference to the contractors' claim of having done Rs. 41,000 worth of work, in which, without admitting the exact amount claimed, the Municipal Engineer admitted that the work amounting to several thousands had been done by the contractors, (printed at p. 73, Vol. 2 to which a reference has also already been made).

To dispose of contention that this term was not essential to the contract, I think it is sufficient to point to the enormous difference between the thousand rupees of the clause and the entire estimated amount of the contract which, at the least, amounted to Rs. 2,41,000 roughly, and which, according to the plaint and the admissions made, included, over and above this, work worth Rs. 80,000. To

hold that the contractors were bound to complete work to this extent without receiving any intermediate payments at all, would be to go contrary to common sense as well as to the plain words of Cl. 7, which shows that the contractors shall receive intermediate payments. I have therefore no hesitation in holding that the breach of contract took place on the part of the Municipal Committee and the contractors were justified in not proceeding with the work after 30th June 1924. (After dealing with the various items separately, his Lordship proceeded). The question now remains of the amount of interest. Mr. Jagan Nath contends that the rate allowed, i. e., twelve per cent per annum, is far too high. At the time in question however the rates of interest were much higher than they are now and one indication of this is given by the admitted fact that when the Municipal Committee stood surety for the loan of Rs. 7,000 by the Central Bank to the contractors, the Bank charged and got nine per cent interest. The rate therefore of twelve per cent. per annum allowed by the trial Court does not seem unreasonable and the matter being one of discretion I would not interfere in appeal with the discretion exercised by the trial Court, especially in view of the conduct of the Municipal Committee throughout, which, to say the least of it, does not seem to me to be befitting the Corporation of the second largest city in the province. On this point the contractors have claimed that the trial Court should also have allowed interest at the rate of twelve per cent per annum from the date of the institution of the suit up to the date of the decree and they further claim that qua the item of future interest the Court should have allowed future interest on the decretal amount at the rate of 6 per cent. per annum and not only on the principal sum of Rs. 91,226. I am loath however to interfere with the discretion exercised by the trial Court and I therefore do not consider that the cross-objections of the contractors should be upheld. On the question as to the amount of principal on which future interest should run, the matter will have to be dealt with at greater length hereinafter. (The remaining portion of the judgment is not necessary for this report).

Tek Chand, J.—I agree.

K.S./R.K.

Decree varied.

A. I. R. 1936 Lahore 641

COLDSTREAM AND BHIDE, J.

Committee of Management of Gurdwaras, Amritsar—Objector—Appellant.

v.

Hakim Singh and others—Petitioners and others—Objectors—Respondents.

First Appeal No. 626 of 1932, Decided on 11th February 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 16th January 1932.

Sikh—Gurdwara — Bunga Sohlanwala — Situation on outskirts of Golden Temple—Institution called as Bunga is significant — Bunga Sohlanwala partly religious and charitable institution — Inalienable — Shri Har Mandir Sahib has no right of control over this Bunga.

The very situation of the Bunga Sohlanwala on the outskirts of the Gurdwara Harmandir Sahib (Golden Temple, Amritsar) lends support to the contention that it is intended for the use of pilgrims visiting on ordinary businesses. The fact that the place is called Bunga is itself significant. So the Bunga Sohlanwala is an institution partly religious and partly charitable in character and it is under the management of the proprietors of the village Sohl as trustees. The Bunga is inalienable. The Shri Harmandir Sahib has no right of superintendence or control over the management of the Bunga. [P 642 C 1, 2; P 643 C 1]

Charan Singh and Gurcharan Singh—for Appellant.

Din Dayal Khanna—for Respondent.

Bhide, J.—There is a Bunga called Bunga Sohlanwala situated on the outskirts of the Gurdwara Harmandir Sahib at Amritsar, popularly known as the Golden Temple, which was claimed as the property of the Gurdwara under S. 3, Punjab Sikh Gurdwaras Act. The proprietors of the village Sohl put in a petition, through seven persons as their representatives, under S. 5 of that Act claiming the Bunga as their property. The petition was sent to the Sikh Gurdwaras Tribunal for decision and that Tribunal has (by a majority) passed the following order thereon:

The proprietors of the village Sohl are the owners of the Bunga but have no right of alienation. The Shri Harmandir Sahib has no right, title or interest therein and in particular no right of superintendence or control.

From this order the Local Committee of the Gurdwaras at Amritsar as well as the proprietors of the village Sohl have preferred appeals. Mr. Charan Singh on behalf of the Local Committee of the Gurdwaras no longer disputed the fact that the Bunga was founded by the pro-

1936 L/81 & 82

prietors of the village Sohl and was under their management, but he contended that the property was dedicated to religious and charitable purposes and the proprietors of the village Sohl are only managing the property as trustees. He further contended that the decree passed by the Tribunal negating the right of the Harmandir Sahib to superintendence and control over the management of the Bunga was wrong firstly, because it was beyond the jurisdiction of the Tribunal, and secondly because it was not justified by the evidence on the record. On behalf of the proprietors of Sohl it was contended in their appeal that the Bunga was the absolute property of the proprietors of Sohl and the Tribunal was wrong in declaring the property to be inalienable. It will appear from the above that the two points which require decision in appeal are:

- (1) Whether the Bunga in question is dedicated to religious or charitable purposes or is secular property; and
- (2) whether the decree is wrong in so far as it negatives the right of superintendence and control of the Shri Harmandir Sahib.

As regards the first point there is no direct evidence as to dedication, but there is sufficient evidence on the record to show that the Bunga is dedicated to religious and charitable purposes. We have in the first place an important agreement of the year 1876, (Ex. P/6) executed by Nihal Singh a custodian of the Bunga in favour of the proprietors of Sohl in which the following passage occurs:

Asthan Bunga Sohl wa Thathe ka jo mata'liqa Darbar Sahib men Kavesar Mahan Singh Granthkhawani karta hai, ba'd fautidgi uske main Bunga Sohl wa Thathi men Granthkhawani karunga, bunga ko abad rakhunga. Jo tahl sewa Kavesar Mahan Singh ki karte hain waise hi meri kar diya karange. Agar main bunga abad na rakhunga to Sohl Thathi ko ikhtyar hai, mera koi uzar na hoga. [Kavesar Mahan reads the Granth Sahib in the institution, the Bunga of Sohl and Thathi, which is attached to the Darbar Sahib. After his death I will read the Granth Sahib in the Bunga Sohl and Thathi and will maintain the Bunga. Whatever service is rendered to Mahan Singh will be rendered to me also. If I do not maintain the Bunga then it shall be open to the people of Sohl and Thathi (to eject me). I will raise no objection.]

This clearly indicates that the Bunga was dedicated for religious purposes. The contention of the proprietors of the vil-

lage Sohl that the Bunga was built merely for the convenience and comfort of the residents of that village who visited Amritsar on business or otherwise is not sustainable. The very situation of the Bunga on the outskirts of the Gurdwara Harmandir Sahib lends support to the contention of the Local Committee that it is intended for the use of pilgrims visiting the Gurdwara and not for the use of people visiting Amritsar on ordinary business. The fact that the place is called "Bunga" is itself significant. In 9 P R 1917 (1) the term "Bunga" was explained as follows :

Bungas are hostels where pilgrims, coming from various parts of India to pay a visit to the Golden Temple, stay. These hostels were founded by rich men, especially by the Rajas, and were dedicated to the public as wakf property. There was appointed in each Bunga a custodian called Bungai whose duty was to read Granth Sahib and arrange for the comfort of the pilgrims staying in the Bunga and keep the Bunga in proper order.

The above description of a Bunga occurred in the judgment of the trial Court in that case and its correctness was not challenged by either party in appeal. This explanation of the term "Bunga" as given in 9 P R 1917 (1), was adopted in several subsequent decisions: see e. g., 146 P R 1919 (2), Civil Appeal No. 2610 of 1929 (3) and 1933 Lah 1041 (4). The learned counsel for the proprietors of Sohl was not able to cite a single authority in which a Bunga was held to be purely secular property. He referred to 81 P R 1902 (5), in which the Bunga Nur Mahal-yanwala was held to be "an imperfect trust" in the nature of a foundation like a private chapel in a gentleman's park (in England) to which the public have been permitted to resort, but which may be closed or pulled down without reference to the public. This was a Single Bench ruling of the Punjab Chief Court. The view taken in that ruling does not appear to have been accepted in 146 P R 1919 (2), which was a Division Bench ruling of that Court relating to the same Bunga. In 146 P R 1919 (2) the descrip-

tion of a 'Bunga' as given in 9 P R 1917 (1) (quoted above) was referred to and it was held that the Bunga was a religious and charitable endowment and the right of management of such an institution could not be alienated.

The contention of the proprietors of Sohl that only residents of that village were allowed to occupy the Bunga does not appear to be correct. It may be that the residents of that village were given preference, but there is evidence on the record to show that residents of other villages have also resided therein (see e.g., O. W. 1, 3, 4). The agreement Ex. P-6 of 1876 referred to above does not mention that only people from Sohl were to be allowed to put up in the Bunga. There is no such mention even in Ex. P-4 which was an agreement executed by Ajaib Singh, the present Bungai, in the year 1928 after the commencement of the present litigation. If the people of the village Sohl alone had a right to put up in this Bunga one would have expected to find a mention of this important fact in these agreements executed by the Bungais. In view of the above facts, I would hold that the Bunga in dispute is an institution partly religious and partly charitable of the kind described in 9 P R 1917 (1), and that the proprietors of the village Sohl are the managers of the institution as trustees and not as sole proprietors thereof, and I would modify the decree of the Tribunal to this extent. Being a religious and charitable institution the Bunga would be inalienable and there is no reason to interfere with the decree of the Tribunal in this respect.

As regards the second point requiring decision in these appeals, viz., whether the Tribunal was wrong in deciding that the Shri Harmandir Sahib had no right of superintendence or control over the management of the Bunga, the rulings 1935 Lah 279 (6) and 1935 Lah 813 (7) appear to me to be distinguishable. These rulings related to petitions under S. 10, Sikh Gurdwaras Act, and all that was held therein was that such petitions could only be either accepted wholly or partly or dismissed, and that there was no provision in the Act for a declaration as regards

1. Mehr Singh v. Sochet Singh, 1916 Lah 98=35 I C 620=9 P R 1917.

2. Gohl v. Surjan, 1920 Lah 271=146 P R 1919.

3. Management Committee Gurdwaras, Amritsar v. Nanak Singh, Appeal No. 2610 of 1929.

4. Management Committee, Gurdwaras, Amritsar v. Indar Singh, 1933 Lah 1041=147 I C 1142=15 Lah 117=35 P L R 286.

5. Kishen Singh v. Partabkaur, (1902) 81 P R 1902.

6. Shiromani Gurdwara Prabandhak Committee, Amritsar v. Jagat Ram, 1935 Lah 279=156 I C 1042=16 Lah 968=38 P L R 44.

7. Hazara Singh v. Chet Ram, 1935 Lah 813=160 I C 533.

the rights of the objectors being granted by the Tribunal. In the present instance the declaration to the effect that the Shri Harmandir Sahib has no right of control or superintendence over the management has been really given with reference to the petition under S. 5 and not with reference to any independent claim of the objectors. The objectors' case was that the Bunga belonged to the Gurdwara Shri Harmandir Sahib. This claim is no longer pressed. The only claim now put forward on behalf of the local Committee is that the Shri Harmandir Sahib has a right of superintendence and control over the management of the Bunga. This is in effect only a restriction on the rights as claimed by the petitioners under S. 5 and all that the Tribunal has decided is that no such restriction exists. In my opinion the Tribunal had jurisdiction to decide this question.

On merits there seems to be no force in the claim as to superintendence and control advanced on behalf of the Gurdwara. Reference was made to the oral testimony of Natha Singh (O. W. 1), Suba Singh (O. W. 3) and Karta Singh (O. W. 4), but this oral testimony is unconvincing and quite inadequate to establish the alleged right. On the above findings, I would dismiss the appeal of the proprietors of Sohl (Civil Appeal 694 of 1932) and accept that of the Local Committee (Civil Appeal 626 of 1932) in part and declare that the Bunga Sohlana is an institution partly religious and partly charitable in character and that it is under the management of the proprietors of the village Sohl as trustees. The Bunga is inalienable. The Shri Harmandir Sahib has no right of superintendence or control over the management of the Bunga.

Coldstream, J.—I agree.

B.D./R.K. *Order accordingly.*

A. I. R. 1936 Lahore 643

COLDSTREAM AND BHIDE, JJ.

Committee of Management of Gurdwaras, Amritsar—Objectors—Appellants.

v.

Atma Singh—Petitioner and another—Objector—Respondents.

First Appeal No. 1190 of 1933, Decided on 11th February 1936.

Punjab Sikh Gurdwaras Act (8 of 1925), S. 5—Tribunal must decide petitioner's right—Right of objector decided incidentally—Deciding objector's right without pronouncing upon petitioner's right is not correct.

In a petition under S. 5, what the Tribunal has primarily to determine is the right, title or interest of the petitioner in the property in dispute. It may have to determine the objections raised by the opposite party for that purpose, but the section does not seem to justify the determination of the objector's right only, without any pronouncement on the rights of the petitioner: 1935 Lah 279 and 813, *Rel. on.* [P 644 C 1]

*Charan Singh and Gurcharan Singh—*for Appellants.

Din Dayal Khanna and S. L. Puri for *Vishnu Datta*—for Respondent (Petitioner).

Bhide, J.—This appeal arises out of a petition under S. 5, Punjab Sikh Gurdwaras Act, by one Atma Singh for a declaration that he is the owner of a Bunga known as Bunga Budh Singh. The petitioner's claim was opposed by the Committee of Management for the Gurdwaras at Amritsar, who claimed that the Bunga was the property of the Gurdwara Sri Harmandir Sahib. The majority of the tribunal which tried the petition gave no finding as to the petitioner's rights but merely granted a declaration to the effect that the Bunga was not the property of Sri Harmandir Sahib and that Sri Harmandir Sahib had no right of superintendence or control. From this decision the Committee of Management has appealed.

It is contended on behalf of the appellant that the tribunal was in error in holding that the appellant had no right to supervise or control the management of the Bunga, and that in any case the negative declaration as to rights of Sri Harmandir Sahib which was granted by the majority of the tribunal without determining the petitioner's rights was without jurisdiction. As regards the first point, there is no evidence of any value on the record to prove that Sri Harmandir Sahib has any right to control or supervise the management of the Bunga. The appellant produced a few witnesses who stated that they had been located at the Bunga by the Manager of the Harmandir Sahib. But this would not necessarily show any right of control or supervision. A Bunga is usually intended for the residence of pilgrims and the witnesses may have been merely allowed to occupy the Bunga on the recommendation of the Manager of Sri Harmandir Sahib. I, therefore, feel no hesitation in agreeing with the finding of the learned tribunal on this point.

The second contention, however, appears to me to have force. In a petition under S. 5, what the Tribunal has primarily to determine is the right, title or interest of the petitioner in the property in dispute. It may have to determine the objections raised by the opposite party for that purpose, but the section does not seem to justify the determination of the objectors' rights only, without any pronouncement on the rights of the petitioner. This view receives support from recent decisions of this Court, reported as 1935 Lah 279 (1) and 1935 Lah 813 (2). In the present instance the majority of the Tribunal have recorded no finding at all on the petitioner's rights. The learned Tribunal (majority) remarked in their judgment: 'What the Tribunal has to decide under S. 5 is whether the Gurdwara has a right, title or interest in immovable property'. In view of the language of S. 5 and the rulings referred to above, I find myself unable to accept this view. It is, therefore, necessary to determine in this case what right, title or interest the petitioner has in the property in dispute. The petitioner claimed the Bunga as a private property and relied mainly on the fact that the Bunga was gifted to him in 1920, by Kundan Singh and two other persons who claimed to be its proprietors (vide Ex. P-1). The deed of gift, no doubt, describes the Bunga as the private property of the donors, but it is significant that it is stated in that very document that the Bunga was small and could accommodate only 10 travellers. The term 'Bunga' has been described in 9 P R 1917 (3) as a

hostel where pilgrims coming from various parts of India to pay a visit to the Golden Temple stay. These hostels were founded by rich men, especially by the Rajas, and were dedicated to the public as wakf property.

This description was later adopted in subsequent rulings of the Punjab Chief Court as well as of this Court, see e. g. 146 P R 1919 (4), Civil Appeal 2610 of 1929 (5),

1. Shiromani Gurdwara Prabandhak Committee, Amritsar v. Jagat Ram, 1935 Lah 279 = 156 I C 1042 = 16 Lah 968 = 38 P L R 44.
2. Hazara Singh v. Chet Ram, 1935 Lah 813 = 160 I C 533.
3. Mehr Singh v. Sochet Singh, 1916 Lah 98 = 35 I C 620 = 9 P R 1917.
4. Gahl Singh v. Surjan Singh, 1920 Lah 271 = 54 I C 955 = 146 P R 1919.
5. Management Committee, Gurdwaras, Amritsar v. Nanak Singh, Appeal No. 2610 of 1929.

and 1933 Lah 1041 (6). From the recital in the deed of gift referred to above, the Bunga in dispute appears to be an institution of the same character. This conclusion receives further support from an important agreement (Ex. O-2) executed by the petitioner Atma Singh himself in favour of the Committee of Management in 1924. It appears that the petitioner wanted to repair the Bunga and had approached the committee who was in charge of the management of Sri Harmandir Sahib owing to some objection which had been raised. The agreement clearly describes the Bunga as wakf property. This document was put to the petitioner, when he was in the witness box but he was unable to offer any satisfactory explanation of the above recital. He professed to be ignorant of the recital in the document, but I find it difficult to believe this statement. As regards the recital in the deed of gift about the accommodation available for pilgrims in the Bunga also, Kundan Singh, the executant when questioned in the witness box, was unable to offer any explanation.

In view of the above two documents the oral testimony of the witnesses produced by the petitioner in support of his claim cannot be accepted. I would, therefore, hold that the Bunga in dispute is wakf property dedicated for the use of pilgrims to Sri Harmandir Sahib and is an institution of the same description as that given in 9 P R 1917 (3). The petitioner's status is, therefore, only that of a trustee and manager of the Bunga and this fact is not now disputed by the appellant. The deed of gift in favour of the petitioner was virtually tantamount to a transfer of the management in his favour. Such a transfer is not ordinarily permissible in law, but the recitals in the deed show that the executants were in debt and unable to maintain the institution. In the circumstances the transfer may be taken to be for the benefit of the institution and as such valid. As already stated the petitioner's status as a trustee is no longer disputed and hence it is unnecessary to discuss that point further. I would accordingly accept the appeal and modify the decree of the tribunal by declaring that the Bunga in dispute is wakf property dedicated for the use of pilgrims

6. Management Committee, Gurdwaras, Amritsar v. Indar Singh, 1933 Lah 1041 = 147 I C 1142 = 15 Lah 117 = 95 P L R 286.

visiting Sri Harmandir Sahib and that the petitioner is entitled to manage it as a trustee, without any right of control or supervision on the part of Sri Harmandir Sahib. I would leave the parties to bear their costs.

Coldstream, J.—I agree.

B.D./R.K.

Order accordingly.

A. I. R. 1936 Lahore 645

COLDSTREAM AND BHIDE, JJ.

Kesar Singh and another—Petitioners—Appellants.

v.

Balwant Singh and others—Respondents.

First Appeal No. 1523 of 1933, Decided on 11th February 1936.

Punjab Sikh Gurdwaras Act (8 of 1925), S. 10—Petitioner putting up claim that non-applicant has no right—Non-applicant not putting any claim—Petitioner's claim based on their right of ownership—Right not established—Tribunal cannot determine non-applicant's right.

The power to deal with a petition under S. 10 does not include authority to determine a claim not included in the petition itself. Where claim that the non-applicant has no right of superintendence and control is made in the petitions, but this claim is based on the plea that the petitioners were owners of the Bunga, and the evidence adduced by them was to prove that the Bunga was not wakf, the claim failing entirely, the Tribunal can only dismiss the petitions and has no jurisdiction to adjudicate upon the question what rights were possessed by the non-applicants: 1935 Lah 279, Rel. on. [P 647 C 2; P 648 C 1]

Janki Nath Wazir and Dev Raj Sawhney—for Appellants.

Madan Lal, Charan Singh and Gurcharan Singh—for Respondents 2 and 4.

Coldstream, J.—This judgment will dispose of the three appeals Nos. 1528, 1837 and 1838 of 1933, the subject-matter in dispute being the same in all three cases, a building known as the Bunga Maharaja Sher Singh at Amritsar.

This building which abuts on the parkarma or marble terrace round the sacred tank in the centre of which the Sri Harmandir Sahib, (the Golden Temple) a Notified Sikh Gurdwara is situated, was claimed as property of the Gurdwara. Petitions disputing this claim were submitted by Jaswant Singh (No. 1626), Kesar Singh (No. 1628), Darbar Singh and others (No. 1627), residents of Kabna and Jhulke villages in Lahore Tahsil and Sardar Balwant Singh, the great-grandson of the builder of the Bunga. The petitions were duly sent to the Sikh Gur-

dware Tribunal for disposal. The Tribunal dealt with them together in one consolidated proceeding and in each case made a declaration in accordance with the judgment of a majority of the members that the Sri Harmandir Sahib had no right, title and interest in the building which was wakf property dedicated to the use of pilgrims to the Sri Harmandir Sahib and that the descendants of Maharaja Sher Singh were managers of the Bunga.

Against this decree Jaswant Singh and Kesar Singh have presented the appeal No. 1528 and the Committee of Management, the cross-appeals No. 1837, in which the respondent is Jaswant Singh, and No. 1838 in which the respondent is Kesar Singh. Jaswant Singh in his petition asserted that he had perpetual rights of possession and management in the Bunga in his capacity as Bungai, that he was in possession of the first storey of the Bunga having succeeded Sahib Singh as his adopted son, and Sahib Singh having himself succeeded Natha Singh who was in possession before him, by adoption. He asked for a declaration that the Bunga was his property.

In Kesar Singh's petition it was asserted that he and his ancestors had been in "continuous and uninterrupted possession" of two rooms in the Bunga, that the Bunga had never been dedicated to the general public absolutely and that if there had been any dedication it was an imperfect dedication with full power of control and management left with the founders. The relief claimed was that the claim of the Gurdwara be dismissed. Before us it was at first argued for the appellants Kesar Singh and Jaswant Singh that the evidence proved that they were owners of the Bunga, but this position was ultimately abandoned and the only contention pressed was that the Tribunal having held and declared that the Gurdwara had no rights in the Bunga was wrong in going on to declare that the property was wakf dedicated to the use of pilgrims to the Gurdwara and that the descendants of Maharaja Sher Singh, the founder, were managers of it. In the cross-appeal by the Committee of Management the appellants' counsel Mr. Charan Singh asks us to set aside the declaration that the Gurdwara have no rights in the Bunga, first because there was no petition on behalf of the Gurdwara before

the Tribunal for disposal and an adjudication on its rights was without jurisdiction, secondly because the evidence proves that the Gurdwara had a right of controlling the management of the Bunga, and thirdly because the Tribunal ought to have given effect to a compromise during the proceedings effected between Sardar Balwant Singh and the Committee of Management by which, in consideration of certain terms agreed upon, Sardar Balwant Singh transferred his rights to the Committee.

Before issues were struck for trial Sardar Man Singh, counsel for Jaswant Singh and Kesar Singh, made a statement in which he admitted that the present Bunga had been built by Maharaja Sher Singh and his wife Rani Randhavi. The pedigree-table in the Tribunal's judgment is inaccurate. He also admitted that Kesar Singh was a Bungai of the Bunga and Jaswant Singh its Sarparast (overseer) that the first Bungai was Sawaya, grandfather of Natha Singh, that the Maharaja appointed Jaswant Singh and Kesar Singh's predecessors as Bungais, that pilgrims visiting the Golden Temple resided in the Bunga if permitted by the Bungai and Sarparast, and that the Granth Sahib was read in the Bunga by Kesar Singh and Jaswant Singh. I may here note that from a judgment of 1896 referred to below it seems that the Bunga existed before the time of Maharaja Sher Singh but was rebuilt by him and his wife Rani Randhavi.

It is argued before us on their behalf that as Kesar Singh and Jaswant Singh were in possession of the Bunga (and it is admitted by the respondent Committee that Kesar Singh was in possession of the Bunga) it was for the Committee to show that they were not owners. S. 110 Evidence Act, certainly supports this argument but in the present case the admissions made by the petitioners' counsel appear to me to be alone sufficient to justify the dismissal of their petitions. That a Bunga, situated as this building is situated, is ordinarily an institution devoted to an object partly religious partly charitable, is now well established. The nature of the Bungas round the Golden Temple was described as follows in 9 P R 1917 (1), which dealt with a dispute over this very building:

1. Mehr Singh v. Sochet Singh, 1916 Lah 98=35 I C 620=9 P R 1917.

Bungas are hostels where pilgrims coming from various parts of India to pay a visit to the Golden Temple stay. These hostels were founded by rich men especially by Rajas and were dedicated to the public as waqf property. There was appointed on each Bunga a custodian called a Bungai whose duty was to read the Granth Sahib and arrange for the comfort of pilgrims staying in the Bunga and keep the Bunga in proper order.

This definition has been consistently accepted and acted upon by the Chief Court and this Court: see 146 P R 1919 (2), (which did not accept the opinion, expressed by a single Judge in 81 P R 1902 (3), that a Bunga may be an imperfect trust and not a wakf), Civil Appeal No. 2610 of 1929 (4) and the recent judgment published in 1933 Lah 1041 (5). The admissions made by Sardar Man Singh, before issues were framed, leave no doubt that the Bunga Sher Singh is an institution of this kind, that is to say a building in which the Granth Sahib is read, dedicated to the use of pilgrims visiting the Golden Temple and that the petitioners have no proprietary rights in it. No doubt Kesar Singh, his father and grandfather have been Bungais of the Bunga, but there is no reliable evidence of their having set up a title adverse to the institution or that the nature of this Bunga is exceptional. It is true that Kesar Singh stated that he and Jaswant Singh used to lock up their portions of the Bunga when they went away, but even if this be believed their action would not be notice of a claim to hold adversely to the title of the institution of which they were Bungais. He also stated that he and Jaswant Singh had posted a notice on the Bunga that it was private property. But it is not proved when this was done.

On the other hand there is ample evidence showing that the Bunga is a wakf property intended for the residence and comfort of pilgrims. In 1893 Karam Singh, adopted son of Maharaja Sher Singh alienated a portion of the Bunga to one Harnam Singh. In 1895 Karam Singh's widow, Rani Sohan Kaur, sued for

2. Gahl Singh v. Surjan Singh, 1920 Lah 271=54 I C 955=146 P R 1919.

3. Kishan Singh v. Partab Kaur, (1902) 81 P R 1902.

4. Management Committee, Gurdwaras, Amritsar v. Nanak Singh Civil Appeal No 2610 of 1929.

5. Managment Committee of Gurdwaras, Amritsar v. Indar Singh, 1933 Lah 1041=147 I C 1142=15 Lah 117=35 P L R 286.

possession, joining Natha Singh, to whose rights Jaswant Singh claims he has succeeded, and Harnam Singh, Jaswant Singh's real father, as defendants. Natha Singh resisted the claim but in his jawab dawa (O. 11) admitted that the Bunga was Wakf and inalienable and that travellers obtained comfort there at all times. The Rani succeeded in obtaining a decree for possession in 1896 as custodian, the Bunga being found to be a Wakf property, and its alienation unlawful (O. 2 and O. 4). Many years later, Karam Singh's son Raghbir Singh, transferred his rights by deed to one Mohan Singh and Mohan Singh sued Kesar Singh's father, Suchet Singh (who was in possession as Bungai) for possession on the strength of the conveyance. Mohan Singh's suit was dismissed, the alienation being held unlawful as the Bunga was Wakf. An appeal having been dismissed, Mohan Singh came to the Chief Court on second appeal. The judgment of that Court is the one in 9 P R 1917 (1) to which reference has been made above. The appeal was dismissed, the Court holding that when Raghbir Singh sold the Bunga and the right of its management and superintendence, he sold a religious office for his personal gain and that the alienation was therefore invalid.

Although his counsel admitted that Kesar Singh was Bungai, Kesar Singh did not attempt to establish any right, title or interest in the Bunga as such but continued to deny that the Bunga was Wakf, or used for pilgrims, and when asked if he was in possession as a Bungai, he answered that he did not know what a Bunga was. He did not attempt to prove that he had succeeded to any office by hereditary right. He asserted that he was in possession as a Pujari of the Golden Temple. His counsel's statement was that his forefathers were appointed by Maharaja Sher Singh. In these circumstances I have no doubt that his petition was rightly dismissed. As regards Jaswant Singh, who was about 12 years old when his petition was submitted, after hearing his counsel, I am of opinion that the Tribunal was right for the reasons given in its judgment in deciding that Jaswant Singh is not a Bungai. His real father Harnam Singh made a statement as P. W. 16. In this he did not attempt to define Jaswant Singh's claim beyond asserting that he and Jaswant Singh were

in possession of the part of the Bunga, that they had been repairing it, that the Golden Temple had not interfered with their management and had no concern with it and that Kesar Singh had put up a notice with "No admission" written on it on his portion of the building. In cross-examination, he asserted that the Bunga was the property of Natha Singh, adoptive father of Jaswant Singh, whose family had been in possession of it for generations. He declared he could sell the Bunga if he wished. He could not explain how two unrelated families (his and Kesar Singh's) came to be in possession. Jaswant Singh's claim was properly dismissed. For these reasons I would dismiss the appeal No. 1528 of 1933.

The claims of the petitioners, Kesar Singh and Jaswant Singh, having been wholly dismissed the declaration in their favour to the effect that the authorities of the Golden Temple had no right, title or interest in the Bunga ought not in my opinion to have been made. Had they established a right the defining of which necessitated a description of the right found to belong to the Golden Temple, the case might have been different, but here Jaswant Singh has no right and the right of a Bungai, admitted but not claimed in the case of Kesar Singh, is merely that of a servitor not shown to possess any right, title or interest in the property as against the manager thereof. I find support for my view in the judgment of this Court in 1935 Lah 279 (6). In that case a petition under S. 10, Sikh Gurdwaras Act had been withdrawn and stood dismissed but the Tribunal had refused to grant the Gurdwara concerned a declaration of its right. The Shiromani Gurdwara Prabandhak Committee appealed. In dismissing the appeal Monroe, J. remarked that the power to deal with a petition under S. 10—and the position in this respect of a petitioner under S. 10 seems to be similar to that of a petitioner under S. 5—does not include authority to determine a claim not included in the petition itself. No doubt the claim that the Golden Temple had no right of superintendence and control was made in the petitions of Jaswant Singh and Kesar Singh but this claim was based on the

6. Shiromani Gurdwara Prabandhak Committee, Amritsar v. Jagat Ram, 1935 Lah 279=156 I C 1042=16 Lah 968=38 P L R 44.

plea that the appellants were owners of the Bunga, and the evidence adduced by them was to prove that the Bunga was not wakf. This claim failing entirely the Tribunal could only dismiss the petitions and had no jurisdiction in this case to adjudicate upon the question what rights were possessed by the Golden Temple. I would accordingly accept the appeals Nos. 1837 and 1838 and setting aside the declarations made upon the petitions Nos. 1626 and 1628 dismiss the petitions with costs throughout.

Bhide, J.—I agree.

B.D./R.K. *Order accordingly.*

*** A. I. R. 1936 Lahore 648**

BHIDE, J.

(Firm) Chaudhri Fazl Din, Ghulam Qadir, Ahmad Bakhsh & Co.—Plaintiffs—Appellants.

v.

Ghulam Rasul — Defendant—Respdt.

Second Appeal No. 1016 of 1934, Decided on 18th December 1935.

* Civil P. C. (1908), O. 30, R. 9 — Partner of firm doing business with firm on his own behalf — Balance struck in favour of firm after settling accounts — Suit by firm for balance is competent.

Although the Civil P. C. does not profess to lay down substantive law, O. 30, R. 9 implies that a suit by a firm against one of its partners or between firms having common partners is maintainable in certain circumstances. An action for balance of a settled account is not barred merely because there are other unsettled accounts between the partners. [P 648 C 2]

Where, therefore, a partner of a firm is doing business with the firm on his own behalf and has struck a balance in favour of the firm after settling his account, a suit by the firm for the balance is maintainable. The provisions of O. 30, R. 9 which provide that execution will not be taken without the leave of the Court and the Court may order all accounts to be taken and give such directions as it considers just are sufficient to safeguard the interest of the defendant: 1916 Cal 788, *Rel. on.*

[P 648 C 2; P 649 C 1]

Abdul Karim—for Appellants.

Muhammad Amin Khan—for Respdt.

Judgment.—This was a suit by a firm called Chaudhri Fazl Din, Ghulam Qadir, Ahmad Bakhsh & Co., against Ghulam Rasul, one of the partners in the firm for recovery of Rs. 1,436. It appears that the firm was doing commission agency business and Ghulam Rasul had transactions of this nature with the firm on his own behalf. He struck a balance of Rs. 1,128-6-0 in favour of the firm on 1st November 1929 and it was on the basis

of this balance that the suit was instituted. The Courts below have held on the authority of 25 Bom 606 (1) that such a suit by a firm against one of its partners was not maintainable and have thrown out the suit on this preliminary ground. From this decision the plaintiff firm has appealed.

The learned counsel for the appellant pointed out that 25 Bom 606 (1) was decided under the old Civil Procedure Code of 1882 and contended that in view of the provisions of O. 30, R. 9, Civil Procedure Code of 1908, the present suit is maintainable. He also pointed out that even in 25 Bom 606 (1), the suit was not dismissed, but the decree was given subject to its being treated as an item in the partnership accounts. The learned counsel for the respondent, on the other hand, relies on 34 M L J 408 (2), in which the principle of 25 Bom 606 (1) was followed, in spite of the provisions of R. 9, O. 30, Civil P. C. It is true that the Civil Procedure Code does not profess to lay down substantive law, as pointed out in 34 M L J 408 (2), but O. 30, R. 9, certainly implies that a suit by a firm against one of its partners or between firms having common partners would be maintainable in certain circumstances at any rate. In 34 M L J 408 (2) the suit was held to be not maintainable in view of the facts of that particular case. In 25 Bom 606 (1) it is pointed out that Courts of equity in England did not allow the Common law rule as regards the non-maintainability of a suit between firms having a common partner, to stand in their way of doing justice between the parties, when all the persons interested were before the Court. Acting on this principle a decree was granted subject to certain conditions.

In 43 Cal 733 (3) it was held that an action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties. I do not see why this principle should not be applied to the present case. Here the defendant had struck a balance in favour of the

1. *Rustomji v. Purshottam Das*, (1901) 25 Bom 606=3 Bom L R 227.
2. *Lakshman Chetty v. Nagappa Chetty*, 1918 Mad 167=45 I C 86=34 M L J 408.
3. *Ram Nath Gagoi v. Pitambur Deb*, 1916 Cal 788=31 I C 430=43 Cal 733=21 C W N 632=22 C L J 339.

firm after settling his account. All that he can urge is that after settlement of the entire account of the partnership, some balance may be found to be due to him. He has not cared to bring any suit for such an account. But apart from this, the provisions of O. 30, R. 9, Civil P. C., provide that execution will not be taken without leave of the Court and the Court may order all accounts to be taken and give such directions as it considers just. This seems to be sufficient to safeguard his interests. For reasons given above, I hold that the present suit was maintainable. I accept the appeal and remand the case for re-decision under O. 41, R. 23, Civil P. C. Stamp on appeal to be refunded. Costs to follow final decision.

R.M./R.K.

*Appeal allowed.***A. I. R. 1936 Lahore 649**

AGHA HAIDAR, J.

L. Ram Mal Lilo Shah—Defendant—Appellant.

v.

L. Kanshi Ram — Plaintiff—Respondent.

Second Appeal No. 2154 of 1935, Decided on 20th February 1936, from order of Addl. Dist. Judge, Lyallpur, D/- 20th May 1935.

(a) Words and Phrases—'Usage and law' are interchangeable expressions.

Where a person in a written statement refers to his position as a pucca arhtia doing business according to the usage or custom prevailing in a particular locality by which he is liable to render accounts to his principal, but pleads that under the law he is not liable:

Held: that in common parlance 'usage' and 'law' are interchangeable expressions since usage, when proved or admitted has the force of law. [P 650 C 1]

(b) Punjab Courts Act (6 of 1918), S. 41 (3)—Custom or usage need not be confined to agricultural custom only.

A custom or usage may refer to any other kind of business or transaction representing human activity and enterprise, and need not be confined to agricultural custom only; 1926 Lah 227, Rel. on. [P 650 C 1]

*J. G. Sethi—for Appellant.**Achhru Ram and Inder Dev—for Respondent.*

Judgment.—This appeal arises out of a suit brought by the plaintiff against the defendant for rendition of accounts. The plaintiff came into Court on the allegation that the defendant was his agent and as such was liable to account. The defendant in para. 1 of his written

statement stated that his firm was carrying on business as pucca arhtia, according to the usage prevailing in Lyallpur market and under the conditions of Sham Sundar Company, Lyallpur. Lower down he stated that under the law he was not liable to render accounts. The trial Court framed a number of issues. Issue 1 ran as follows: "Whether the accounts between the parties were on the basis of pucca arhat system and consequently the defendant is not liable to render accounts."

The trial Court accepted the contention of the defendant that he was a pucca arhtia and, according to the usage of the Lyallpur market, which was followed by all commission agents dealing in forward contracts, he was not bound to render accounts to his constituents. It accordingly dismissed the plaintiff's suit with costs. The plaintiff went up in appeal and challenged the finding of the Court below on issue 1. The lower appellate Court considered the evidence and, after discussing it in the light of the well-known text book, Pollock and Mulla's Commentary on the Indian Contract Act, came to the conclusion that the relationship between the parties was such that a constituent could demand his account from his commission agent in order to ascertain the price at which his order has been executed. On this finding it held that the defendant was liable to render accounts and remanded the case to the trial Court for disposal according to law. The defendant has come up to this Court in second appeal. Mr. Achhru Ram for the respondent has raised a preliminary objection that no second appeal was competent inasmuch as the appellant has not filed the certificate prescribed by S. 41 (3), Punjab Courts Act. His argument is that the position of a pucca arhtia changes from place to place and in the present case the plea that was raised by the defendant himself was that he was a pucca arhtia according to the usage prevailing in the Lyallpur market.

The Court had therefore to determine what was the usage prevailing in the Lyallpur market. The lower appellate Court came to the conclusion that the variety of pucca arhtia, which was to be found in Lyallpur market, was liable to render account to the principal and that in this respect he was in the position of

an ordinary commission agent and not a person dealing as a principal with a principal. Mr. Sethi argued that, although in the opening portion of written pleas he had referred to his position as a pucca arhtia doing business according to the usage or custom prevailing in the Lyallpur market, he had also pleaded that under the law he was not liable to render accounts and that therefore he had taken up a position quite apart from the language used by him in the opening portion of his written statement. This argument does not appeal to me. In common parlance "usage" and "law" are interchangeable expressions since usage, when proved or admitted has the force of law. Mr. Achhru Ram further argued that the words "custom or usage" which are to be found in S. 41(3), Punjab Courts Act, need not be confined to agricultural usage only. There is force in this contention. A custom or usage may refer to any other kind of business or transaction representing human activity and enterprise, and need not be confined to agricultural custom only.

He has quoted the authority of a Single Judge of this Court in 1926 Lah 227 (1) in support of his contention. It may be noted that this case before the learned Single Judge arose out of a Division Bench judgment, but as one of the learned Judges had ceased to be a member of the Court, the application for review came up before him as a Single Judge. The view of the law laid down by the learned Judge appears to be correct and Mr. Sethi has not been able to quote any authority to the contrary except his own assertion that it is not sound law. In my opinion the preliminary objection taken by Mr. Achhru Ram prevails and the appeal is dismissed with costs.

D.S./R.K.

Appeal dismissed.

1. Firm Gobind Prasad Wazir Singh v. Firm Mangal Sain Duli Chand, 1926 Lah 227 = 91 I C 506.

A. I. R. 1936 Lahore 650

YOUNG, C. J. AND ABDUL RASHID, J.
Sheo Ram and others—Petitioners.

v.

Luta Ram and others—Opposite Parties

Civil Misc. No. 278 of 1935, Decided on 22nd January 1936, for review of decision in Civil Appeal No. 505 of 1932, D/- 22nd February 1935.

(a) Limitation Act (1908), S. 12—*A* applying for copy of judgment on 4th January 1934—Copying agent making note on application on 9th that *A* was required to deposit Rs. 10 as advance copying fee—Order not communicated to *A*—*A* calling for copy on 16th and depositing advance copying fees as required—Copy obtained by *A* on same day—Practice of copying department not to accept advance copying fees till probable cost of copying was ascertained—*A* held entitled to allowance of period from 4th January to 16th January, as time requisite for obtaining copy.

A applied on 4th January 1934 to the Copying Department for a copy of judgment and decree delivered on 23rd December 1933 and deposited the urgent fees. On 5th, 6th, 7th and 8th January, *A* went to the copying agent but was told on each occasion, that the file of the case had not been received in the Copying Department. On the 9th the copying agent wrote a note on the application to the effect that the file showed that the costs of the copying would exceed Rs. 10 and that *A* was required to deposit Rs. 10 in advance. There was nothing to show that the order was ever communicated to *A*. On the 16th, *A* again called for the copies and deposited Rs. 10 as advance fees. The copy was ready the same day and *A* obtained it after the necessary further payment. The practice of the Copying Department, when the application was made, was not to accept any advance copying fees till the probable cost of the copying was ascertained on inspection of the file, although the practice was abolished subsequently. It was obvious that on 4th January *A* was not asked any advance fees and that even if *A* had tendered them they would not have been accepted. It was also clear that the order demanding advance fees was not communicated to *A* till the 16th:

Held: that *A* was entitled to an allowance of 12 days from 4th to 16th January as time requisite for obtaining a copy of the judgment.

[P 651 C 1, 2; P 652 C 1]

(b) Civil P. C. (1908), O. 47, R. 1—Appeal dismissed on preliminary ground, as barred by limitation—Counsel for appellant subsequently discovering that rules of Financial Commissioner requiring payment of copying fees along with application, were not being enforced—Appellant had paid copying fees, according to practice prevailing, when demanded—Appellant, according to practice prevailing, found entitled to more time as being time requisite for obtaining copies which brought appeal within limitation—Case held fit for review of judgment dismissing appeal.

Counsel for appellant whose appeal was dismissed on the preliminary ground, that it was barred by limitation and who was taken by surprise discovered subsequently that the rules of the Financial Commissioner requiring the payment of copying fees on the day when the application was presented, were not being observed and that according to the existing practice the copying fees were to be paid only when the probable cost of the copying was ascertained. It was found that according to the practice which prevailed, the appellant had

paid the copying fees when demanded and that the appellant was entitled to some more days as being time requisite for obtaining copies, which brought the appeal within limitation :

Held : that there was sufficient ground for allowing review of the judgment dismissing the appeal as the counsel for appellant had discovered new important evidence which was not within his knowledge and could not be produced by him after the exercise of due diligence at the time when the judgment was delivered.

[P 652 C 1, 2]

J. N. Aggarwal—for Petitioners.

M. C. Mahajan and Bhagwat Dayal — for Opposite Parties.

Order. — This is an application under O. 47, R. 1, Civil P. C., for a review of our judgment dated 22nd February 1935, whereby we dismissed the appeal preferred by the applicants (Civil Appeal No. 505 of 1932) against the judgment of the Senior Sub-Judge, Ferozepore, dated 23rd December 1931. The appeal was dismissed on the ground that it was preferred after the lapse of 101 days from the passing of the decree, and that as only one day was taken in procuring the copy of the judgment appealed from, it was barred by limitation.

The principal point argued by the learned Counsel for the applicants is that a period of 12 days should be allowed under S. 12, Lim. Act, as period "requisite for obtaining a copy of the judgment and the decree." The judgment was delivered by the Senior Sub-Judge on 23rd December 1931. An application was presented to the Copying Department on 4th January 1932 for obtaining an attested copy of the judgment and the decree on urgent fees. Rs. 2 were deposited as urgent fees. It appears from the affidavit of Sheo Ram, applicant, and the endorsement of the copying agent on the application for grant of copies that on 5th, 6th, 7th and 8th January the applicant went to the Copying Agent, but was told on each occasion that the file of the case had not yet been received in the Copying Department. On the 9th the copying agent wrote the following note on the application for grant of copies :

Sir,

The file shows that the costs of the copies applied for will exceed Rs. 10. It is therefore submitted that the applicant be required to deposit Rs. 10 in advance.

There is nothing to show that this order was ever communicated to the applicant. On the 16th the applicant again called for the copies of the judgment and the decree, and deposited Rs. 10 as ad-

vance fees. The copy was got ready that day, and the applicant was asked to pay another Rs. 3-12-0, which he did, and obtained the copy. The question for consideration is whether these 12 days can be allowed to the applicant as days requisite for obtaining the copy of the judgment. Standing Order No. 5 issued by the Financial Commissioner, Punjab, regulates the grant of copies so far as the judgments of Sub-Judges are concerned. R. 10 of the Standing Order runs in the following terms :

- (i) Every application for a copy of a record, other than an application made by post, shall be accompanied by a deposit in cash of a sum which shall not be less than the cost of preparing and certifying such copy
- (ii) If the application is not accompanied by the cash deposit it shall be returned to the person presenting it with an endorsement stating the amount of the deposit required ; such endorsement shall be dated and signed by the officer returning the application and a note of the date of return shall be made in the register.

In view of the rule quoted above, it has been held in a number of rulings that the date of making the deposit referred to in the Rule must be regarded as the date of making the application for copies. It was in accordance with these rulings that in our judgment, dated 22nd February 1935, we held that only one day was taken in procuring the copy of the judgment. The applicants have produced an attested copy of a statement of S. Pritam Singh, Copying Agent, Ferozepore, which shows that prior to 14th June 1934, the Copying Department at Ferozepore did not accept any advance copying fees till the probable cost of the copy was ascertained on an inspection of the file. On 14th June 1934 the Deputy Commissioner of Ferozepore made an order that advance copying fees may be accepted by the Copying Department, and it was only in pursuance of that order that advance copying fees began to be accepted by the Copying Department. It is obvious therefore that on 4th January 1932, Sheo Ram, applicant, was not asked for any advance copying fee, and that if he had tendered any such fee it would not have been accepted. It is further clear that the Copying Agent reported on 9th January 1932, that an advance copying fee of Rs. 10 should be demanded from the applicant, and that this order was not communicated to the applicant till the 16th of January. In these circumstances we are of the opinion that the applicants

are entitled to an allowance of twelve days, that is from the 4th of January till the 16th of January, as time requisite for obtaining a copy of the judgment appealed from.

It was contended on behalf of the respondents that as an advance of Rs. 10 was asked for from Sheo Ram on 9th January 1932, the applicant should not be allowed any days subsequent to the 9th of January as time requisite for obtaining a copy of the judgment. It appears to us however that the orders of the Financial Commissioner referred to above were not being enforced in Ferozepore previous to 14th June 1934, otherwise the application would have been returned to the applicants either on 4th January or on 9th January 1932 with an endorsement stating the amount of the deposit required. The copy does not bear any endorsement that it was at any time returned to the applicants. The learned counsel for the respondents also contended that in view of the observations of their Lordships of the Privy Council in 3 Lah 127 (1) to the effect that

Order 47, R. 1, Civil P. C., 1908, must be read as in itself definitive of the limits within which a review of a decree or order is now permitted, and the words "any other sufficient reason" mean a reason sufficient on grounds at least analogous to those specified immediately previously,

this application should be dismissed as it does not come within the provisions of O. 47, R. 1. In our opinion this contention is without any force. On 22nd February 1935, we dismissed the appeal on a preliminary objection being raised by the respondents. On that day the learned counsel for the appellants was taken by surprise, and he had no means of knowing that the rules of the Financial Commissioner regarding deposits of copying fees were not being enforced in Ferozepore in January 1932. When his appeal was dismissed, he began making enquiries and discovered new and important evidence which was not within his knowledge and could not be produced by him after the exercise of due diligence at the time when our judgment dismissing the appeal was delivered. For the reasons given above we accept this application for review, set aside our judgment and the decree based thereon dated 22nd February 1935, and hold that the

applicants' appeal (Civil Appeal No. 505 of 1932) was preferred to this Court within time. The appeal will now be set down for hearing on the merits at an early date. We make no order as to costs so far as the application for review is concerned.

R.M./R.K.

Application allowed.

* * A. I. R. 1936 Lahore 652

TEK CHAND AND DALIP SINGH, JJ.
Rameshwar and others — Plaintiffs—
Appellants.

v.

Mt. Ganpati Devi and another—Defendants—Respondents.

First Appeal No. 458 of 1930, Decided on 3rd February 1936, from decree of Senior Sub-Judge, Ambala, D/- 12th November 1929.

(a) **Hindu Law—Reversioner—Representative suit by presumptive reversioner for declaring alienation by widow ineffectual as against reversioners—On his death, right to sue survives to next presumptive heir and not personal heirs of deceased reversioner.**

Where, while a widow is still alive, a presumptive reversioner brings a representative suit for a declaration that certain alienation by the widow would be ineffectual as against the reversioners and pending suit he dies, the right to sue survives not to his personal heirs but to the next presumptive or contingent heirs: 1915 P C 124, *Foll.* [P 654 C 2]

(b) **Hindu Law—Succession—Sister's son's widow or sister's son's daughter is not heir.**

A sister's son's widow or a sister's son's daughter is not in the line of heirs either under the Mitakshara or under Act 2 of 1929, Hindu Law of Inheritance (Amendment) Act and therefore none of them has a right to succeed under any circumstances. Hence on the death of a presumptive reversioner who has brought a suit for a declaration that certain alienation by widow will not affect the reversioners, the sister's son's widow or sister's son's daughter cannot continue such suit. [P 655 C 1]

(c) **Hindu Law—Succession—Adoption by husband—Daughter of wife not associating in adoption is only half-sister of adopted boy but not sister (*Obitor*).**

Obitor.—Where a person makes an adoption with one wife, the daughter of another wife who was not associated with him in adoption is only a half-sister of the adopted boy but not a sister. [P 655 C 2; P 656 C 1]

(d) **Hindu Law of Inheritance (Amendment) Act (2 of 1929), S. 2—Half-sister—*Quaere*.**

Quaere.—Whether sister in S. 2 of Act 2 of 1929 includes a half-sister: 1933 All 491 and 1935 Oudh 332, *Ref.* [P 656 C 1]

(e) **Civil P. C. (1908), O. 22, R. 10—R. 10 is a residuary Rule under O. 22.**

Rule 10 is the residuary Rule in O. 22 and deals with cases of assignment, creation or devolution of the interest of a party during the pendency of a suit not expressly covered by the preceding Rules of that Order. [P 656 C 2]

1. Chhaju Ram v. Neki, 1922 P C 112=72 I C 566=49 I A 144=3 Lah 127 (P C).

* * (f) Civil P. C. (1908), O. 22, R. 10—Suit by presumptive reversioner challenging alienation by limited owner—Period of 12 years from date of alienation over before Act 2 of 1929—Death of reversioner—Sister of last male holder as being included in list of heirs by Act of 1929 cannot continue suit of reversioner on ground of devolution, creation or assignment of interest.

The 'interest' referred to in R. 10 is the interest of a person who was a party to the suit. It is the transfer by assignment, creation or devolution pendente lite of the interest of such a person to the applicant, which entitles the latter to make an application to continue the suit or appeal, as the case may be, and not the creation of an independent right in him. [P 656 C 2]

A suit was filed by a presumptive reversioner challenging an alienation by the limited owner as not affecting his interest. The period of 12 years for such a suit elapsed before Act 2 of 1929 came into force. On death of the plaintiff reversioner, a sister of last male-holder sought to continue the suit on the ground that she had been included in the line of heirs by Act 2 of 1929 under O. 22, R. 10, Civil P. C. :

Held: that there was no transmission by assignment, creation or devolution of the interest of a party to the litigation to her within the meaning of R. 10, and that she was not competent to apply for permission to continue the suit. [P 657 C 1]

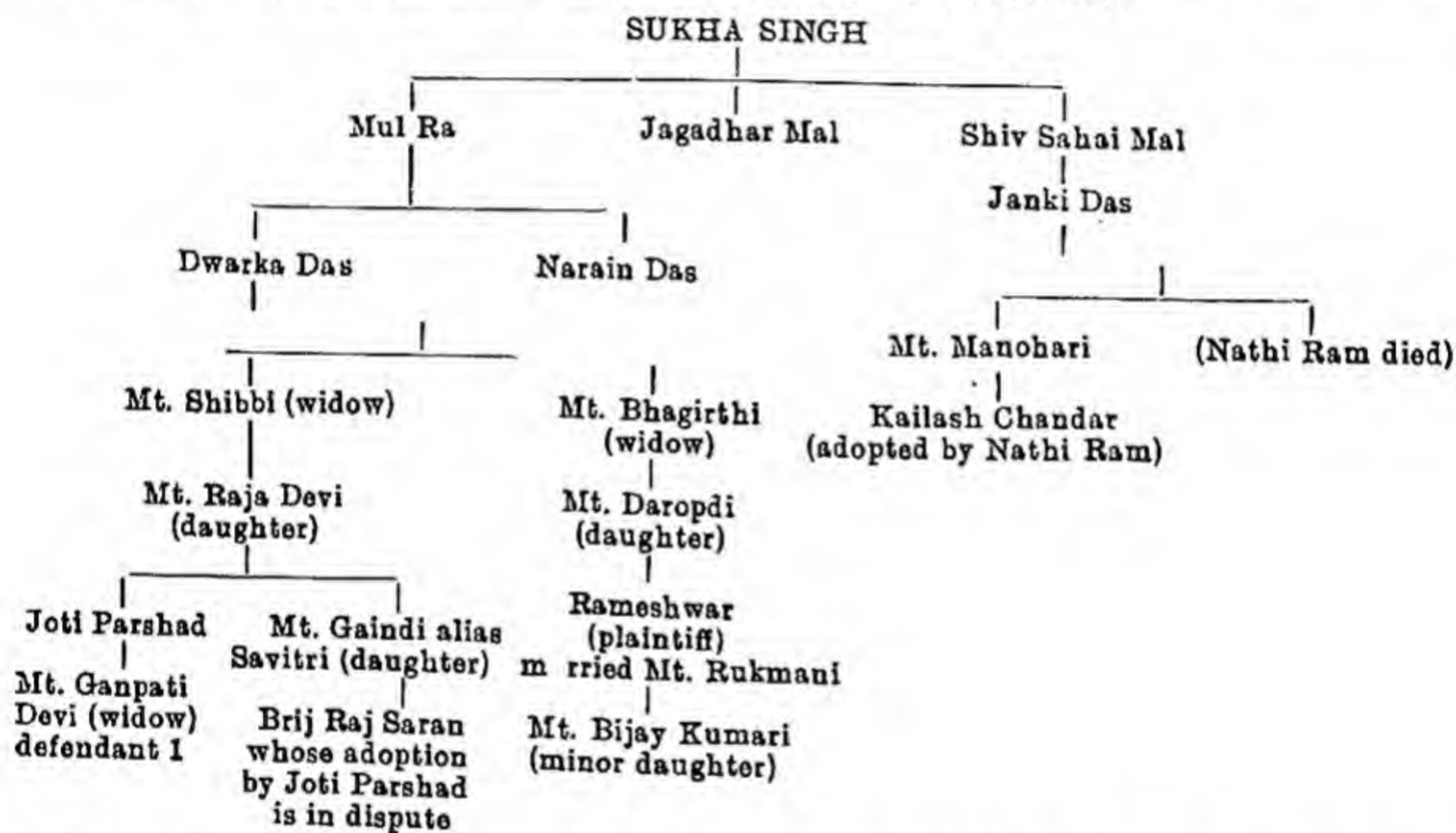
(g) Civil P. C. (1908), O. 22, R. 10—Power under, is discretionary—Delay not explained—Discretion not to be exercised.

The powers of Court to grant permission under O. 22, R. 10 are discretionary. Where such an application is made after great delay and the delay is not properly explained, the discretion should not be exercised. [P 657 C 1]

Nawal Kishore, Fakir Chand Mital and Mehr Chand Shukla—for Appellants.

Jagan Nath Aggarwal, Tek Chand Dhand and Shankar Sharan—for Respondents.

Tek Chand, J.—The parties to this litigation are Gaur Brahmans of Jagadhari, District Ambala, and are related to each other as follows :



The property in dispute originally belonged to Dwarka Das, who died on 31st July 1891. On his death mutation was effected in the names of his two widows, *Mt. Shibbi* and *Mt. Bhagirathi*. *Mt. Bhagirathi* died early in 1902, and on 6th May 1902 mutation of her share in Dwarka Das's estate was sanctioned in the name of the surviving widow *Mt. Shibbi*. Shortly afterwards, *Mt. Shibbi* applied to the revenue authorities that the entire estate be entered in the name of *Joti Parshad*, who was the son of *Mt. Raja Devi*, the daughter of Dwarka Das by *Mt. Shibbi*, and who (it was alleged), had been adopted

by Dwarka Das in his life-time and was in actual possession. The application was granted and entries made showing *Joti Parshad*, adopted son of Dwarka Das, as the owner. *Joti Parshad* died childless on 21st July 1915 and the estate was mutated in the name of his widow *Mt. Ganpati Devi*. On *Mt. Ganpati Devi*'s application, stating that *Joti Parshad* had adopted *Brij Raj Saran* as his son, and that the latter was his rightful heir, mutation was sanctioned removing *Mt. Ganpati Devi*'s name and substituting that of *Brij Raj Saran* as owner on 28th May 1916. Since then *Brij Raj Saran*

has been in possession of the property. On 23rd August 1927 Rameshwar, who is the son of Mt. Daropdi, the daughter of Dwarka Das by his second wife Mt. Bhagirathi, instituted a suit for a declaration that "the oral gift of the estate of Joti Parshad made by his widow Mr. Ganpati Devi in favour of Brij Raj Saran by means of the mutation dated 28th May 1916 was ineffectual against his reversionary rights and would not affect such rights after the death of Mt. Ganpati Devi."

Rameshwar was a minor at that time and the suit was brought by his father Nand Lal as his next friend. In the plaint it was alleged that Joti Parshad had been adopted by Dwarka Das and had succeeded to his property as his dattaka son, and therefore Rameshwar stood to Joti Parshad in the position of his sister's son and as such was entitled to succeed after the death of his widow, Mt. Ganpati Devi. The suit was contested by Brij Raj Saran, who denied the factum as well as the validity of the adoption of Joti Parshad by Dwarka Das. It was further pleaded that Joti Parshad had validly adopted Brij Raj Saran as his son, and therefore he was Joti Parshad's rightful heir and had succeeded as such. After a lengthy trial, the learned Subordinate Judge dismissed the suit holding that Joti Parshad had not been proved to have been adopted by Dwarka Das and consequently the plaintiff Rameswar was not Joti Parshad's heir and had no locus standi to sue. From this decree a first appeal was lodged in this Court by Rameshwar minor through his next friend Nand Lal. Shortly afterwards the appellant, Rameshwar, attained majority, and on his application was allowed to continue the appeal in his own name. Before the appeal came up for hearing, Rameshwar died sonless on 30th September 1934. On 8th December 1934 an application under O. 22, R. 3, Civil P. C., purporting to be on behalf of Mt. Rukmini, widow of Rameshwar, was presented by Mr. Nawal Kishore, praying that she be substituted as the appellant in place of her deceased husband. This application was granted by a Judge in Chambers subject to just exceptions.

On 31st May 1935, another application, also under O. 22, R. 3, Civil P. C., was presented by Mt. Bijay Kumari minor daughter of Rameshwar, through her grandmother Mt. Daropdi as next friend,

for substituting Mt. Bijay Kumari as the legal representative of Rameshwar, deceased appellant. This application also was granted, subject to all just exceptions. On 5th November 1935, Mt. Daropdi, mother of Rameshwar, applied under O. 22, Rr. 10 and 11 of the Code, stating that she being the daughter of Dwarka Das, adoptive father of Joti Parshad deceased, was the latter's 'sister' and as such was his heir under Hindu Law, as modified by Act 2 of 1929. She averred that on the death of Rameshwar the "right to sue" had survived to the other reversioners of Joti Parshad and she claimed that she was the first in the line of succession. On these allegations she prayed that she "be substituted or added as an appellant in place of Rameshwar deceased and allowed to continue the appeal in order to avoid multiplicity of suits and to secure a real and proper determination of the matter in dispute."

At the hearing, counsel for Brij Raj Saran, respondent, raised preliminary objections against the maintainability of these applications and urged that the right to continue the appeal had not devolved on any of the applicants, and that the appeal must be held to have abated and should be dismissed as such.

In considering the preliminary objections, it must be borne in mind that Mt. Ganpati Devi is still alive, and on the allegations in the plaint, succession will open out to the reversioners of Joti Parshad on her death. It was for this reason that the suit had been brought by Rameshwar in a representative capacity, he claiming to be the presumptive heir, and the relief asked for was for declaration that the alleged alienation by Mt. Ganpati Devi would be ineffectual against the reversioners after the death of the alienor. The plaintiff, however, died during the pendency of the suit, and the succession has not yet opened out. It is settled law that in such a suit the 'right to sue' survives, not to the personal heirs of the deceased plaintiff but to the next presumptive or contingent heirs of Joti Parshad. This matter is concluded by the decision of their Lordships of the Privy Council in 38 Mad 406 (1), and the proposition was not contested by the learned counsel for these petitioners.

1. Venkatanarayana Pillai v. Subbammal, 1915 P C 124=29 I C 298=42 I A 125=38 Mad 406 (P C).

Assuming (as was alleged in the plaint) that Joti Parshad was the validly adopted son of Dwarka Das and Mt. Daropdi is to be regarded as the 'sister' of Joti Parshad, Mt. Rukmani and Mt. Bijoy Kumari are related to him as his sister's son's widow and sister's son's daughter respectively. But a sister's son's widow or a sister's son's daughter is not in the line of heirs either under the Mitakshara or under Act 2 of 1929, and therefore none of them has a right to succeed to his estate under any circumstances. The 'right to sue,' therefore, does not survive to either of them, and their counsel frankly conceded that their applications had been made under misapprehension and were not maintainable. I accordingly hold that Mt. Rukmani and Mt. Bijay Kumari's applications are incompetent and must be dismissed.

The third application is by Mt. Daropdi, mother of Rameshwar, and was filed more than 15 months after his death. It was not made under R. 3 of O. 22, but purports to be under Rr. 10 and 11 of that Order. The applicant claims that she stands to Joti Parshad in the position of his sister by reason of his adoption as the son of her father Dwarka Das. It is common ground that according to the Mitakshara as it was administered in Northern India (including the Punjab) up to 1929, a sister was not in the line of heirs and, therefore, at the time of his death in 1915, or at the institution of the suit by Rameshwar in 1927, Mt. Daropdi had no locus standi to contest Mt. Ganpati Devi's alienation. During the pendency of the suit, however, the Indian Legislature passed the Hindu Law of Inheritance (Amendment) Act, 2 of 1929, whereby a sister was declared to be one of the heirs of a Hindu governed by the Mitakshara. This Act came into force in February 1929. It is contended on behalf of Mt. Daropdi that by this enactment an 'interest' was 'created' in her favour in the estate of Joti Parshad and she became entitled to apply under Rule 10 for permission to continue the appeal filed by Rameshwar against the dismissal of his suit to contest the alleged alienation by Joti Parshad's widow.

For the respondent Mr. Jagan Nath urges that: (1) Act 2 of 1929 does not help the applicant, as under S. 2 it is the "sister" who has been made an heir and not a "half-sister." The learned counsel points

out that there is no allegation or proof that Mt. Bhagirathi, the mother of the applicant, had been associated in the alleged adoption of Joti Parshad by Dwarka Das. She not being his "receiving mother," her daughter, Mt. Daropdi, could not by any fiction of Hindu law be regarded as the full sister of Joti Parshad. At best she became his "half-sister" and under the Act, it was contended, a "half-sister" is not one of the heirs; (2) assuming her to be an heir, she had no right to apply under O. 22, R. 10 which deals with cases of "assignment, creation and devolution" of the interest of the original appellant otherwise than in one of the modes described in the preceding rules of that order, and that there had been no assignment, creation or devolution of such interest in favour of the applicant, by the enactment of Act 2 of 1929; and (3) in any case, the power of the Court to grant applications under Rule 10 is discretionary, and in view of the circumstances of this case and the conduct of Mt. Daropdi this is not a fit case in which the Court should exercise its discretion in her favour.

We have heard both counsel at length on these points, and after giving consideration to their arguments, I am of opinion that the second and third of these objections are well-founded and must prevail. In the view which I take on the last mentioned points, it is not necessary to discuss in detail the questions raised in the first point, though I feel bound to say that, as at present advised, I think the objection is without force. I am inclined to accept Mr. Jagan Nath's argument, that the daughter of the wife of a Hindu, who had adopted a son, but who had not associated this wife in the adoption, cannot be regarded as the "full" sister of the adoptee. In the absence of any original text directly bearing on the point, and having regard to the conflicting dicta as to the position of an adopted son vis a vis the wives of the adoptor, which are to be found in modern textbooks on Hindu law and in the judgments of the High Courts, the question cannot be said to be free from difficulty. But, as at present advised, I do not see how by any fiction of Hindu law can an adopted boy be said to stand in the position of a natural son to all the wives, living or dead, of the adoptor. It is that particular wife of the adoptor, who has been associ-

ated by him in the ceremony of adoption, or who herself has made the adoption under the authority of the husband, who is his prati-grahitri or "receiving mother," and it is to her alone that his filiation as a son takes place; to the other wives of the adoptor he stands in the position of a step-son.

In this case, there is no allegation or proof that Mt. Bagirthi was the 'receiving' mother of Joti Parshad and therefore her daughter Mt. Daropdi cannot claim to be the "full" sister of Joti Parshad, even if his adoption by Dwarka Das may be assumed to have been proved. Her status accordingly is on no account higher than that of a "half-sister," and the question arises whether a half-sister is an heir under Act 2 of 1929. In 55 All 725 (2), a Full Bench of the Allahabad High Court has answered this question in the negative, and this ruling has been followed by a Single Bench of the Oudh Chief Court in 155 I C 94 (3). In the latter case, the actual dispute was between the full sister and a step-sister, and there is no doubt that as between the two, the former is a preferential heir. In the report of the case decided by the Allahabad High Court, the facts are not stated, and it is not clear whether the half-sister of the last male-holder claimed to succeed equally with his full sister, or whether the dispute was between a half-sister and some other relation who admittedly was in the line of heirs. The decision of the Full Bench however proceeded on general grounds and laid down categorically that the word 'sister' in S. 2 of Act 2 of 1929 does not include a half-sister. With great respect, I think that the conclusion of the learned Judges is expressed too broadly, and I confess I have grave doubts as to the soundness of the decision and the reasons on which it is based. But, as was already stated, it is not necessary to express a final opinion on this point in this case, for it seems clear to me that Mt. Daropdi's application must fail, even if it be assumed that she had the status of a full sister of Joti Parshad deceased and was as such entitled to succeed to his property on the death of his widow Mt. Ganpati Devi, defendant 1.

As already stated, she has applied under R. 10, O. 22, Civil P. C., for permission to continue the appeal filed by Rameshwar more than 13 months after his death. R. 10 reads as follows:

(1). In other cases of assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to, or upon whom, such interest has come or devolved.

This rule is the residuary Rule in O. 22, and deals with cases of assignment, creation or devolution of the interest of a party during the pendency of a suit, not expressly covered by the preceding Rules of that Order. It is admitted by the learned counsel for the appellant that there has been no 'assignment' or 'devolution' of interest in favour of the appellant. He contends however that there has been the 'creation' of an interest in her favour, inasmuch as in 1929, about two years after the institution of the suit, she was made an heir of Joti Parshad by an Act of the Indian Legislature, whereas she was not in the line of heirs at all before that enactment. This contention however appears to me to be based on a misunderstanding of the Rule. The 'interest' referred to in R. 10 is the interest of a person who was a party to the suit. It is the transfer by assignment, creation or devolution pendente lite of the interest of such a person to the applicant, which entitles the latter to make an application to continue the suit or appeal, as the case may be, and not the creation of an independent right in him. In the present case I fail to see how the interest of Rameshwar in the subject-matter of the suit can be said to have been transmitted to the appellant by the enactment of the Act in 1929. It may be that by that Act she was included in the line of heirs of her 'brother' Joti Parshad, but that circumstance did not give her a right to interpose in the present suit, which had been brought by Rameshwar to contest the alienation by Joti Parshad's widow alleged to have been made in May 1916. Under Art. 125, Limitation Act, the period within which such a suit can be brought is 12 years. This period expired in 1927. At that time Mt. Daropdi as the 'sister' of Joti Parshad was not in the line of heirs and could not have maintained a declaratory suit to contest the alienation. Two years later, when the legislature included her in the line

2. Ram Adhar v. Mt. Sudesra, 1933 All 491=145 I C 529=55 All 725=1933 A L J 680 (F B).

3. Mt. Kabutra v. Ram Padarath, 1935 Oudh 332=155 I C 94=1935 O W N 545.

of heirs, it did not by any means invest her with the right to bring a declaratory suit for challenging alienations which were more than 12 years old. It cannot, therefore, be said that there was any transmission by assignment, creation or devolution of the interest of a party to the litigation to Mt. Daropdi within the meaning of R. 10 and she is not competent to apply for permission to continue the appeal.

Further, even if that Rule were applicable, the powers of the Court to grant the permission asked for are discretionary. As already stated, Rameshwar had died on 30th September 1934 and the present application by Mt. Daropdi was not made until 5th November 1935, i. e. more than 13 months after his death. It is conceded that Mt. Daropdi was fully aware of all the facts and no reason has been suggested as to why she did not come at the earliest opportunity. It was on 31st May 1935 that she, acting as the next friend of her grand-daughter Mt. Bijay Kumari minor, applied for substitution of the latter's name as the legal representative of Rameshwar. At that time she did not indicate in any way that she herself had any right to continue the appeal or that she intended to avail herself of the right. Indeed her alleged interest was created, if at all, in 1929, when the Act was passed, and there is no reason why she should have kept quiet for six years. In the circumstances I do not think that this is a fit case in which the discretion of the Court should be exercised in her favour, even if her application is otherwise competent.

For these reasons I would dismiss the application of Mt. Daropdi for "being substituted or added" as an appellant in this appeal. The appeal has abated and must be dismissed. Having regard to all the circumstances I would leave the parties to bear their own costs in this Court.

Dalip Singh, J.—I agree.

V.B.B./R.K.

Appeal dismissed.

* A. I. R. 1936 Lahore 657

ADDISON AND ABDUL RASHID, JJ.
Antu and another—Plaintiffs.

v.

Mohammad Ibrahim Ali Khan and another—Defendants.

Civil Ref. No. 31 of 1934, Decided on 13th March 1936, from order of Agha Haidar, J., D/- 12th February 1936.

1936 L/83 & 84

* Jurisdiction—Civil and Revenue Courts—Application by occupancy tenants for being adjudicated insolvents—Occupancy rights included in details of property—Tenants declared insolvent and Official Receiver taking possession of all their property—Occupancy rights sold by receiver without objection from tenants—Landlord obtaining possession of land after getting sale cancelled—Suit by occupancy tenants for possession of land held to be cognizable by civil Courts—Ss. 50 and 77 (3), Punjab Tenancy Act held inapplicable.

Where an occupancy tenant alienates his rights, and the landlord getting the alienation declared void obtains possession of the holding, a suit by the tenant for possession of the occupancy holding is cognizable only by civil Courts.

[P 658 C 2]

Certain occupancy tenants presented an application for being adjudicated insolvent, including their occupancy rights in the details of the property given in the application and stating that they were prepared to make over to the Court their entire property moveable or immovable, except that which was not liable to auction-sale under the Civil Procedure Code or any other law. The occupancy tenants were adjudged insolvents and the Official Receiver took possession of their property including the occupancy land and the occupancy rights in the land were sold, the occupancy tenants not objecting to the sale. The landlord instituted a suit for cancellation of the sale, which was decreed and the landlord obtained possession of the land. The occupancy tenants instituted a suit in the civil Court for possession of the occupancy land:

Held: that the suit was cognizable by the civil Court and that Ss. 50 and 77 (3), Punjab Tenancy Act did not apply to the case: 1 P B 1911 (Rev.) and 1930 Lah 934, *Rel. on.*

[P 658 C 1, 2]

*Shamair Chand and Parkash Chandra—*for Plaintiffs.

*Mohammad Amin Khan—*for Defendants.

Order.—This is a civil reference under S. 99, Punjab Tenancy Act, and has arisen in the following circumstances: Antu and Hannu, plaintiffs, were occupancy tenants of the land in dispute measuring 33 bighas and 6 biswas and Nawab Muhammad Ibrahim Ali Khan, defendant 1, was their landlord. On 9th December 1927, Antu and Hannu presented an application to the District Judge, Karnal, praying that they be adjudged insolvents as they were unable to pay their debts. The details of the property given in this application included the occupancy rights in the land in dispute. In para. 4 of the application it was stated by Antu and Hannu that they were prepared to make over possession of their entire moveable and immovable property, excepting that which was not liable to auc-

tion and sale under the Civil Procedure Code or any other law. The plaintiffs were adjudged insolvents on 6th August 1928. The Official Receiver took possession of their entire property including the land in dispute. On 22nd August 1928, the occupancy rights in the land in dispute were sold in favour of Ghulam Mustafa Khan, defendant 2, for Rs. 1,200. Nawab Muhammad Ibrahim Ali Khan, defendant 1, objected to this sale but the District Judge overruled his objections. The plaintiffs did not raise any objection to the sale. Shortly after his objections had been dismissed, Nawab Muhammad Ibrahim Ali Khan instituted a suit in the Revenue Court for cancellation of the sale of the occupancy rights in the land in dispute. This claim was decreed and Nawab Muhammad Ibrahim Ali Khan took possession of the land, and mutation was sanctioned in his favour. The plaintiffs thereupon instituted a suit in the civil Court for possession of the land in dispute urging that their occupancy rights did not become extinct by the cancellation of the sale in favour of Ghulam Mustafa Khan and that as the land had come into the possession of the landlord they were entitled to hold it as occupancy tenants. The civil Court by its order dated 14th July 1933, returned the plaint to the plaintiffs for presentation to a revenue Court. The revenue Court being of the opinion that the suit was cognizable by a civil Court, has made the present reference to this Court under S. 99, Punjab Tenancy Act.

It is perfectly obvious that in the present case Antu and Hannu occupancy tenants were not dispossessed of the land without their consent. They included the occupancy rights in the land in dispute in the list of property filed in the insolvency Court and they surrendered possession of the land to the Official Receiver voluntarily. They did not make any objection to the sale of their occupancy rights by the Official Receiver. In these circumstances Ss. 50 and 77 (3) (g), Punjab Tenancy Act have no applicability to the present case. The learned counsel for the landlord contended that as the plaintiffs had stated in their application for being adjudged insolvents that they were prepared to make over possession of their entire moveable and immoveable property except that which was not liable to auction and sale under the Civil Procedure

Code or any other law, the plaintiffs could not be taken to have handed over possession of the land in dispute to the Official Receiver voluntarily and that they must be held to have been dispossessed of the occupancy holding without their consent. In our opinion this contention is without any force. In the application for insolvency it was not stated that the occupancy rights were rights under S. 6, Punjab Tenancy Act, and were not liable to be attached or sold under S. 56, Punjab Tenancy Act. As mentioned above, after handing over possession of the land in dispute to the Official Receiver the plaintiffs did not raise any objection at the time of the sale in favour of Ghulam Mustafa Khan, defendant 2.

It was held by the Financial Commissioner in 1 P R 1911 (Rev) (1) that a suit by occupancy tenant who has alienated his occupancy rights, for recovery of his tenancy from the landlords after the latter had had the alienation declared void and obtained possession from the alienee, was cognizable by the civil Courts and the revenue Courts had no jurisdiction to decide such cases. A Division Bench of this Court held in 1930 Lah 934 (2) that where an occupancy tenant alienated his rights and the landlord getting the alienation declared void obtained possession of the holding, a suit by the tenant for possession of the occupancy holding was cognizable only by civil Courts. The principle underlying these rulings is fully applicable to the facts of the present case. For the reasons given above, we hold that the suit instituted by Antu and Hannu against the landlord and the vendee of the occupancy rights for possession of the land in dispute is cognizable by the civil Courts. We accordingly remit the case to the Assistant Collector directing him to send the plaint to the civil Court for decision in accordance with law. Parties will bear their own costs in this Court.

R.M./R.K. *Order accordingly.*

1. Mukhtan Singh v. Nada Singh, (1911) 1 P R 1911 (Rev.)=8 I C 733.
2. Ram Kaur v. Khushal Singh, 1930 Lah 934 =128 I C 541=31 P L R 615.

A. I. R. 1936 Lahore 659

JAI LAL, J.

Ishar Singh and others—Defendants—Appellants.

v.

Sadhu Singh and another—Plaintiffs and others—Defendants—Respondents.

Second Appeal No. 43 of 1936, Decided on 16th April 1936, from decree of Dist. Judge, Lahore, D/- 15th October 1935.

(a) Deed—Alteration—Bond not requiring attestation—Alteration by substitution of attesting witness is not material—Liability of executor is not affected.

Bonds which do not require attestation by substitution of one attesting witness in place of another by erasing the name of the witness who had originally attested, it is not a material alteration and therefore it does not affect the liability of the executant on the bond.

[P 659 C 2]

(b) Limitation Act (1908), S. 19—Bond executed in favour of some persons having equal shares—Acknowledgment in favour of only one person—Other persons are not entitled to benefit of S. 19.

There is a distinction between addressing the acknowledgment of liability and acknowledging liability to a person. In order to bring his case within limitation the person who attempts to enforce his right must show that the acknowledgment of liability was in his favour though it need not have been addressed to him, as acknowledgment of liability to the person who is claiming relief may be addressed to another person; so when an acknowledgment of liability is made in favour of only one of the obligees having equal shares, the others are not entitled to the benefit of S. 19; 14 Cal 801 (P C), *Expt.*

[P 660 C 1]

(c) Limitation Act (1908), S. 19—Bond in favour of persons having equal shares—Acknowledgment of liability in favour of only one—Obligee having benefit of S. 19 is entitled to recover his share only and not whole amount.

Where a bond is executed in favour of several obligees having equal shares in the amount, and an acknowledgment of liability is made in favour of only one of them, the obligee having the benefit of S. 19 is entitled to recover his share only and not the whole amount.

[P 660 C 2]

*Din Dayal Khanna for V. N. Sethi—*for Appellants.*Fakir Singh—*for Respondents.

Judgment.—A bond was executed in favour of Sadhu Singh, Charan Singh and Dewa Singh by the appellants. The bond was for Rs. 1,200. The share of Dewa Singh was attached in execution of a money decree against him and was purchased by one Anant Ram who instituted a suit against the appellants and recovered a third share out of the amount due on the bond. In that suit the plea

of the defendants, the appellants before me, was that they had executed a bond but only in favour of Sadhu Singh and that Dewa Singh had no interest in it. They made absolutely no mention of Charan Singh. The suit out of which this second appeal has arisen was then instituted by Sadhu Singh and Charan Singh for recovery of the balance of two-third share out of the principal amount and interest due on the bond after deducting what had been recovered by Anant Ram and after giving credit for the amount received by them. The trial Court dismissed the suit but the learned District Judge on appeal has decreed it.

Only two questions are raised before me on behalf of the appellants. One is that there has been a material alteration in the bond by the plaintiffs Sadhu Singh and Charan Singh and therefore no suit is maintainable on the bond. The alteration in question consists of substitution of one attesting witness in place of another by erasing the name of the witness who had originally attested it. The object of this forgery is not understood but the bond did not require attestation and therefore it is contended and rightly on behalf of the respondents that the alteration is not a material alteration and therefore it does not affect the liability of the defendants on the bond. I cannot disturb the conclusion of the learned District Judge on this matter. The second question raised on behalf of the appellants is that in view of the fact that an acknowledgment of liability was only in favour of Sadhu Singh, he alone is entitled to the benefit of S. 19, Lim. Act, and that Charan Singh is not entitled to the benefit of that section and therefore the suit, so far as it relates to the share of Charan Singh is barred by time. It is true that in the plaint no distinction is made between the shares of Sadhu Singh and Charan Singh but at the commencement the learned counsel for the respondents argued the case on the assumption that both these persons had equal shares in the amount in suit, and this seems to be the case because in the previous litigation a third share of Dewa Singh was sold and purchased by Anant Ram who recovered the third share due under the bond by virtue of his purchase. It must, therefore, be assumed that the three obligees under the bond were entitled to equal shares in the amount of

the bond and therefore Sadhu Singh and Charan Singh are entitled to the balance in suit in equal shares.

On behalf of the appellants reliance is placed on a judgment of the Privy Council reported as 14 Cal 801 (1), where it has been held that the acknowledgment of liability under S. 19 means liability to the person who is seeking relief in respect of which acknowledgment has been made or some person through whom he claims. The respondents' counsel however refers to the Explanation to S. 19 which provides that for the purposes of the section an acknowledgment need not be addressed to the person entitled to the property or right, and cites some cases in support of his contention, but there is a clear distinction between addressing the acknowledgment of liability to a person and acknowledging liability to a person. In order to bring his case within limitation the person who attempts to enforce his right must show that the acknowledgment of liability was in his favour though it need not have been addressed to him, as acknowledgment of liability to the person who is claiming relief may be addressed to another person. That is the effect of 14 Cal 801 (1), read with the Explanation to S. 19, Lim. Act. In the present case the acknowledgment by the appellants was contained in a written statement filed by them on 15th April 1931 in the suit which was instituted by Anant Ram. In that suit Dewa Singh, Sadhu Singh and Charan Singh were defendants 1, 2 and 3 respectively. The appellants were defendants 4 to 6 and it was stated by defendants 4 to 6 that they had executed a bond for Rs. 1,200, but only in favour of defendant 2, i.e. Sadhu Singh, that they owed nothing to defendant 1, Dewa Singh. No mention was made of defendant 3, i.e., Charan Singh, but in view of their express statement that they had executed the bond only in favour of defendant 2, that is, Sadhu Singh it must be held that they acknowledged no liability in favour of Charan Singh. Charan Singh therefore is not entitled to the benefit of S. 19, Lim. Act.

The next question arises whether Sadhu Singh is under the circumstances entitled to claim the whole of the balance due on

the bond. In view of the circumstances of the case that it is not the case of Sadhu Singh as set out in the plaint that he is the only obligee under the bond and therefore entitled to recover the whole of the amount, and the fact that really the amount was due in equal shares to the three obligees, I do not think that Sadhu Singh is entitled to recover the whole of the amount, that is, including the share of Charan Singh. He is entitled, in my opinion, to the benefit of S. 19 and the suit, so far as he is concerned, has rightly been held within time but so far Charan Singh is concerned it must be held to be barred by time, and as Sadhu Singh is not entitled to recover the whole amount but his own share in the bond the only decree that I can pass is to modify the decree of the learned District Judge by directing that the suit of Charan Singh shall be dismissed, but there shall be a decree in favour of Sadhu Singh for Rs. 367-8-0 with costs on that amount in the Court of the District Judge. In this Court the parties shall bear their own costs.

D.S./R.K.

Decree modified.

A. I. R. 1936 Lahore 660

JAI LAL, J.

Mt. Bundo and another—Plaintiffs—Petitioners.

v.

Mt. Nihato and others—Defendants—Opposite Parties.

Civil Revn. No. 706 of 1935, Decided on 17th February 1936, from order of Senior Sub-Judge, Kangra, D/- 6th July 1935.

(a) Custom (Punjab)—Succession—Kangra District—Sister and sister's son.

Under the Customary law of the Kangra District, sister and sister's son do not succeed to the deceased proprietor. [P 661 C 1]

(b) Punjab Courts Act (6 of 1918), S. 41—Question of custom not depending upon any conflicting evidence but only on interpretation of Customary law of District—Necessity of certificate under S. 41 held doubtful—(Quære.)

Quære—Where the question of custom does not depend upon any conflicting evidence but only on the interpretation to be placed on certain paragraph of the Customary law of the District, it is doubtful whether a certificate under S. 41, is necessary at all to enable a person to file a second appeal to the High Court: 1931 Lah 433, Rel. on. [P 661 C 1]

Mehr Chand Mahajan—for Petitioners.
Mehr Chand Sud—for Opp. Parties.

Judgment.—This judgment will dispose of Civil Revision No. 706 of 1935 and Civil Appeal No. 1741 of 1935. The petitioners in the one case and the appellants in the other instituted a suit for declaration and for pre-emption claiming to be the next heirs of the vendors. Both the Courts below have held that assuming that they established their relationship, which it was found they had failed to do, under the Customary law of the Kangra District, they were not entitled to succeed to the vendors. An application for a certificate under S. 41, Punjab Courts Act, was refused by the lower appellate Court and consequently a petition for revision has been presented in this Court against that order and an appeal has been presented on the merits.

It is doubtful whether a certificate was necessary at all to enable the plaintiffs to file a second appeal in this Court because the question did not depend upon any evidence but only on the interpretation to be placed on para. 54, Customary law of the District. It could not therefore be asserted that the evidence on the question was conflicting. This was the view expressed by a Division Bench of this Court in a Letters Patent Appeal No. 167 of 1926 reported as 1931 Lah 433 (1), in which the question of the interpretation of the same paragraph of the Customary law was involved. That case however is also an authority against the appellants on the merits. It was held in that case that para. 54 was exhaustive on the subject of succession of sister's sons. The plaintiffs are sister and sister's son of the vendors and according to para. 54 they are not entitled to inherit the estate of the vendors. The matter therefore is concluded by an authority which I am bound to follow, and I dismiss both the appeal and the petition for revision. The appellants shall pay the costs of the appeal. The parties shall bear their own costs of the petition for revision.

R.W./R.K.

*Appeal and petition
dismissed.*

1. Sohnu v. Babga, 1931 Lah 433=135 I O 54.

* A. I. R. 1936 Lahore 661

JAI LAL, J.

Sita Ram—Plaintiff—Petitioner.

v.

Jagan Nath Singh—Defendant—Respondent.

Civil Revn. No. 661 of 1935, Decided on 14th January 1936, against order of Sm. C. C. Judge, Delhi, D/- 7th August 1935.

* Limitation Act (1908), Arts. 7 and 102—Motor-driver is artisan and house-hold servant within meaning of Art. 7—Suit for wages is governed by Art. 7 and not by residuary Art. 102.

A motor-driver is an artisan and a house-hold servant too, especially when he is provided with board and lodging by the employer within the meaning of Art. 7. Hence a suit by him for wages is governed by Art. 7 and not by the residuary Art. 102: 1927 Rang 279, Rel. on; 1933 Lah 936, Expl.- [P 662 C 1, 2]

Shamsher Bahadur—for Petitioner.

Mehr Chand Sud—for Respondent.

Order.—The Judge, Small Cause Court, Delhi, has dismissed the petitioner's suit on the ground that the same is barred by time. The petitioner was employed by the respondent as his motor-driver; it appears from the pleadings of the respondent that in addition to his salary he was provided with board and lodging. Inter alia a plea was raised by the respondent that the suit was barred by time under Art. 7, Lim. Act. The petitioner, on the other hand, claimed that Art. 102 of the Act applied to his case. This Article applies to suits for wages not otherwise provided for. In its nature, therefore, it is a residuary Article and it would apply if Art. 7, which is the only other Article claimed to be applicable to the case, did not apply. This Article provides a period of one year for a suit for the wages of a house-hold servant, artisan or labourer not provided for by Art. 4. Art. 4 admittedly has no application to this case. The question, therefore is whether the petitioner comes within the definition of a house-hold servant or of an artisan. The trial Court has held that he is an artisan. It has cited no authority in support of its conclusion but the learned counsel for the respondent has cited before me 5 Rang 477 (1), a judgment of a learned Judge of the Rangoon High Court. In that case it was held that a motor-car-

1. Sewaram v. Lachminarayan, 1927 Rang 279 =104 I O 520=5 Rang 477.

driver was an artisan within the meaning of Art. 7, Sch. 1, Lim. Act. The definition of the expression "artisan" in Webster's Dictionary was relied upon in support of this conclusion. This case is a direct authority in support of the conclusion of the learned Judge, Small Cause Court. But Mr. Shamsheer Bahadur for the petitioner contends, relying upon 15 Lah 26 (2), a judgment of a learned Judge of this Court, that an artisan means a person who makes certain things as part of his trade or calling: but I do not think that the judgment relied upon lays down that an artisan means merely a handicraftsman, that is to say, one who makes certain things as part of his trade or calling. That is certainly one of the implications of the word "artisan" but not all its implications.

In the reported case the question was whether professional instruments of a medical practitioner came within the purview of S. 60, Civil P. C., and were protected from attachment as tools of an artisan. The question was answered in the negative for reasons already stated. There is no statutory definition of the expression "artisan," but in Webster's Dictionary it is defined as "one trained to manual dexterity in some mechanic art of trade, a handicraftsman, a mechanic." It is probable that the petitioner is not a handicraftsman. He may be a mechanic as every motor-driver is expected to be. He was not, however, employed as a mechanic but was employed to drive the motor-car of the employer. He is certainly trained to manual dexterity as the art of driving a motor-car does necessarily require manual dexterity and the driving of a motor-car is a mechanic art, because it requires some knowledge of mechanism of the motor-car and the use of such knowledge in driving the car. I feel, therefore, no doubt that a motor-driver is an artisan and when he takes up service as motor-driver, he must be deemed to have been employed as an artisan. I am further inclined to think that, in the circumstances of the present case the petitioner must be held to fall within the definition of a domestic servant which is the same thing as a household servant as that expression is used in Art. 7, Lim. Act. Now, a house-hold

servant again is nowhere defined in any statute, but the implications of the expression are to be gathered from a discussion of the subject on p. 41 et seq. of A Treatise on the Law of Master and Servant by Charles Manley Smith, Edn. 8. It is remarked there that no general rule can be laid down as to who do and who do not come within the category of domestic or menial servants, and the following definition by Roche, J., is cited:

Domestic servants are servants whose main or general function it is to be about their employers' persons or establishments, residential or quasi-residential, for the purpose of ministering to their employer's personal or ordinary needs or wants or to the needs or wants of those who are members of such establishments, including guests.

Now, applying, this test, a motor-driver and especially one who is provided with board and lodging by the employer, would come within the definition of a domestic servant and I have no reason to think that the expression "house-hold servant" in India is used in a different sense to the expression "domestic servant" in England. The petitioner could be called upon at any time during the day or the night to drive the motor-car for the employer, the members of his family or his guests according to their reasonable requirements, and as such, he would come within the definition of a house-hold servant. In my opinion, therefore, the learned Judge of Small Cause Court has applied Art. 7, Lim. Act to this case and, under that Article, the suit was admittedly barred by time. I dismiss this petition, leaving the parties to bear their own costs.

V.B.B./R.K. *Petition dismissed.*

A. I. R. 1936 Lahore 662

JAI LAL, J.

Amar Singh and others—Plaintiffs.

v.

Sundar and others—Defendants.

Civil Ref. No. 63 of 1935, Decided on 2nd March 1936, by the Commissioner, Jullundur, D/- 19th October 1935.

Punjab Tenancy Act (16 of 1887), S. 77—Land neither occupied nor let for agricultural purposes but used as site for building in village—Provisions of Punjab Tenancy Act do not apply—Civil Court has jurisdiction to try suits relating to such land.

Where the land is neither occupied nor has been let for agricultural purposes or purposes subservient to agriculture or for pasture but is occupied as the site of a building in a village, the provisions of the Punjab Tenancy Act do

2. Karam Chand Sood v. Official Receiver, 1933 Lah 936=144 I C 848=15 Lah 26=34 P L R 809.

not apply and the suit relating to such a land is cognizable by a civil Court under S. 77.

[P 663 C 1,2]

Order.—This is a reference under S. 99, Punjab Tenancy Act by the Assistant Collector, First Grade, Dharmsala, in the Kangra District, made through the Collector, Kangra District, and the Commissioner Jullundur Division. The facts are these: Amar Singh and others instituted a suit against Sundar and others for possession of 14 marlas of land described in the plaint and Rs. 5 as rent of the land for one year. The suit was originally instituted in the Court of Subordinate Judge, Fourth Class, and was decreed by him. An appeal was preferred to the Senior Subordinate Judge at Dharmsala, but the learned Judge held that the suit was cognizable by a revenue Court only and directed that the plaint be returned to the plaintiffs for presentation in a Court having jurisdiction to entertain the suit. The plaint having been returned was presented in the Court of the Assistant Collector, First Grade, at Dharmsala, who was of opinion that the suit was cognizable by a civil Court, especially as the defendants raised an objection that the suit was not cognizable by a revenue Court but by a civil Court and the plaintiffs admitted the correctness of this objection. Consequently this reference has been made.

In the plaint the plaintiffs have stated that they were the owners of the land in suit and that it had been given to the defendants for building a house thereon and that in lieu of cash payment of rent the defendants had undertaken to render services to the plaintiffs. It was alleged that the house had been built by the defendants who continued to render services to the plaintiffs for sometime but had ultimately refused to do so and had therefore incurred forfeiture of their tenancy according to the terms of the grant. It is obvious from the allegations of the plaintiffs and these allegations are not denied by the defendants so far as they are relevant to the question of jurisdiction—that the land in suit does not come within the definition of "land" under the Punjab Tenancy Act. "Land" in that Act is defined to mean land which is not occupied as the site of any building in a town or village and is occupied or has been let for agricultural purposes, or for purposes subservient to agriculture or for

pasture and includes the sites of buildings and other structures on such land. It is clear that the land in dispute is neither occupied nor has it been let for agricultural purposes or for purposes subservient to agriculture or for pasture. On the other hand it is occupied as the site of a building in a village. The provisions of the Punjab Tenancy Act therefore do not govern the present case. The suit consequently was not excluded from the jurisdiction of the civil Courts by S. 77, Punjab Tenancy Act. I hold therefore that the suit was cognizable by a civil Court. I consider that under the circumstances the proper order to pass is that the Assistant Collector, First Grade, Dharmsala, formally returned the plaint to the plaintiffs for presentation in the civil Court and as the plaintiffs had already presented the plaint in the civil Court and had obtained a decree, in exercise of revisional jurisdiction of this Court, I revise the order of the Senior Subordinate Judge, Dharmsala, directing that the plaint be returned to the plaintiffs for presentation in a Revenue Court, and send the case back to him with direction to hear the appeal of the defendants on the merits.

Neither of the parties is present or represented before me. The Assistant Collector, First Grade, shall therefore call both the parties before him and communicate the contents of this order to them. He will send the records to the Senior Subordinate Judge, Dharmsala, and shall direct the parties to appear before the learned Judge on a date fixed by him, i. e., the Assistant Collector. There will be no order as to the costs of these proceedings.

R.W./R.K.

Case sent back.

*** A. I. R. 1936 Lahore 663**

DALIP SINGH AND BHIDE, JJ.

Secy. of State—Defendant—Appellant.

v.

Ram Lal Kohli—Plaintiff—Respondent.

First Appeal No. 998 of 1933, Decided on 18th April 1935, from decree of Sub-Judge, 1st Class, Lahore, D/- 10th April 1933.

*** Master and Servant—Person engaged on footing of monthly servant—Month's notice given and service terminated—This amounts to only discharge and not dismissal or removal.**

Where a person who is engaged on the footing of a monthly servant is given a month's notice and is duly paid for that month, and his services are terminated, he is only discharged and not dismissed or removed. Hence a suit for damages for wrongful dismissal does not lie: 1935 Lah 669 and 1936 Lah 282, *Ref.*

[P 664 C 2; P 665 C 1]

Ramlal and Shamsher Bahadur—for Appellant.

Chiranjiva Lal and Ram Lal Anand II—for Respondent.

Dalip Singh, J.—The plaintiff in this case brought a suit claiming Rs. 5,250 as damages on the ground that his dismissal was malicious and unlawful and ultra vires; and that defamatory and libellous statements had been made against him which had not been enquired into and hence he brought the suit against the Secretary of State. The Secretary of State took up various defences, which need not concern us, but among the defences was that the plaintiff had been discharged within the terms of his contract, he being only a temporary hand engaged by the Public Works Department and under para. 140 of the P. W. D. Code his contract was that of monthly servants which were terminable at a month's notice, that the month's notice had been given to him and he had been duly paid for that month and therefore the suit did not lie. The trial Court framed a number of issues, issue 1 being 'was the plaintiff dismissed or discharged?' The learned Judge held that it was unnecessary to decide this issue, because the procedure followed in terminating the plaintiff's services was malicious and wrongful and that therefore though the dismissal was not ultra vires, and though there was no malicious or libellous statement, yet the termination of the plaintiff's services was invalid because wrongful and malicious. He assessed the damages at Rs. 129 because the Superintending Engineer could terminate the plaintiff's services by a month's notice and therefore the measure of the damages was a month's salary. For the rest the suit was dismissed, the parties to bear their own costs.

Both sides have come in appeal. The learned Government advocate contends that there was a discharge and not a dismissal and therefore no question as to the rules being followed or not followed or whether it was malicious or wrongful arises at all. He has also contended that

the Crown may dismiss a servant at any time unless there is statutory protection and has referred to Civil Appeal No. 1813 of 1933 (1), which so holds. There is also a ruling, Civil Appeal No. 692 of 1931 (2), in which the same was held, but it was pointed out that the rules made under the Government of India Act had statutory authority and therefore dismissal of civil servants in the service of the Crown was not entirely at His Majesty's pleasure. I see no conflict between the two rulings and as at present advised I see no reason to consider that Civil Appeal No. 692 of 1931 (2) was wrongly decided. The question therefore is whether the termination of the services of the plaintiff should be called 'discharged' or should be called 'removal or dismissal' so as to attract the operation of the Punishment and Appeal Rules 1930, which are printed at p. 95 of the Record. Para. 3 of the rules lays down certain penalties that may be imposed upon a member of a subordinate service; the relevant ones are (f) and (g), (f) removal from the service of Government which does not disqualify from future employment and (g) dismissal from the service of Government which disqualifies from future employment. To this rule an explanation is given where it is stated that the discharge of a person engaged under contract in accordance with the terms of his contract does not amount to removal or dismissal within the meaning of this rule. The plaintiff admitted that he was governed by para. 140 of the P. W. D. Code, which states that persons engaged locally will be on the footing of monthly servants. No special definition is given of the words "the footing of monthly servants" and I take it that these words have the ordinary meaning that the services are terminable by a month's notice on either side.

The plaintiff admittedly did receive a month's notice and has been duly paid for that month and so would fall within the terms of the rule and the termination of his services would amount only to a discharge. The learned counsel for the plaintiff contends that if charge-sheets are framed against a person then in all

1. *Jammo v. Secy. of State*, 1935 Lah 669=155 I C 395=37 P L R 370=16 Lah 1017.
2. *Hari Ram v. Secy. of State*, 1936 Lah 282=158 I C 996=37 P L R 780.

cases the termination of the services amounts to dismissal; in other words that there should be read into the rule words to the effect, "except when the services are terminated for gross misconduct." I fail to see why any such words should be read into the rule, which is quite clear. It follows therefore that the plaintiff was neither dismissed nor removed but was only discharged and it is admitted that on this finding the plaintiff's suit must fail. The plaintiff's appeal, it is also admitted, must fail on this finding. I would therefore accept the Secretary of State's appeal and dismiss the suit with costs throughout. The plaintiff's appeal must fail and is hereby dismissed. No order as to costs.

Bhide, J.—I agree.

K.S./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 665

AGHA HAIDAR, J.

(Firm) Shadi-Khair Din—Defendants
—Appellants.

v.

Qutba and others—Plaintiffs and another
—Defendants—Respondents.

Second Appeal No. 1817 of 1933, Decided on 27th June 1934, from decree of Dist. Judge, Gurdaspur, D/- 2nd August 1933.

Custom (Punjab)—Alienation — Alienation of 1/10 part of property to raise funds to go to Mecca—Transaction is not extravagant and is within rights of alienor.

Where a person, owning 12 kanals of property, alienates about $1\frac{1}{2}$ kanals in order to raise funds to enable him to go to Mecca, it is not by any means an extravagant transaction. He is well within his rights, both according to the tenets of the Mahomedan religion and the Customary law, to alienate a 1/10th fraction of his property in order to perform the sacred duty of going to Mecca for performing the Haj: 178 P J P W R Part 1, Vol. III, Disting. [P 666 C 1, 2]

Ram Lal Anand I—for Appellants.

Jagan Nath Talwar—for Respondents.

Judgment.—Mahi, defendant 1, owned 12 kanals of land. On 26th April 1926 Mahi sold about $1\frac{1}{2}$ kanals to Nizam Din, defendant 2, for a sum of Rs. 1,150. Mahi and Nizam Din were both agriculturists. Nizam Din sold the land, which he had purchased, to Shadi-Khair Din, defendant 3, for the same amount which Nizam Din had paid to Mahi, namely, Rs. 1,150. Qutba, the brother of Mahi, brought the present suit for a declaration that, as the property was

ancestral property and the alienation was without consideration and necessity, it would not affect his reversionary rights on the death of Mahi. Two issues were framed namely: (1) Whether the property in suit was ancestral; (2) Whether the sale was for consideration and necessity. The trial Court, though finding that the property was ancestral, dismissed the suit on the ground that there was no necessity for the sale.

The plaintiff went up in appeal and the learned Judge of the lower appellate Court accepted the finding of the trial Court that the land in suit was ancestral property. As regards the sale consideration and necessity he held that the sale by Mahi, which on the face of it was in favour of Nizam Din, was in reality to Shadi-Khair Din, defendant 3, and that, in fact, Nizam Din was a mere figurehead and the real purchasers were Shadi-Khair Din. He rightly pointed out that this device was adopted by Shadi-Khair Din in order to evade the provisions of the Land Alienation Act. Shadi and Khair Din were Lobars and not agriculturists and would have found it difficult to secure a sale in their favour through the Deputy Commissioner. As to the sum of Rs. 380 the learned Judge of the lower appellate Court pointed out that it represented a sum which had been advanced by Shadi-Khair Din to the vendor Mahi and that, this being so, it was incumbent upon Shadi-Khair Din to prove necessity for the sale. The learned Judge was not satisfied that Shadi-Khair Din had proved necessity for Rs. 380. He accordingly disallowed the item of Rs. 380 and this finding has not been challenged before me.

As to the balance of Rs. 770 an interesting question arose before the learned District Judge and I am glad to find that he granted a certificate to Shadi-Khair Din under the provisions of S. 41 (3), Punjab Courts Act. This sum of Rs. 770 was utilized by Mahi to meet the expenses of the Haj pilgrimage which he performed in due course. The question, therefore, arose whether the alienation by Mahi to the extent of about $1\frac{1}{2}$ kanals was for valid necessity.

The learned Counsel for the appellant who appeared before me in this Court frankly admitted that there was no direct authority of this Court on the point and that the only case which had any bearing on the subject-matter of the controversy

was the one referred to by the learned Judge of the lower appellate Court. This case is 178 P J P W R Part 1, Vol. III(1). In this case a deed of sale had been executed by one Gul Muhammad in favour of Mt. Janno, his sister, for a sum of Rs. 800. It was said that this money was taken to enable Gul Muhammad to go to Mecca in order to perform the pilgrimage of Haj. Gul Muhammed died soon after and could not go to Mecca. He had already performed one Haj before. The learned Judges considered that it was highly improbable that Mt. Janno ever really paid Rs. 800 or indeed any money to Gul Muhammad, and they went on to observe that, even if she did, a mere wish to go on a pilgrimage, especially when Gul Muhammad had already been once to Mecca, could not be regarded as a necessity. It would be seen at once that on the question of fact the learned Judges were extremely sceptical and in fact they thought it to be highly improbable that the sum of Rs. 800 was ever paid, and the case could easily have been disposed of on this assumption only.

They, however, went on to observe that a mere desire to go on a pilgrimage to Mecca, especially when Gul Muhammad had already performed the Haj once, could not be considered as a necessity. So far as this proposition is concerned the present case is distinguishable from the case which the learned Judges had before them. In the first place the learned Judges laid emphasis on the fact that it was a mere pious wish to go on a pilgrimage which did not materialize. In the present case Mahi did as a matter of fact go to Mecca to perform the Haj. In the second place Gul Muhammad had already performed his Haj and, therefore, according to the injunction laid down by the Mahomedan religion as regards Haj, he was not bound to go to Mecca a second time for the purpose. It was more or less a matter of spiritual luxury in his case. In the present case Mahi had 12 kanals of property and some kothas, and the fact that he alienated about $1\frac{1}{2}$ kanals in order to raise funds to enable him to go to Mecca was not by any means an extravagant transaction. The sale affected only about 1/10th of the land apart from the kothas. He was, therefore, well with-

in his rights, both according to the tenets of the Mahomedan religion and the Customary Law, to alienate a 1/10th fraction of his property in order to perform the sacred duty of going to Mecca for performing the Haj.

I am, therefore, clearly of opinion that the case in 178 P J P W R, part 1, Vol III (1) is clearly distinguishable and that the sale, in so far as it was effected for the purpose of raising the sum of Rs. 770, was for valid necessity. I would, therefore, allow the appeal and, setting aside the decree of the lower appellate Court, order that the defendants-appellants would be entitled to remain in possession of the property during the life time of Mahi and on his demise the plaintiff would be able to take possession of the land on payment of Rs. 770. As to the question of costs the point was not free from difficulty and under all the circumstances I order the parties to bear their own costs throughout.

R.K.

*Appeal allowed.***A. I. R. 1936 Lahore 666**

AGHA HAIDAR, J.

Sardar Mohammad—Defendant—Appellant.

v.

Mt. Maryam Bibi—Plaintiff—Respondent.

Second Appeal No. 1504 of 1935, Decided on 31st January 1936, from decree of Dist. Judge, Jullundur, D/- 15th June 1935.

Mahomedan Law—Marriage—Dissolution of—Wife embracing Christianity during subsistence of marriage—Marriage is dissolved—Intention of conversion is immaterial.

If the wife of a Mahomedan who had married her husband when both of them professed the Mahomedan faith, during the subsistence of marriage, abjures Islam and becomes Christian, the marriage is ipso facto dissolved. The ulterior motive of the conversion so long as the fact of conversion is genuine does not affect the question : 1915 Lah 14 and 33 All 90, *Foll.*

[P 667 C 2; P 668 C 1]

*Mohammad Sharif—for Appellant.**R. P. Khosla—for Respondent.*

Judgment.—This is a suit for declaration that the plaintiff is not the wife of the defendant, who was her husband, as she has renounced the Mahomedan faith and has embraced Christianity. The parties were married about 11 years ago. The plaintiff and defendant appear to be young people. The defendant appellant

1. Khan Muhammad v. Sher Muhammad, 178 P J P W R Part 1, Vol. III.

contracted a second marriage about three years, before the institution of the present suit. This would be sometime in 1931. This year is an eventful one so far as the mutual relations of the parties are concerned. In that year the wife brought a suit for the recovery of Rs. 500, her dower debt. She also brought a suit in the same year for arrears of maintenance. The husband brought a suit against the wife for the restitution of conjugal rights. In the same year, the husband sued the parents of the wife for damages for preventing her from going to his house. On 11th November 1932, the suit which the wife had brought for her dower debt was decreed and so was the husband's suit for restitution of conjugal rights on 8th November 1932. On the same date, the husband obtained a decree for Re. 1 as damages against his wife's parents. On 22nd November 1932, the wife transferred her decree for dower in favour of her first cousin, named Rahmat Ali. Having thus secured her position so far as the dower was concerned on 5th December 1932, according to her statement, she became a Christian and on 31st May 1933 she instituted the present suit. The course of events narrated above leaves no room for doubt that the relations of the spouses were very much strained and the wife was apparently displeased with the husband on account of his contracting a second marriage. She took the precaution of transferring the decree in favour of a third party before embracing the Christian religion thinking perhaps that the decree in her favour might be in danger, in case she tried to execute it after having embraced the Christian faith. Both the Courts below have decreed the plaintiff's claim. The defendant has come up to this Court in second appeal.

According to Mussalman law of the Hanafi School, a Mahomedan male is allowed to marry a woman belonging to one of the revealed religions. According to Mahomedan Law, Christianity is a revealed religion because its followers believe in scriptures and have received the "Kitab." They are, therefore Kitabis and the marriage of a Mahomedan with a Kitabia is valid. Apart from authorities and as a matter of first impression the fact that a Mussalman wife embraces Christianity during wedlock ought not to make any difference for the obvious reason that she has gone over from one religion

which believes in a Kitab, namely, the Mahomedan religion, to another similar religion. This view has been entertained by a very eminent jurist of Bulkh and Samarkand, and the distinguished commentator on Mahomedan Law, the late Right Hon'ble Sayed Ameer Ali, seemed to be inclined to the same view. But the current of judicial opinion in this country seems to be uniform and it has been held in numerous cases that if the wife of a Mahomedan who had married her husband when both of them professed the Mahomedan faith, during the subsistence of marriage, abjures Islam and becomes Christian, the marriage is ipso facto dissolved: 114 P L R 1916 (1), and 33 All 90 (2). I am quoting only these two cases as samples out of a large body of cases to which my attention has been invited but which need not be quoted for the purposes of this case. I do not feel strong enough to record my dissent against this highly respectable and distinguished body of judicial opinion on the subject.

It was argued very strenuously on behalf of the appellant that before decreeing the plaintiff's suit the Court below should have recorded a finding that the conversion was a bona fide one. I find that though the exact word "bona fide" has not been used, yet the lower appellate Court has held that there was no evidence in the case for holding that the baptism of Mt. Maryam Bibi by Paul was merely a colourable transaction. I take the meaning of the sentence to be that she had in reality and in fact embraced Christianity with no mental reservation. The learned Judge has further pointed out that there could be little doubt that Mt. Maryam Bibi plaintiff was prompted only by desire to bring about a dissolution of the marriage, when she renounced her religion and became a Christian. But this finding does not help the appellant. Whatever may be her motives, the fact remains that she has given up the Mahomedan faith and has embraced Christianity. Her object may be to get rid of her husband for whom she apparently does not care but that is not a matter of any consequence so far as the decision of the present appeal is concerned. A per-

1. Ghaus v. Mt. Faiji, 1915 Lah 14=29 I O 857 =114 P L R 1916.
2. Amin Beg v. Saman, (1911) 33 All 90 = 7 I O 342=7 A L J 956.

son may embrace a particular religion in order to benefit from a worldly point of view or in the hope of entering the kingdom of heaven, but so long as his conversion is genuine, his ulterior and even sordid motives would not affect the question. On a consideration of all the facts and the circumstances of the case in my opinion the Court below has arrived at the right decision. I would therefore affirm the judgment and decree of the Court below and dismiss the defendant's appeal with costs.

B.D./R.K.

Appeal dismissed.

* A. I. R. 1936 Lahore 668

JAI LAL, J.

Boda Ram—Defendant—Appellant.

v.

Devi Das-Hari Chand, Joint Hindu Family—Plaintiff—Respondent.

Second Appeal No. 1594 of 1935, Decided on 6th January 1936, from decree of Dist. Judge, Dera Ghazi Khan, D/- 4th July 1935.

* (a) Court-fees — Cross-objections for future interest—Court-fee stamp of Rs. 10 is sufficient.

When cross-objections with regard to future interest are filed the amount of future interest cannot be determined as it depends upon the date of payment of the amount decreed by the judgment-debtor. Hence ad valorem Court-fee is not necessary. Court-fee Rs. 10 is sufficient: 1934 Lah 32, *Appl.* [P 668 C 2]

(b) Limitation Act (1908), Art. 115—Hundi drawn by A in favour of B on C—C accepting Hundi but getting discharge from B by executing document to him—Suit by C against A—Limitation runs from date of discharge obtained by C and not from date of acceptance of Hundi.

A owed money to B for which he executed a hundi in favour of B on C. C accepted the hundi and obtained discharge subsequently by executing a document in favour of B and sued A:

Held: period of limitation was three years but the cause of action arose only when C obtained a discharge from B and not from date of acceptance of hundi by C: 1935 Lah 307, *Disting.* [P 659 C 1]

(c) Interest—Future interest — Judge not applying his mind to question—There is no exercise of discretion.

Where in a case where future interest should have been given the lower Court does not apply its mind at all to such question, there is no exercise of discretion by that Court and interest can be granted in appeal. [P 669 C 2]

Kharak Singh, Dhillon for Jawahir Singh Dhillon—for Appellant.

Qabul Chand Mital for M. L. Puri—for Respondent.

Judgment.—This appeal is by the defendant, the suit having been decreed against him by the learned District Judge. The respondent plaintiff has filed cross-objections with regard to future interest. The District Judge had omitted to grant him future interest. The cross-objections are within time but have been filed on a Court-fee stamp of Rs. 10 only and an objection is raised that ad valorem Court-fee should be paid on such cross-objections. The amount of future interest, however, cannot be determined as it depends upon the date of payment of the amount decreed by the judgment-debtor. Applying the principle of 154 I C 470 (1) I hold that a Court-fee stamp of Rs. 10 is sufficient under the circumstances. The only question raised on the defendant's appeal is the question of limitation and it is not an easy question to decide. The facts are these:

Bodha Ram owed money to Topan Das, and on 27th January 1928 he drew a hundi in favour of Topan Das for the amount due from him to the latter. It was drawn on the respondent Devi Das. It appears that on 27th January 1928 Topan Das made entries in his books crediting the amount of the hundi to Bodha Ram and debiting the same to Devi Das. It has not been shown that Devi Das made any corresponding entries in his books, but it is proved that he accepted the hundi. On 20th April 1931 Devi Das executed a document in favour of the heirs of Topan Das, who had in the meantime died, thereby discharging the liability under the hundi. The suit out of which this appeal has arisen was then filed by Devi Das against Bodha Ram for recovery of money paid by him to the heirs of Topan Das, and inter alia it has been defended on the ground that it is barred by time. Both parties are agreed that the normal period of limitation is three years but they differ as to the date from which it should be counted. According to the appellant time should run from 27th January 1928; according to the respondent—and this is the view of the District Judge also—from 20th April 1931. No authority directly bearing on the case has been cited by either party. The respondent's counsel has referred to 1935

Lah 307 (2), but the facts of that case were different from those in this case, and therefore it is not fully applicable.

The learned District Judge has held that Art. 115, Limitation Act, applies which provides a period of three years for compensation for breach of any contract, express or implied not in writing registered and not otherwise specially provided for in the Indian Limitation Act. Time is to begin from the date when the contract is broken. The learned counsel for the respondent supports the conclusion of the learned District Judge and further adds that Art. 62 also covers the case. That article relates to a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use and provides a period of three years from the date when the money is received. In my opinion Art. 115 is the more appropriate article and time runs in this case from 20th April 1931. When the plaintiff respondent accepted the hundi drawn by Bodha Ram in favour of Topan Das he really became liable for the amount jointly with Bodha Ram, and it was open to Topan Das to institute a suit on the hundi both against Bodha Ram and Devi Das. It was only on 20th April 1931 when Topan Das's heirs accepted the sole liability of Devi Das, that Bodha Ram was discharged from liability to Topan Das's heirs under the original transaction of loan or under the hundi drawn by him. Before that date it was not open to Devi Das to institute a suit against Bodha Ram because he had not paid the money to Topan Das. His right to recover the money from Bodha Ram accrued only when he had obtained the discharge for Bodha Ram by actual payment of the money to Topan Das's heirs or by accepting his sole liability for the same by executing a document in their favour. Therefore time in this case runs from 20th April 1931 and the view of the learned District Judge is correct.

It was urged by the appellant's counsel that there were other points raised by the defendant in his defence and the learned District Judge should have given a finding on the same. But they had all been decided by the trial Court against the appellant and it does not appear that

the appellant attacked the conclusions of the trial Court before the learned District Judge. It is not, therefore, open to the appellant now to claim that a remand should be made to the District Judge to enable him to give independent findings on those points. The appeal, therefore, must be dismissed with costs and I order accordingly.

Now with regard to cross-objections it is clear that the suit being by the plaintiff who had undertaken to satisfy the liability of the appellant to Topan Das and who has done so he was entitled to interest till the date of repayment to him by Bodha Ram, and therefore this is a case in which future interest should have been awarded by the learned District Judge. He has not applied his mind to the question of future interest at all. Therefore it is not a case where the District Judge has exercised his discretion against the plaintiff. I accept the cross-objections and modify the decree of the learned District Judge by providing that the decretal amount shall bear interest at six per cent per annum from the date of the institution of the suit till realisation. There will be no order as to the costs of the cross-objections.

K.S./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 669

AGHA HAIDAR, J.

Bije Singh—Plaintiff—Appellant.

v.

Shib Singh and others—Defendants and others—Pro forma defendants—Respondents.

Second Appeal No. 1706 of 1935, Decided on 4th February 1936, from decree of Dist. Judge, Hoshiarpur, D/- 1-6-1935.

Prescription—Possessory title—Cutting of grass from barren land does not amount to exclusive user or possession.

Mere cutting of grass or similar acts of user in an area of barren land do not amount to such an exclusive possession as would entitle a person to be given a decree for possession on the basis of his possessory title: 1927 Cal 49; C. A. No. 422 of 1930 and 1923 Lah 25, Ref.

[P 670 C 1, 2]

Nand Lal Bhalla—for Appellant.

Mehr Chand Sud—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for exclusive possession of a certain area of land. The trial Court granted the plaintiffs a decree for possession as asked by them. The lower appellate Court has modified the decree

2. Aljaz Husain v. Maqbul Husain, 1935 Lah 307=156 I O 836.

by giving the plaintiffs only a decree for joint possession. One of the plaintiffs has come up to this Court in second appeal and his learned counsel has argued very earnestly that he was entitled to exclusive possession of the area which he had been holding.

The khasra number with which we are concerned is 3429 and is entered as shamilat deh. It is 54 kanals in area. In the jamabandi of 1914-15 the entire khasra number with the exception of 8 kanals and 2 marlas, which was shown in the possession of plaintiffs' ancestor Nihala, was entered in the possession of the whole proprietary body. In the jamabandi of 1918-19 the plaintiffs' ancestor Nihala is shown as being in possession of 17 kanals and 2 marlas. In the jamabandi of 1922-23 the same Nihala is shown as being in possession of the entire khasra number measuring 54 kanals. A similar entry is recorded in the jamabandi of 1930-31. The case for the plaintiff is that he had been dispossessed from three separate areas which form the subject-matter of three separate suits. In this Court we are concerned only with two appeals in two suits. The extent of the plaintiffs' share is only $\frac{1}{32}$. The plaintiff however alleges that he has been in exclusive possession of the whole area and therefore he is entitled to be put in possession of the same. Now the question is what is the nature of the plaintiff's possession, for it is not disputed that if the plaintiff has been in possession exclusively of an area for a long series of years, he is entitled to retain it, unless there is a partition. The area in dispute is banjar qadim and is not cultivated at all. It is wild jungle land in a sparsely cultivated and thinly populated part of the country. Some hardy shrubs and rank grass grow on the land and the proprietors make use of these products without attracting any serious notice. We would assume for the sake of argument that the plaintiff has for a series of years been cutting grass for his own use, but from this fact alone it cannot be said that the plaintiff was in exclusive possession of the land as against his co-sharers.

My attention has been invited to the decision of a learned single Judge of this Court in an unreported case, C. A. No. 422 of 1930 (1), who in his turn has followed

1. Ram Saran v. Chet Ram, C. A. No. 422 of 1930.

two cases reported in 69 I C 4 (2) and 98 I C 849 (3). 69 I C 4 (2) has no direct bearing and may properly be left out of consideration, but there are observations in 98 I C 849 (3) at p. 850 which lend support to the respondents' contention. In my opinion the learned single Judge of this Court arrived at the right conclusion that the mere cutting of grass or similar acts of user in an area of barren land did not amount to such an exclusive possession as would entitle the plaintiff to be given a decree for possession on the basis of his possessory title. This being so the lower appellate Court has arrived at the right conclusion and I dismiss the two appeals with costs.

B.D./R.K.

Appeals dismissed.

2. Mansa v. Khushali Ram, 1923 Lah 25=69 I C 4.

3. Nanda Kumar Das v. Emdad Ali, 1927 Cal 49=98 I C 849=44 C L J 265.

A. I. R. 1936 Lahore 670

TEK CHAND AND DALIP SINGH, JJ.

Abdul Ghani—Plaintiff—Appellant.

v.

Maula Baksh and others—Defendants—Respondents.

Second Appeal No. 1815 of 1934, Decided on 28th November 1935, from decree of Dist. Judge, Ambala, D/- 26th June 1934.

Limitation Act (1908), S. 12—Application before signing of decree for copy of it—Period between the day of application and day on which copy of decree was supplied was excluded for appeal.

Judgment was delivered on 28th August 1933. Appellant applied for copies of judgment and decree on 29th August 1933. No deposit as required by rule was made and application was not returned. On 1st September 1933 Rs. 7-12-0 were paid by appellant. Copy of judgment was supplied. Repeated demands by appellant for copy of decree were made. He was told that decree was not signed. Decree was signed on 19th September 1933. Appellant deposited annas 12 and he was supplied a copy of decree on the same day (19th September 1933):

Held: that time between 29th August 1933 and 19th September 1933 was to be excluded under S. 12, Lim. Act for the purpose of appeal: 157 I C 181 and 1935 Lah 889, *Rel. on.*

[P 671 C 2]

Held further: that due to the action of the Copying Department in not following the rules prescribed, the appellant, was misled into thinking that all the days from 29th August 1933 till 19th September 1933 would be excluded. This case therefore was eminently fit for S. 5 of the Act.

[P 672 C 1]

Maurice—for Appellant.

Muhammad Monier—for Respondents.

Dalip Singh, J.—The facts necessary for the decision of this appeal are as follows: Judgment was pronounced by the trial Court on 28th August 1933, and on 29th August the present appellant applied for copies of the judgment and the decree. No deposit, as required by the rules, was made with this application nor was the application returned to the applicant (as also required by the rules) endorsed with the amount necessary to be deposited by him. On 1st September 1933, Rs. 7-12-0 were paid by the applicant. In his affidavit the present appellant states that this sum was demanded from him and was therefore paid. He states in the affidavit that he remained under the impression that this sum had been demanded for copies both of the judgment and the decree, and that when a copy of the judgment was furnished to him on 1st September 1933, he thereafter repeatedly made demands for a copy of the decree-sheet as well. He was told that the decree had not been signed and therefore no copy could be supplied. On 19th September 1933 annas 12 were deposited by him for the decree-sheet and, the decree having been signed on that date, a copy of the said decree was supplied to him on the same day. During this period, the appellant states that no sum was ever demanded from him as deposit for the decree-sheet.

On 16th October 1933, the present appellant put in an appeal before the learned District Judge. The appeal was dismissed on the ground that the same was barred by limitation and that neither S. 12, Lim. Act was applicable nor was there any room for the application of S. 5. Accordingly the appellant has come in second appeal to this Court. The learned Counsel appearing for him has cited 13 Cal 104 (1), in which it was stated broadly that where an application had been made before the decree was signed, the appellant was entitled as of right to a deduction of the time between the actual delivery of the judgment and the date of the signing of the decree. In 12 All 461 (2), this ruling was differed from to the extent that it was held in the latter ruling that limitation would begin to run from the date of the judgment

and not from the date of the signing of the decree. In agreement with the facts of the Calcutta High Court the Allahabad Full Bench also held that where an application had been made before the signing of the decree, the appellant would be entitled as of right to the period which elapsed between the date of the application and the date of the signing of the decree. It differed from the Calcutta High Court in that it considered that the wording of the Calcutta High Court was too broad and might include a case where application had been made after the decree had been signed. But on the point as it arises before us there is no essential difference between the Calcutta and the Allahabad views.

It is clear that if the appellant is entitled to the time between 29th August 1933 and 19th September 1933, his appeal would be within time. The reply of the learned Counsel for the respondent is that though actually an application had been put in to the Copying Department, such application not having been accompanied by the deposit required under the rules should not be taken to be an application at all. For this, reliance is placed on a ruling reported as 1935 Lah 889 (3), which refers to another ruling 35 P L R 713 (4). The latter ruling is a Single Bench ruling. On the other hand there is a ruling reported as 37 P L R 235 (5) a ruling by the same Division Bench as decided 1935 Lah 889 (3). In that case, in which the judgment is a brief one, as far as I am able to see, the facts were on all fours with the present case. Copies of the judgment and decree-sheet were applied for on 3rd January. From 3rd January to 13th January copies could not be given as the Court had not prepared the decree-sheet. The estimated price was not paid till 25th January and the copies were ready on 30th January. The learned Judges held that obviously the appellant was entitled to the time from 3rd to 13th January, and from 25th to 30th even if the period between 13th and 25th January was excluded. I would, therefore, hold that the appeal was within time by reason of S. 12, Lim. Act.

1. Bani Madhub Mitter v. Matungini Dass, (1886) 13 Cal 104.
2. Bechi v. Ahsanullah Khan, (1890) 12 All 461 = 1890 A W N 149 (F B).

3. Jiwan v. Punjab National Bank, 1935 Lah 889 = 160 I O 897.
4. Mehr Ali Beg v. Sarwan, (1934) 35 P L R 713.
5. Balj Nath v. Zapu Ram, (1935) 37 P L R 285 = 157 I O 181.

Further, if for any reason S. 12, Lim. Act is inapplicable, I would still hold that this is a case eminently fit for the application of S. 5, Lim. Act. Due to the action of the Copying Department in not following the rules prescribed, I think it may very well be urged on behalf of the appellant that he was misled into thinking that his period of limitation would exclude all the days from 29th August, till 19th September. It is well settled that where a person has been misled by the action of the Court or any officer of the Court, S. 5, Lim. Act should be applied.

I would therefore accept this appeal and remand the case to the learned District Judge for disposal according to law. This being a pauper appeal, there is no court-fee stamp to be refunded: other costs will be costs in the cause.

Tek Chand, J.—I agree.

M.D./R.K. *Appeal accepted.*

A. I. R. 1936 Lahore 672

BHIDE, J.

Ladha Ram—Plaintiff—Appellant.

v.

Barkat Ali and others—Defendants—Respondents.

Misc. First Appeal No. 1996 of 1935, Decided on 12th February 1936, from order of Addl. Dist. Judge, Lyallpur, D/- 6th March 1935.

Limitation—Condonation of period—Application under S. 151, Civil P. C., is not competent when some other provision of Civil P. C., is available—Delay caused by wrong prosecution of such application cannot be condoned under S. 5, Lim. Act.

When a remedy is provided by law, resort to the inherent jurisdiction under S. 151, Civil P. C., is not permissible. A person prosecuting an application under S. 151, Civil P. C., cannot be said to be acting in good faith when he has a remedy open to him under some other provision of Civil P. C. Delay due to such wrong prosecution cannot be condoned under S. 5, Lim. Act: 1924 All 446; 1927 Bom 79 and 1934 Lah 671, Ref. [P 673 C 1]

S. L. Puri—for Appellant.

Abdul Majid—for Respondents.

Judgment.—Civil Appeal No. 1996 and Civil Revision No. 767 of 1935, are connected and will be disposed of together. The facts giving rise to the appeal and the petition for revision may be briefly stated as follows:

The plaintiff Ladha Ram had instituted a suit for recovery of Rs. 1,100 which was dismissed by the trial Court. He

preferred an appeal to the District Judge, Lyallpur. The appeal was to come up for hearing before the District Judge on 23rd February 1935. The District Judge was on tour on that day and in his absence the appeal was taken up by Mr. M. R. Kayani, Additional District Judge. Lala Kul Bhushan, counsel for the appellant was summoned but he stated that he had no notice of the transfer of the case to the Court of the Additional District Judge and was not prepared to argue. The learned Additional District Judge treated this as tantamount to default and dismissed the appeal. On 6th March 1935, an application for restoration of the appeal under O. 41, R. 19 was presented. The application was dismissed on the same date by the learned Additional District Judge, apparently without hearing either the appellant or his counsel. The appellant presented another application for restoration under O. 41, R. 19 read with S. 151, Civil P. C. This application came up before Sardar Kartar Singh, successor of Mr. Kayani, who held that the application under S. 151, Civil P. C., was not maintainable inasmuch as an appeal was competent from the order of dismissal of the application made under O. 41, R. 19, Civil P. C. The plaintiff Ladha Ram has now preferred an appeal from the order of dismissal of the first application under O. 41, R. 19, Civil P. C., dated 6th March 1935, and has also filed a petition for revision of the order of Sardar Kartar Singh, dated 17th July 1935, dismissing the second application under O. 41, R. 19, Civil P. C., read with S. 151, Civil P. C.

The learned counsel for the respondents has raised preliminary objections that the appeal which was presented on 3rd October 1935, is time-barred and the application for revision is incompetent. As to the first point, there is no doubt that the appeal is *prima facie* time-barred inasmuch as the order of dismissal of the first application under O. 41, R. 19, Civil P. C., was passed on 6th March 1935, and the appeal was presented nearly seven months after the date of the order. The learned Counsel for the appellant however seeks extension of time under S. 5, Lim. Act, on the ground that the appellant was engaged in prosecuting in good faith another application for reversal of the order dated 6th March 1935, viz., the second application under

O. 41, R. 19 read with S. 151, Civil P. C., referred to above. The only point for consideration therefore is whether the period spent in prosecuting this latter application from 14th March 1935 to the 17th July 1935, can be allowed to be deducted. The learned counsel has cited 44 Cal 87 (1), at 94 in support of his contention that time spent in prosecuting another application in good faith for reversal of the order under appeal can be allowed to be deducted under S. 5, Lim. Act. He has also cited 14 Lah 206 (2), in which it was held that wrong advice given by counsel might be considered to be sufficient ground for granting extension under the same section. There is however no evidence on the record to show that the second application under O. 41, R. 19, read with S. 151, Civil P. C., was made in good faith on the advice of any counsel. The appellant has not given any affidavit that he consulted any counsel at all and the application does not purport to have been signed by any counsel. No authority has been cited in support of the contention that an application under S. 151, Civil P. C., for the reversal of the order dated 6th March 1935, in the exercise of the inherent powers of the Court was maintainable when an appeal from the said order was competent. There is on the other hand ample authority in support of the contention of the learned counsel for the respondent that when a remedy is provided by law, resort to the inherent jurisdiction under S. 151, Civil P. C., is not permissible: cf 46 All 144 (3), 51 Bom 26 (4) and 14 Lah 779 (5).

In the 'circumstances it must be held that the appellant did not act in good faith in prosecuting an application under S. 151, Civil P. C., for reversal of the order dated 6th March 1935. The time spent in prosecuting that application cannot therefore be deducted and the appeal must, as a result be held to be time-barred. The petition for revision

also must fail because in view of the facts given above, the petition under S. 151, Civil P. C., was incompetent and, was therefore rightly dismissed by the learned Additional District Judge. I accordingly dismiss the appeal as well as the petition but in view of all the circumstances I leave the parties to bear their own costs in this Court.

B.D./R.K. *Appeal and Revision dismissed.*

A. I. R. 1936 Lahore 673

BHIDE, J.

Mohammad Yakub and another—Plaintiffs—Appellants.

v.

Abdul Karim and others—Defendants—Respondents.

Second Appeal No. 1269 of 1935, Decided on 11th December 1935, from decree of Senior Sub-Judge, Sialkot, D/- 1st April 1935.

(a) *Adverse Possession—Suit for possession as owner alleging defendant to be tenant—Plaintiff's failure to prove relationship of landlord and tenant and payment of rent by defendant does not justify inference of defendant's adverse possession.*

Where the plaintiff sues for possession as owner alleging the defendant to be a tenant, from the mere fact that the plaintiff fails to prove the relationship of landlord and tenant between him and defendant, and payment of rent by defendants, the inference that the defendants have been in adverse possession is not justifiable. [P 674 O 2]

(b) *Adverse Possession—Suit for possession—Defendant pleading possession as co-sharer but not adverse possession—Statement by father of defendant in earlier proceedings that he had no right in property—Only small portion in occupation of defendant—Defendant not proved to be co-sharer—Defendant's possession held only permissive and not adverse to plaintiff.*

In a suit for possession of property from the defendant the latter contested on the ground that he was in possession as co-sharer. It was found that there was a relation between plaintiffs and defendant, that the defendant's father had disclaimed any interest in the property and the defendants were occupying only a small room in the two-storeyed building. Further the defendant did not plead adverse possession nor did he prove that he was a co-sharer:

Held: that when possession can be lawful, it should be presumed to be so, rather than wrongful and as such defendant's possession should be presumed to be permissive and not adverse to plaintiff and that the plaintiff should be deemed to be in constructive possession of property: 109 I C 458, *Rel. on.* [P 674 O 2]

(c) *Practice—Relief—Both parties overstating respective claims is not sufficient to defeat plaintiff's claim.*

1. Joseph A. J. S. v. Corporation of Calcutta, 1916 P O 128=36 I C 912=48 I A 243=44 Cal 87.

2. Gulam Mahomed v. Usman, 1933 Lah 541=149 I C 968=34 P L R 554=14 Lah 206.

3. Joshi Shib Prakash v. Jhinguria, 1924 All 446=78 I C 416=46 All 144.

4. Vallabhbhai Naranji v. Ohhotelal Purushotamdas & Co., 1927 Bom 79=100 I C 154=51 Bom 26=28 Bom L R 1442.

5. Allahabad Bank Ltd. v. Raja Ram, 1938 Lah 671=146 I C 966=14 Lah 779=35 P L R 124.

Where both the plaintiff and defendant have overstated their claim, the fact that plaintiff has overstated his claim is not sufficient to defeat his claim. [P 675 C 1]

Shamair Chand—for Appellants.

R. L. Anand I—for Respondents.

Judgment.—This was a suit for possession of a two-storeyed building in the occupation of defendants 1 and 2. The plaintiffs alleged that they were the owners of the house and defendants 1 and 2 were occupying it as their tenants. The defendants on the other hand claimed that they were occupying it as co-sharers in the house. The Court below found that plaintiffs were owners of the house and that the defendants were not co-sharers therein. They have however held that plaintiffs had failed to prove that the defendants were occupying the portion of the house in dispute as tenants and that the defendants' possession thereof being adverse and over 12 years' duration, the plaintiffs could not recover possession. The suit has been accordingly dismissed and plaintiffs appeal.

The learned counsel for the appellants contends that the finding that the defendants were in adverse possession is one of law or at least a mixed question of fact and law, being based on inferences from certain facts, and, as such, open to challenge in second appeal. It was further urged that in the present case the finding was unsound as the inference drawn was not justified by the facts proved: 19 Cal 253 (1) was cited as an authority in support of the contention. The learned counsel for the defendants, on the other hand, contended that the case was really governed by Art. 142, Limitation Act, and the suit was rightly dismissed as the plaintiffs had failed to prove that they were dispossessed or had discontinued possession within 12 years before the institution of the suit. In support of this contention he relied on a recent Full Bench decision of this Court reported as 16 Lah 442 (2), the facts of which appear to have been similar. In that case also the plaintiffs had alleged a tenancy which they failed to prove, but the allegations were held to be tantamount to an allegation of constructive dispossession. The learned coun-

sel for the appellants urged in reply that even if the Full Bench ruling was applicable, there was no finding by the Courts below that plaintiffs had been dispossessed or had discontinued possession more than 12 years before the suit. The Courts below have applied Art. 144 to the case and have not given any clear finding from the stand point of Art. 142; but the learned counsel for the defendants contended that the finding of the Court below, that the defendants were in adverse possession since 1918 as against the plaintiffs, implied that the plaintiffs were dispossessed in that year.

The contention appears to be correct as far as it goes, but the question is whether the learned District Judge's finding on the question of adverse possession is correct. The learned District Judge has laid stress on the fact that the plaintiffs had failed to prove the relationship of landlord and tenant as no payment of rent was proved. But this would not necessarily justify an inference that the defendants were occupying the house adversely. It is significant that the defendants themselves did not plead any adverse possession at all in their written statements and tried to justify their possession on the ground that they were co-sharers. The defendants are occupying only a small room in the house and it is highly probable that they were allowed to occupy it only on account of their relationship and nothing more. The learned District Judge does not appear to have considered an important document in this connection, viz Ex. P-3, a statement filed by Nathu, father of defendants 1 and 2, in guardianship proceedings in the year 1916, in which he clearly stated that he had no concern with the property. This shows that defendants must have been occupying the house with the consent of the plaintiffs. It was urged that in 1916 the exchange had not yet taken place and the plaintiffs were not the sole owners of the house. But even so, plaintiffs were entitled to 1/3rd share, and the defendants may have been allowed to occupy a small portion of the property with reference to the plaintiff's share therein.

As held in 29 P L R 162 (3), when possession can be lawful, it should be presumed to be so, rather than wrongful, and

1. *Lachmeswar Singh v. Manowar Hossain*, (1892) 19 Cal 253=19 I A 48=6 Sar 133 (P C).

2. *Behari Lal v. Narain Das*, 1935 Lah 475=157 I C 686=16 Lah 442=37 P L R 743 (F B).

3. *Bhola v. Sant Saran Singh*, (1928) 29 P L R 162=109 I C 458.

in view of the relationship of the parties, the statement of Nathu referred to above and the fact that only a small room in a two storeyed building is in the occupation of the defendants, the proper inference, in my opinion, was that the defendants' possession was permissive and not adverse to the plaintiffs. On this inference plaintiffs must be held to have been in constructive possession all along. It may be that the plaintiffs overstated their case in alleging that they were realising rent from defendants, but the defendants similarly overstated their case in claiming to be co sharers. I do not think this overstatement should be considered to be sufficient to defeat the plaintiffs' claim. I accept the appeal and decree the plaintiffs' suit, but in view of all the circumstances leave the parties to bear their costs throughout.

M.D./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 675

COLDSTREAM AND BHIDE, JJ.

Albel Singh and others — Objectors—Appellants.

v.

Narain Dass—Petitioner and others—Pro forma Respondents—Respondents.

First Appeal No. 675 of 1933, Decided on 10th March 1936, from decree of Sikh Gurdwara Tribunal, Lahore, D/- 16th January 1933

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 8—Any hereditary office-holder can present petition.

Any hereditary office-holder can present a petition under S. 8. It is not necessary that he should be either a past office holder or a present office-holder. [P 676 C 1]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 8—Hereditary office holder—Office devolving before January 1920 according to hereditary right or by nomination—Person who becomes mahant is holder of hereditary office.

Where the office of Mahant devolves before 1st January 1920 according to hereditary right or by nomination by office-holder for the time being, a person who himself becomes Mahant as the chela of his guru is the holder of the hereditary office of Mahant of this institution. [P 677 C 2]

(c) Punjab Sikh Gurdwaras Act (8 of 1925), S. 16 (2) (iii) — Dharmasala not public institution but private property of Udasi fraternity—Dharmasala rebuilt by Sikhs but continued to be managed by hereditary mahants—Merely because worship has been Sikh, subsequent to rebuilding, it does not become Sikh Gurdwara.

A dharmasala, when it was founded, was not a public institution but was the private property of the Udasi fraternity; several years later it was rebuilt by the Sikhs but was continued to be managed by the hereditary mahants; subsequent to the rebuilding the worship was Sikh :

Held : that this fact alone would not make the dharmasala a Sikh Gurdwara within S. 16 of the Act. [P 678 C 1]

Gurcharan Singh and Charan Singh—for Appellants.

Pandit Nanak Chand and Yashpal Gandhi—for Respondent (Petitioner).

Coldstream, J.—The dispute in this case relates to a dharmasala, a religious and charitable institution, in the village Isewal in the Ludhiana District, which was claimed to be a Sikh Gurdwara in a petition submitted to the Local Government under the provisions of S. 7, Sikh Gurdwaras Act. The petition was published on 10th May 1929 and on 13th July 1929 Narain Das, the present respondent, presented a petition under S. 8 of the Act denying that the dharmasala was a Sikh institution. Narain Das described himself as mahant. Narain Das's petition was resisted by the Sikhs who had presented the petition under S. 7 on the grounds that Narain Das was not the chela of the previous mahant of the institution, Dharm Das, and not being a hereditary office-holder was not competent to present a petition under S. 8. It was also contended that the dharmasala was not an Udasi dera as asserted by Narain Das, but was a Sikh institution which had come into existence about 21 years previously, that is to say about 1911, when it was founded for the use of the villagers. The petition under S. 8 was duly forwarded to the Sikh Gurdwaras Tribunal for disposal. The Tribunal struck two issues :

1. Whether the petitioner is a hereditary office-holder and has the right to present this petition? 2. Whether the dharmasala in dispute is a Sikh Gurdwara within the meaning of S. 16 (2) (iii) of the Act?

The President and Members of the Tribunal came to a unanimous conclusion that the dharmasala was not a Sikh Gurdwara, and holding that in view of this finding issue 1 did not require decision, granted Narain Das the declaration which he sought. Against this judgment some of the Sikhs responsible for the petition under S. 7 appealed to this Court. When

the appeal came before Monroe and Rangil Lal, JJ., the point was taken for the appellants that the Tribunal ought not to have decided the case without a finding on the issue whether the petitioner was a hereditary office-holder, and it was suggested that the objectors had not been given a proper opportunity to produce evidence to rebut the prima facie case established by the evidence put forward by the petitioner. The learned Judges found that the objection was technically correct and remanded the case to the Tribunal for a decision on issue 1, stating in their order that the parties would be at liberty to produce further evidence.

The tribunal after hearing some evidence on both sides decided by a majority (Sardar Man Singh dissenting) that the petitioner was a hereditary office-holder entitled to submit a petition under S. 8. Sardar Man Singh's decision was that as the petitioner had come into office after the commencement of the Act, he could be neither a present office-holder nor a past office-holder and therefore could not be a hereditary office-holder. The appeal is now before us in decision and we have heard counsel and been taken through the whole of the evidence. It is not disputed that the first mahant was Mast Ram, who, it appears, built the dharmasala at Isewal. He was the mahant of a larger institution at Pamal, a village a few miles distant, and the dharmasala at Isewal was admittedly an off shoot of the institution at Pamal. From the time of Mast Ram onwards, the mahants have all been Udasī Sadhs. When the first inquiry was made into the nature of the muafi attached to the institution in 1851, the mahant was Puran Das, chela of Mast Ram, and it was stated by the lambardar of the time that the muafi would devolve upon the chela of the muafidar who had succeeded to the gaddi or mahantship. Mast Ram had another chela, Prem Das, who resided at the dharmasala at Isewal, but he did not claim the muafi, which remained with Puran Das. At the enquiry made in 1881 the mahant was Brahm Das chela of Prem Das. From his statement it appears that for some time one Ram Saran Das had been in possession of the Isewal property. After his death Prem Das took possession of the land, but Puran Das remained as mahant and was recorded as owner of the muafi. Puran Das died about 1873. After

his death the land was recorded as the property of Kotu Ram, chela of Puran Das. Brahm Das was absent at this time, but when he returned Kotu Ram the chela of Puran Das, appointed Brahm Das as the mahant and left the office. When Brahm Das died he was succeeded as mahant by Sarup Das, his chela. Sarup Das died in or about 1919 and was succeeded by his chela Dharam Das who on his death in 1929 was succeeded by Narain Das, the petitioner in this case.

The evidence relating to the devolution of the office of mahant has been referred to in sufficient detail in the order of the tribunal on remand, dated 15th June 1935, and it is not necessary to describe it full here. It has never been disputed that Narain Das was mahant at the time he presented his petition. The contentions urged before us on behalf of the appellants are that Narain Das has not proved exactly at what time or in what manner he was appointed mahant, that both he and Sarup Das became mahants not because they are chelas of the mahants who preceded them, but because they were appointed by the village proprietary body and that (as held by Sardar Man Singh) Narain Das, not being a present office-holder or a past office-holder cannot be an office-holder at all for the purpose of the Sikh Gurdwaras Act. It is proved by the admissions of the appellants' own witnesses that Narain Das was the mahant of the institution in succession to Dharm Das. Lakha Singh, O. W. 1, when cross-examined, stated that mahant Narain Das was the chela of Dharm Das, who was the mahant before him and that the succession to the office of a mahant in this institution had been from guru to chela, although the appointment had been by the village panchayat. Albel Singh, O. W. 4, one of the petitioners under S. 7, stated that Narain Das had been appointed servitor of the dharmasala because Dharm Das had told the villagers that he could not serve the institution and because he had the right to succeed Dharm Das as chela and was thought fit for the appointment by the villagers. Narain Das's own statement is that he was appointed by the fraternity, being a chela of Dharm Das and having been nominated as his successor by a will executed by Dharm Das on 18th December 1925. This will is a registered document (P. W. 10/1) and nominates Narain Das

as heir to all of Dharm Das's property including the dera. It was registered on the date it was executed, and two of the lambardars of the village were present at the time of the registration.

Counsel for the appellants argues that the evidence of the succession after the death of Mast Ram does not show that the succession has always been from guru to chela because it does not prove who exactly Ram Saran Das was and because Prem Das was not a chela of Ram Saran Das and Brahm Das was not a chela of Kotu Ram. The history of the mahantship given above shows that the mahants of the institution at Isewal belonged to the fraternity who owned the parent institution at Pamal. It is clear that Brahm Das succeeded as the chela of Prem Das, who was a chela of Mast Ram. Ram Saran Das was in charge for some time, apparently during the time of Mt. Ram, but in the pedigree table of the mahants incorporated in the land revenue records of 1882 Ram Saran Das is not shown at all. There Mast Ram is shown as having two chelas, Prem Das and Puran Das, and Prem Das is shown as the guru of Brahm Das. Below the name of Kotu Ram, who is recorded as the chela of Puran Das, there is a note that he owns no land in Isewal but is a proprietor in Pamal. The evidence proves beyond any reasonable doubt that the office of mahant of this institution has since its foundation devolved from guru to chela by hereditary right or nomination by the mahant for the time being. It is to be observed moreover that when the case was being tried by the tribunal it was never disputed that in this institution the succession had always been from guru to chela.

As regards the contention that Sarup Das and Dharm Das were appointed by the Sikhs of the village, I agree with the conclusion of the President and both members of the Tribunal that this is not proved. The appellants rely in this connexion principally upon the documents O. W. 11/1 and O. W. 14/1. The President and one member of the Tribunal have rejected these documents as fabrications and the other member, Sardar Man Singh, does not regard them as reliable evidence. There is no doubt at all that Sarup Das succeeded Brahm Das as his chela and was himself succeeded by his chela Dharm Das. I see no force in the argu-

ment adopted by Sardar Man Singh that Narain Das was incompetent to present the petition because he was neither a past office-holder nor a present office-holder. The definitions of present and past office-holders, [S. 2 (4) (v) and (vi), Sikh Gurdwaras Act] were necessary for the purpose of the provisions relating to applications by dismissed office-holders for compensation for unlawful removal (see Ss. 6 and 11 of the Act). Only present and past hereditary office-holders can apply for compensation. But S. 8 provides that any hereditary office-holder may present a petition under that section. A 'hereditary' office means an office the succession to which before 1st January 1920 devolved according to hereditary right or by nomination by the office-holder for the time being. As the office of Mahant in this case devolved before 1st January 1920 according to hereditary right or by nomination by the office-holder for the time being, Narain Das, who himself became mahant as the chela of his guru, is the holder of the hereditary office of mahant of this institution.

It remains to consider whether the Tribunal's decision, that the dharmshala at Isewal is not a Sikh Gurdwara, is incorrect. Before us the appellants' counsel began by stating that the appellants' case was that the institution came into being for the first time in 1880, that being the time when the dharmshala at Isewal was placed definitely under a mahant who was not the mahant of the parent institution at Pamal. This parent institution, counsel admits, was an Udasi dera and so also admits was the dharmshala at Isewal to begin with. Counsel further admits that before 1880 the dharmshala was not a public institution at all but was the private property of the Udasi fraternity who managed it. This was not however the case set up by the appellants before the tribunal. When the trial opened Sardar Gurcharan Singh, who represented the objectors, stated that the institution was established about 22 years before by the Sikh proprietors of the village for the purpose of public worship of the Granth Sahib, and the evidence produced by the objectors was directed towards proving that the present institution was founded about 1911 when the Sikhs of the village rebuilt the kacha dharmshala making it a pacca building.

Now there is no evidence that when the Sikhs rebuilt the dharmsala they established a new institution. The dharmsala continued to be managed by the hereditary mahant and remained in possession of its old property which had belonged to the dharmsala founded by Mast Ram. Nor is there any evidence that the nature of the worship which had been carried on previously in the institution was altered when the present pacca building was erected. On the contrary the case of the appellants was that from the beginning the Granth Sahib had been worshipped in the dharmsala. When stating his case, at the beginning of the trial, Sardar Gurcharan Singh admitted that there was a muafi attached to the dharmsala and stated that the dharmsala was a Sikh Gurdwara. There is no doubt that lately the worship in the institution has been Sikh, but this fact alone will not make the dharmsala a Sikh Gurdwara within the meaning of S. 16, Sikh Gurdwaras Act. The facts on which the President and Rai Sahib Dwarka Parshad based their decision justify their conclusion that the dharmsala is not a Sikh Gurdwara. There is no need to repeat these facts here, for Sardar Gurcharan Singh has not attempted to argue that any of them is not established by the evidence in the case. He relies solely upon the evidence that since it was rebuilt Sikh worship has been carried on in the institution. For the reasons indicated above I would dismiss this appeal with costs.

Bhide, J.—I agree.

R.W./R.K. *Appeal dismissed.*

A. I. R. 1936 Lahore 678

BHIDE, J.

Mohamda—Defendant—Appellant.

v.

Chuni Lal and others—Plaintiffs—Respondents.

Second appeal No. 680 of 1935, Decided on 17th December 1935, from order of Senior Sub-Judge, Gujrat, D/- 12th March 1935.

(a) Second Appeal—Finding of fact on evidence cannot be disturbed.

A finding of fact, if based on evidence, which has been considered and believed by the lower Court, cannot be disturbed in second appeal.

[P 678 C 2]

(b) Punjab Relief of Indebtedness Act (7 of 1934), S. 6—Provisions of Act apply only to suits pending or filed after passing of Act—Appeal is not included within scope of S. 6.

According to S. 6 the provisions of part 3 of the Act apply only to suits which were pending on or instituted after the commencement of the Act. Hence it does not apply where the suit is decided long before the coming into force of the Act even though an appeal is pending. An appeal cannot be included within the scope of S. 6. The legislature presumably used the word 'suit' advisably in S. 6 and that section cannot be held to be applicable to appeals.

[P 678 C 2: P 679 C 1]

Allah Din Malik—for Appellant.

Jagan Nath Talwar for *Chuni Lal* and *Prem Nath Bharadwaj*—for Respondents.

Judgment.—This was a suit for recovery of Rs. 930 inclusive of principal and interest. The suit was dismissed by the trial Court but was decreed on appeal by the learned Senior Sub-Judge; from this decision a second appeal has been preferred. The finding of the learned Senior Sub-Judge that the bahi entry on which the suit was based was duly proved is one of fact and cannot be disturbed in second appeal. The learned counsel for the appellant has urged that the learned Senior Sub-Judge has failed to take into consideration certain circumstances in connection with the transaction. But it seems to me that the finding is based on evidence, which was considered and believed by the Court and no point of law arises. The next contention of the learned counsel was that the Senior Sub-Judge has given no finding on the question of interest; but it appears from the judgment that this point was not pressed before him. It has not been specifically raised even in the grounds of appeal in this Court. The last contention of the learned counsel was that the interest allowed in the case is in excess of what is permitted by the Punjab Relief of Indebtedness Act. He relied in this connection on Ss. 5 and 6 of that Act, but the present suit was decided before the Act came into force, and in view of S. 6 it seems to me that the provisions of the Act cannot be applied to the present suit. According to S. 6 the provisions of part 3 of the Act apply only to suits which were pending on or instituted after the commencement of the Act. The Act came into force on 19th April 1935 and the present suit was decided long before that date, namely on 17th December 1934. The learned counsel contended that the present appeal is a continuation of the suit, but I do not think that appeals can be included within the scope of S. 6. No provision of this kind affecting substantive

rights can be taken to have retrospective effect except in so far as it is expressly laid down in the Act. The legislature presumably used the word 'suit' advisably in S. 6 and I am, therefore, of opinion that the section cannot be held to be applicable to appeals. I do not think 'suits' and 'appeals' can be treated as synonymous terms. I dismiss the appeal with costs.

V.B.B./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 679

ADDISON AND ABDUL RASHID, JJ.

Misri Lal—Plaintiff—Appellant.

v.

Babu Lal and *another*—Defendants—Respondents.

Letters Patent Appeal No. 98 of 1935, Decided on 6th March 1936, from judgment of Dalip Singh, J., D/- 2nd May 1935, reported as 1936, Lah 151.

Custom (Punjab) — Gaur Brahmins of Chiragh Delhi—Remoter kindred are not excluded by nearer kindred

Amongst the Gaur Brahmins of Chiragh Delhi the remoter kindred are not excluded by the nearer kindred: 1936 Lah 151, *Affirmed*.

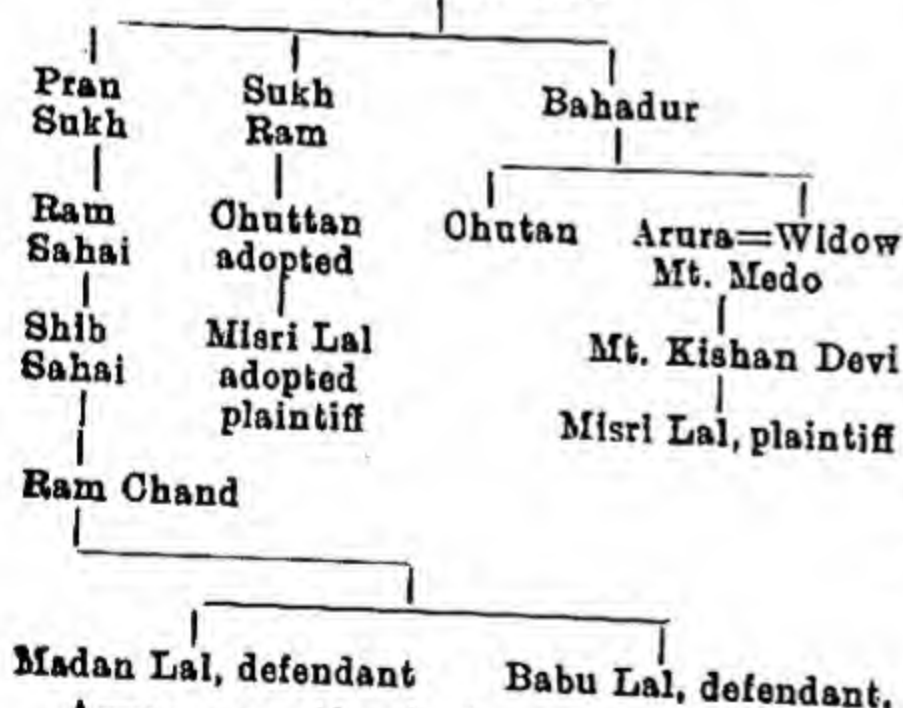
[P 681 C 1]

M. C. Mahajan and *Bhagwat Dayal*—for Appellant.

J. G. Sethi—for Respondents.

Abdul Rashid, J.—The following pedigree table is necessary for the purposes of this appeal.

RATTAN LAL



Arura was the last male holder of the land in dispute, and on his death Mt. Medo took possession of the land belonging to her husband on the usual widow's life estate. On the death of Mt. Medo, Misri Lal plaintiff claimed the whole of the land by right of inheritance in his natural family as he was the son of

Arura's daughter. This claim was rejected by the revenue authorities and the land belonging to Arura was divided equally between the plaintiff on the one hand and Madan Lal and Babu Lal defendants on the other hand. The suit, out of which the present appeal has arisen, was instituted by Misri Lal on 13th March 1928, for a declaration to the effect that he was the owner and in possession of the whole of the land in dispute and for correction of the revenue entries. It was stated in the plaint that the parties who were Gaur Brahmins of village Chiragh Delhi in the Delhi Province, were governed by Hindu Law, and that the plaintiff was entitled to succeed in his adoptive family as he was a nearer relation of the last male holder than the defendants. The defendants pleaded inter alia, that the parties were governed by agricultural custom, that they were entitled to a half share in the land in dispute by the right of representation, and that under Customary Law the nearer kindred of the deceased could not exclude the more remote. The trial Court held that the parties were governed by Hindu law, and decreed the plaintiff's claim. On appeal, the learned District Judge dismissed the plaintiff's suit. Against this decision, the plaintiff preferred an appeal to this Court which was heard by single Judge. The learned single Judge having dismissed the appeal, the plaintiff has preferred the present appeal under Cl. 10, Letters Patent.

The sole question for consideration in this appeal is whether the parties are governed by agricultural custom or their personal law. The Brahmins being a priestly class, the initial presumption is that they would be governed by their personal law and the burden would be on the defendants to prove that they follow custom. In the present case however the learned District Judge and the learned single Judge of this Court have held that the presumption in favour of the personal law has been sufficiently rebutted by the evidence produced on behalf of the defendants. The parties live in village Chiragh Delhi but the land in dispute is situate in Mauza Bahapur which is contiguous to Chiragh Delhi. In Mauza Bahapur one Thok, namely, Thok Hussainpura, is exclusively owned by the Brahmins and its area is 545 bighas and 13 biswas. In the other Thok known as

Serai Jolina Brahmins own a large area and the rest of the land in this Thok is owned by Khattris, Christians, Gujars, etc. The Brahmins have a right in the shamilat land as well. One of the three Lambardars of the village is a Brahmin. The greater part of the area owned by Brahmins is under their personal cultivation and part of the area is cultivated by them through their servants or tenants.

Gaur Brahmins are a notified agricultural tribe in the Delhi Province and they were consulted at the time of the compilation of the *Riwaj-i-ams* of 1880 and 1911. Question 104 of the *Riwaj-i-ams* of 1880 shows that the right of representation prevailed amongst the Brahmins and that amongst them the descendants of a predeceased son were entitled to the same share as their father would have inherited had he been alive. The Customary Law of the Delhi district compiled in 1911 also shows that answers given by the Brahmins were duly recorded and that in most cases their answers were identical with the answers given by the other agricultural tribes of the district. Question 47 of this *Riwaj-i-ams* runs as follows:

Q. When there are male descendants who do not all stand in the same degree of kindred to the deceased, and the persons through whom the more remote are descended from him are dead, will the nearer descendants exclude the more remote; or are the more remote descendants entitled to succeed simultaneously with the nearer descendants?

A. All tribes:

When there are male descendants who do not stand in the same degree of kindred to the deceased, and the persons through whom the more remote are descended from him are dead, the nearer descendants do not exclude the more remote. The more remote are entitled to succeed simultaneously with the nearer descendants.

It is abundantly clear from the oral evidence of the parties that daughters are excluded from inheritance among the Gaur Brahmins of Chiragh Delhi. One instance of the collateral succession of a widow has also been established by reliable evidence in the present case. Ram Rakha (D. W. 4) is a Lambardar of Bahapur and is a Gaur Brahmin by caste. He stated that if a person dies leaving a brother and a son of another deceased brother, then both the brother and nephew will succeed to the property. He cited an instance of the distant and nearer kindred succeeding equally in his own family. Kirpa Ram Lambardar

of Serai Jolina, which is situated at a distance of only $1\frac{1}{2}$ kos from Chiragh Delhi, stated that Brahmins of Serai Jolina follow agricultural custom in matters of succession. It is significant that some of the witnesses of the plaintiff also admitted in cross-examination that amongst the Gaur Brahmins a brother and a nephew succeed together. Jagan Nath (P. W. 1) stated that even if a brother and a nephew of the deceased be living separately, still they will inherit together. Balak Ram (P. W. 2) also admitted that a brother and a nephew of a deceased both inherit. These admissions made by the witnesses for the plaintiff show that amongst the Gaur Brahmins of Chiragh Delhi the remoter kindred are not excluded by the nearer kindred.

There is a temple of Kalkaji at Mauza Bahapur and all the Brahmins of Chiragh Delhi are pujaris (worshippers) of this temple. They also officiate at the time of different religious functions. Reliance was placed on behalf of the appellant on this aspect of the case and it was urged that Brahmins performing religious functions could not be held to have abandoned Hindu law in favour of agricultural custom. This as well as the initial presumption that Brahmins are governed by their personal law are the only matters which support the plaintiff's claim. A number of rulings were quoted by the learned counsel on either side. Reliance was placed on behalf of the appellant on 1931 Lah 491 (1), 6 Lah 524 (2) and 7 Lah 555 (3) wherein Brahmins of various places have been held to be governed by their personal law. On the other hand, the learned counsel for the respondent relied on 142 I C 284 (4), 131 I C 347 (5) and 86 P R 1904 (6) wherein Brahmins of different villages situated in the Delhi Province have been held to be governed by agricultural custom. It is unnecessary to discuss these rulings as each case must be decided on the evidence produced

1. *Mt. Bhagwani v. Sitaram*, 1931 Lah 491=134 I C 302=32 P L R 284.
2. *Khajan Chand v. Paras Ram*, 1925 Lah 646=90 I C 1045=6 Lah 524.
3. *Mahomed Din & sons v. Berry & Co.*, 1927 Lah 86=99 I C 948=7 Lah 555=27 P L R 864.
4. *Badlu v. Mt. Umrao Kaur*, 1933 Lah 473=142 I C 284=34 P L R 351.
5. *Ghogri v. Manbhari*, 1931 Lah 123=131 I C 347.
6. *Chuttan v. Ramchand*, (1904) 86 P R 1904.

therein. Rulings may sometimes serve as judicial instances of a particular custom having been proved to prevail amongst a certain caste in a certain village.

On a consideration of the entire evidence produced by the parties in this case, we are of the opinion that the decisions of the learned District Judge and the learned single Judge of this Court are correct, and that the defendants have succeeded in establishing that Gaur Brahmins of village Chiragh Delhi are governed by Customary Law in matters of succession and that amongst them the nearer kindred of the last male holder do not exclude the remoter kindred. For the reasons given above, we dismiss this appeal. The parties will bear their own costs in this appeal.

B.D./R K.

Appeal dismissed.

*** A. I. R. 1936 Lahore 681**

JAI LAL, J.

Kherati Lal—Plaintiff—Petitioner.

v.

Janki Parshad—Defendant—Opposite Party.

Civil Revn. No. 660 of 1935, Decided on 20th January 1936, from order of Senior Sub-Judge, Gurgaon, D/. 11th June 1935.

(a) Deed—Proof—Finger-print expert giving evidence not on scientific comparison of thumb-impressions in Court concerning document—Evidence held inadmissible to prove document.

Where the execution of a document by a person is to be proved with the help of a finger-print expert, who on his examination gives evidence merely on his observation and summary comparison and not on scientific comparison of the thumb impressions in Court, his evidence should not be considered to be admissible in proving the document. [P 681 C 2]

* (b) Costs—Witnesses—Witnesses summoned but not examined—Costs cannot be claimed by party summoning them.

Where witnesses are summoned by a party but are not examined in Court, then such party is not entitled to the costs of such witnesses. [P 681 O 2]

Mehr Chand Mahajan and *Shaman Chand*—for Petitioner.

Nanak Chand Pandit—for Opposite Party.

Order.—This petition is against the dismissal of the petitioner's suit by the Sub-Judge, First Class, with appellate powers, holding that the document on which the suit was based had not been proved to have been executed by the de-

fendant. This on the face of it is a finding of fact which cannot be attacked on revision. But the counsel for the petitioner contends that the conclusion of the learned appellate Judge is based on inadmissible evidence. The thumb-impression was sent for comparison to the Finger Print Bureau at Pillaur and the report was that it did not tally with the admitted thumb-impression of the alleged executant of the document. The plaintiff, however, did not examine the finger print expert. Interrogatories were sent to him at the instance of the defendant but the person examined was not the expert who had originally examined the thumb-impression and had reported that it did not correspond with the admitted thumb-impression. On the other hand, another expert was examined and he gave evidence merely on his observation and summary comparison and not scientific comparison of the two thumb-impressions in Court. In my opinion this evidence was not under the circumstances admissible.

But the question is whether the conclusion of the lower appellate Court is vitiated merely on this account. An examination of the judgment appealed against shows that the rest of the evidence produced by the plaintiff was considered to be unreliable. The case is before me on revision and I do not think that any good ground has been shown why I should under the circumstances remand the case to the learned appellate Judge for re-decision even on the finding that the evidence of the finger-print expert relied upon by him is inadmissible in evidence. The petition however, must be accepted on the ground that in calculating the costs awarded against the petitioner the trial Judge has included costs of witnesses who were summoned by the respondent but were not examined in Court. In my opinion the costs of such witnesses should not have been awarded to the defendant in this case. I accept the petition to this extent that I direct the trial Judge to amend his decree-sheet by awarding to the defendant the costs of only those witnesses who were actually examined in Court or on interrogatories and by excluding costs of witnesses who were summoned but were not produced at all. Under the circumstances I make no order as to costs of this petition.

R.W./R.K.

Petition accepted.

A. I. R. 1936 Lahore 682

JAI LAL, J.

Bimal Pershad and others—Plaintiffs—Appellants.

v.

Sital Pershad and another—Defendants—Respondents.

Misc. First Appeal No. 728 of 1935, Decided on 29th November 1935, from order of Sub-Judge, 1st Class, Gurgaon, D/- 21st January 1935.

Arbitration—Award—Application to file award—Mere prayer to omit certain portion from decree does not make it application to file part of award—Subsequent application to drop prayer made six months after award—Original application held one to file award and prayer superfluous—Subsequent application held application to amend original and not fresh application.

There is no law preventing a petitioner under Cl. 10, Sch. 2, Civil P. C., to file an award made without the intervention of the Court, from objecting to a portion of the award, nor is there any provision entitling the applicant to ask the Court to file a part of the award. But if a subsequent prayer, which is a mere superfluity and which is illegal, has been made, the Court should ignore it, and such a prayer does not invalidate the original application, which is otherwise valid. [P 683 C 1]

Where application was made to file award with prayer to omit certain portion in the decree, and a subsequent application was made more than six months after the award to drop the prayer:

Held: it was application to file an award and the mere prayer to omit certain portion from the decree was a mere superfluity and did not make the application to file part of the award. [P 682 C 1]

Held further: the subsequent application was not an original application but one merely to amend the original application, and should be allowed. [P 682 C 2]

Shamair Chand—for Appellants.*Achhru Ram and Fakir Chand Mital*—for Respondents.

Judgment.—The parties to this appeal were partners in a business. Disputes having arisen between them as to the dissolution of the business of the partnership and its accounts, the same were referred by them to the arbitration of the persons appointed by them as arbitrators. The arbitrators after hearing the parties made an award which inter alia provided that a certain sum of money was due to another firm by the partnership and that the same should be paid out of the partnership assets. Within six months from the date of the award the appellant made an application to the Sub-Judge to file the award under Cl. 20, Sch. 2, Civil P. C.

In the application, however, it was alleged that the item found to be due to the other firm was not really due from the partnership, but that its inclusion among the liabilities of the partnership was due to fraud exercised by the other partners on the arbitrators. The prayer was that the award may be filed and a decree be granted in accordance with the award after excluding the item mentioned above. It appears that the other firm had in the meantime instituted a suit against the partnership for recovery of the money claimed by them and it also appears that an objection had been taken by the respondents that the application to file a portion of the award was not legally competent. Consequently on 15th November 1934, which would be six months after the date of the award, the appellant made an application to the Sub-Judge praying that his allegation, that part of the award was illegal owing to the fraud of the respondents and that therefore in the decree that portion be not included, may be struck out from his original application, which had been made on 23rd July 1934. The reason for this prayer was stated to be the institution of a suit by the other firm against the firm of the parties. I have already mentioned that the application of 23rd July 1934 was made within six months of the date of the award and was, therefore, within time.

The question then arose before the Sub-Judge whether the first application could be entertained by him in view of the objection that an application to file a part of the award was not competent and the second question which arose before him was whether the second application of 15th November 1934 could be entertained as an application to amend the original application or as a fresh application to file the award; in the latter case it would obviously be barred by time. The learned Sub-Judge has answered both these questions against the appellant. In my opinion the order of the lower Court cannot be maintained. The first application was not an application to file a portion of the award. It was an application to file the award. No doubt a prayer was added that owing to reasons specified in the application portion of the award was invalid and therefore in the final decree that may be passed on the award that portion be not included. There is no law preventing a petitioner,

under Cl. 20, Sch. 2, Civil P. C., to file an award made without the intervention of the Court, from objecting to a portion of the award. At the same time there is no provision entitling an applicant to ask the Court to file a part of the award. This proposition is not disputed by the learned counsel for the appellant but his contention is that his prayer was to file the award and if a subsequent prayer, which was a mere superfluity and which was illegal, had been made by him the Court should have ignored it; and that such a prayer did not invalidate the original application to file the award which was otherwise valid.

The law does not require that an applicant should ask that a decree be passed. All that an applicant is expected to ask is that the award should be filed. The rest of the procedure is provided by law. If the Court directs that the award be filed then it must, subject to the provisions of Cl. 21, file the award and then pass a decree in accordance therewith. In the peculiar circumstances of this case the main prayer to file the award being in accordance with law the Court should either ignore the subsequent illegal prayer or it could allow the appellant to amend his application by deleting such prayer. An application was made by the applicant for permission to amend his original application by deleting the prayer or by withdrawing it. That application should have been granted by the learned Judge below and on an amendment having been made the original application would in any case have become valid and should have been deemed to have been made on 23rd July 1934. In my opinion this appeal must succeed. I accept it with costs and remand the case to the learned Subordinate Judge with directions to proceed with the application to file the award in accordance with law. In view of the subsequent application of the appellant the Court will not now go into the question of validity or otherwise of the award with reference to the item held by the arbitrators to be due to the other firm which was objected to by the applicant in his application of 23rd July 1934.

V.B.B./R.K.

*Appeal accepted.***A. I. R. 1936 Lahore 683**

JAI LAL, J.

Muhammad Sharif and another—Defendants—Appellants.

v.

Khuda Bakhsh and another—Plaintiffs—Respondents.

Second Appeal No. 1690 of 1935, Decided on 20th January 1936, from decree of Dist. Judge, Sialkot, D/- 29th July 1935.

(a) **Mahomedan Law — Marriage — Minor daughter given in marriage by mother in presence of her first cousin—Marriage is not void, but invalid.**

Where a minor girl is given in marriage by her mother in presence of her first cousin, the marriage is not void, but invalid in the sense that the girl would be entitled to exercise her option of puberty. [P 683 C 2]

(b) **Mahomedan Law — Marriage — Minor girl given in marriage by mother in presence of first cousin—Suit by latter for declaration of invalidity of marriage and injunction—Form of decree.**

Where a minor girl is given in marriage by her mother in presence of her first cousin, and the latter files a suit for declaration of invalidity of the marriage and injunction, to grant a declaration that the marriage is invalid may create complications for the future. The marriage is invalid in this sense that the girl on attaining puberty shall be entitled to exercise her option of puberty. An injunction against the mother and husband restraining from consummating the marriage of the girl with husband till she has had an opportunity to exercise or not to exercise her option of puberty, should be granted. [P 684 C 1]

Mukand Lal Puri—for Appellants.

Mathra Das—for Respondents.

Judgment.—Mt. Allah Rakhi, was given in marriage by her mother to Muhammad Sharif. At the time of her marriage she was six years of age and is said to be about ten years of age at the time of the institution of the suit. The suit was by her first cousin Khuda Bakhsh for a declaration that the marriage was invalid as it was contracted by the mother who was incompetent to do so in his presence.

There is no doubt that in the presence of the plaintiff Khuda Bakhsh, Mt. Allah Rakhi's mother was not competent to give her away in marriage, and it is conceded that such a marriage would be invalid according to the Mahomedan Law, but it is not void. It is invalid in this sense that on attaining puberty the wife has a right to repudiate the marriage, in other words, she is entitled to exercise her option of puberty.

The learned District Judge is conscious of this fact, but has granted an injunction against Mubammad Sharif and the mother of Mt. Allah Rakhi restraining them to call the latter as the wife of Mubammad Sbarif. In my opinion, in the present case to grant a declaration that the marriage is invalid may create complications for the future. I have already stated, that the marriage under the circumstances is invalid in this sense that Mt. Allah Rakhi on attaining puberty shall be entitled to exercise her option of puberty, and this is not denied by either side. At the same time the injunction granted by the learned District Judge is not legal and must be set aside, but in its place it is necessary to grant an injunction against Muhammad Sharif and the mother of the girl, Mt. Aishan, restraining them from consummating the marriage of Mt. Allah Rakhi with Muhammad Sharif till she has had an opportunity to exercise or not to exercise her option of puberty. This issue of this injunction is necessary in the interests of the minor. The appeal is accepted, the decree of the learned District Judge set aside and in lieu thereof a decree is granted for an injunction in terms specified above. The parties shall bear their own costs.

V.B.B./R.K. *Appeal accepted.*

A. I. R. 1936 Lahore 684

BHIDE, J.

Hari Bakhsh—Appellant.

v.

Sham Sundar, Proprietor of Firm Umrao Singh Sham Sundar and another—Respondents.

Misc. First Appeal No. 1369 of 1935, Decided on 23rd December 1935, from order of Senior Sub-Judge, Delhi, D/- 17th April 1935.

Succession Act (1925), S. 299 — Assignment of bond—Order is not purely of formal or interlocutory nature — Such order is appealable.

The order of a District Judge under S. 299, Succession Act, assigning a bond should not be considered to be of a purely formal or interlocutory nature and as such not open to appeal. The order might be considered to be in some respects similar to one under S. 145, Civil P. C., and an order under that section is appealable, so order under S. 299 is also appealable.

[P 684 C 2]

Balwant Rai—for Appellant.

Nawal Kishore—for Respondents.

Judgment. — A preliminary objection was raised in this case that no appeal was competent. Reliance was placed in support of this objection on 39 Cal 563(1), in which it was held that an order assigning a bond passed by a District Judge under S. 79, Probate and Administration Act, was not appealable. The learned counsel for the respondent on the other hand relied on 2 Rang 117 (2) and 1929 Rang 109 (3) in which the view taken in 39 Cal 563 (1) was dissented from. The decision of the question depends upon the interpretation of the language of S. 299, Succession Act, which runs as follows:

Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Civil Procedure Code, 1908, applicable to appeals.

The learned counsel for the appellant contends that this section means that an appeal will not be competent unless the order in question is in the nature of a decree or is an order appealable under the provisions of the Civil Procedure Code. The learned counsel for the respondent on the other hand contends that every order passed by the District Judge by virtue of powers conferred upon him under the Succession Act is appealable and that the section only lays down that the procedure in the Civil Procedure Code governs such appeals. The interpretation of the section is not free from difficulty, but even accepting the interpretation of the learned counsel for the appellant I do not see why the order in the present case should be considered to be of a purely formal or interlocutory nature and as such not open to appeal. The order might be considered to be in some respects similar to one under S. 145, Civil P. C., and an order under that section is appealable. The refusal to assign the bond to the appellant means that he will not be entitled to seek his remedy against the sureties. This seems to me to involve a substantive right and I am inclined to think that an appeal would be maintainable. However, it is not necessary to give any definite decision on this point in the present case; for

1. Kalimuddin v. Mahurtin, (1912) 39 Cal 563 = 13 I C 690.

2. Haji Pu v. Tin Tin, 1924 Rang 237 = 80 I C 746 = 2 Rang 117.

3. U Po Hnit v. Bo Gyi, 1929 Rang 109 = 118 I C 401.

I have come to the conclusion that the appeal must fail even on merits.

The only ground on which the learned counsel for the appellant pressed his claim to have the bond assigned to him was that the appellant had a certain claim against the estate of the late Bishen Dayal in respect of which Babu Ram had been appointed an executor. It was urged that this claim had not been satisfied and therefore the bond should be assigned to the appellant. S. 292, Succession Act, however, requires that it should be established that the engagement of the bond had not been kept by the executor. No such breach of it has been proved. The bond did not contain any definite conditions as regards the claim of the appellant. Even if the appellant's claim was not satisfied, it would not necessarily show that the executor was guilty of any breach of the bond. His inability to do so may have been due to reasons beyond his control. In the present case it appears, in fact, that certain allegations of mal-administration were made against Babu Ram but it was found finally by this Court that he had not been guilty of any misappropriation though the accounts were not quite regular in certain respects: vide order of this Court dated 2nd October 1928. No subsequent act of any mal-administration has been alleged or proved. In the circumstances I see no reason to interfere with the order of the learned Senior Subordinate Judge. I dismiss the appeal with costs.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 685

TEK CHAND AND JAI LAL, JJ.

Co-operative Assurance Co., Ltd., Lahore
—Defendant—Appellant.

v.

Sachdev and another—Plaintiffs—Respondents.

Second Appeal No. 1279 of 1935, Decided on 24th February 1936, from decree of Addl. Dist. Judge, Lahore, D/- 16th April 1935.

(a) Insurance—Language of policy ambiguous — Interpretation beneficial to assured should be favoured—Rules of company, at time of issue of policy providing that policy would be forfeited, if assured committed suicide—Rule subsequently modified providing that there would be forfeiture in case of suicide after period of two years from date of policy—Policy granted subject to rules for time being in force—Words 'Rules for time

being in force' held to mean rules in force at time of maturity of policy—Assured committing suicide after period of 12 years—Heirs held entitled to amount due under policy.

If the terms of a policy are couched in ambiguous language, that interpretation should be favoured which is beneficial to the assured. The underlying principle is that the terms of the policy being the language of the company must be interpreted against it. [P 686 C 2]

The rules of an Insurance Company, at the time when a contract of insurance was entered into, provided that if the assured committed suicide, his heirs or assignees were not entitled to anything more than the premia paid by the assured during his life time. The rule was subsequently modified and a new rule framed which provided that if the assured committed suicide after two years of the date of the policy, there would be no forfeiture. There was a provision in the policy that "the policy was granted subject to the rules and regulations for the time being in force of the company."

The assured committed suicide after about twelve years from the date of the issue of the policy and his heirs claimed the amount due under the policy:

Heid: that the words, "the policy was granted subject to the rules and regulations for the time being in force of the company" meant the rules and regulations in force at the time of the maturity of the policy and not those in force when the policy was issued and the heirs of the assured were entitled to the amount due under the policy: *Anderson v. Fitzgerald*, (1853) 4 H L 484 and *Pelly v. Royal Exchange Assurance Co.*, (1757) 1 Burr 341, Rel. on.

[P 687 C 1]

(b) Second Appeal—Question of fact—Suit against Insurance Company by heirs of assured committing suicide, for amount due under policy—Circumstances in which suicide was committed, whether assured was of sound mind, whether act was deliberate and intentional, are questions of fact.

In a suit for recovery of the amount due under a policy against an Insurance Company by heirs of an assured committing suicide, the circumstances in which the assured put an end to his life and whether at that time he was of sound mind and whether the act which he committed was deliberate and intentional are questions of facts which should be agitated and adjudicated upon in Courts below. The Insurance Company is not entitled to urge for the first time in second appeal the plea that the heirs of the assured should not be allowed to benefit by his felonious act, committed deliberately and while of sound mind.

[P 687 C 1]

Mehr Chand Mahajan—for Appellant.
Badri Das, Achhru Ram and Din Dayal Kapur—for Respondents.

Tek Chand, J.—This second appeal arises out of a suit instituted by the plaintiffs-respondents, who are the minor sons of one Peshawari Lal Puri, against the defendant-appellant, the Co-operative Assur-

ance Co. Ltd., Lahore, for recovery of Rs. 3,732-12-0 being the amount alleged to be due on an endowment policy which had been taken by the deceased Peshawari Lal in the defendant company. The suit has been decreed by the Courts below for Rs. 3,722-6-0. The company appeals. The facts found are that on 14th November 1919 Peshawari Lal signed a proposal form for a 25 years' endowment policy for Rs. 4,000, on payment of a premium of Rs. 72, per annum.

This proposal was accepted by the company and the policy issued on 22nd December 1919 for Rs. 4,000, payable to the assured on 14th November 1944, or, in case of his death earlier, to his assignees or heirs. On 21st January 1932 Peshawari Lal put an end to his life by his own act. His sons Sachdeva and Vasdev minors through their mother as next friend claimed from the company the full sum of Rs. 4,000 with interest less Rs. 480 which had been borrowed by the deceased in June 1929. The company however offered to pay Rs. 1,800 only, being the amount of the premia paid by the deceased. They declined to pay the full amount of the policy on the ground that, according to the rules of the company, which were in force in 1919 when the contract of assurance had been entered into, if the assured committed suicide his heirs or assignees were not entitled to receive anything more than the premia paid by the assured in his lifetime. It appears however that in 1930 this rule had been modified by the company and a new rule framed which was, that if the assured committed suicide within two years of the issue of the policy the sum payable by the company would be the amount of the premia paid by him. If, however suicide was committed after two years of the date of the policy, there would be no forfeiture. The plaintiffs relied upon this latter provision, which they alleged was in force at the time of the death of the assured.

The question for determination is which of these two rules governs the case. In the contract of assurance, as contained in the policy, there is no condition specifically dealing with the matter. There is however, a foot-note added which contains the following words:

This policy is granted subject to the rules and regulations for the time being in force of the Co-operative Assurance Co., Ltd.

The contention for the Company is that the reference here is to the rules and regulations which were in force at the time of the issue of the policy, i. e., December 1919. The plaintiffs, on the other hand, contend that the words 'for the time being in force' should be taken to have been used in their ordinary significance and mean 'the rules in force at the time when the policy matures.' The Courts below have preferred the latter interpretation and have held that the rules and regulations referred to mean the rules and regulations in force at the time of the death of the assured. It is unfortunate that the language used in the foot-note is not as clear as it should have been. It is conceded by Mr. Mehr Chand for the Company that the ordinary meaning of the phrase "for the time being" is that of time indefinite, and that it refers to a state of facts which will arise in the future and which may (and probably will) vary from time to time. The meaning may, of course, be different according to the context. But there is nothing in the document in question which justifies our construing the words in a different sense. Mr. Mehr Chand contends however that it would lead to anomalous results, if the Company by its unilateral act could modify the conditions under which the policy was held. At first sight there appears to be some force in this contention. But I do not think in a case like this, this consideration should be allowed to outweigh the firmly established rule of interpretation of policies of assurance, that if the terms of a policy are couched in ambiguous language, that interpretation should be favoured which is beneficial to the assured. The underlying principle is that the terms of the policy, being the language of the company, must be interpreted against it. As observed by Lord St. Leonards in (1853) 4 H L C 484 (1) at p. 507:

it (the policy) is of course prepared by the company, and if, therefore there should be any ambiguity in it, it must be taken, according to law, more strongly against the person who prepared it.

The earliest case on the subject is (1757) 1 Burr 341 (2) at p. 349 where it was laid down that:

1. *Anderson v. Fitzgerald*, (1853) 4 H L 484 = 17 Jur 995.
2. *Pelly v. Royal Exchange Assurance Co.*, (1757) 1 Burr 341.

It is certain that in the construction of policies, the strictum jus, or apex juris, is not to be laid hold on: but they are to be construed largely, for the benefit of trade and for the insured.

I therefore in agreement with the view taken by the Courts below hold that the words "the rules and regulations for the time being in force of the Co-operative Assurance Co.," mean the rules and regulations in force at the time of the maturity of the policy, that is to say, the rules as contained in the "Prospectus and Table of Rates" of the defendant Company issued in 1930. Mr. Mehr Chand raised a further contention that the condition relating to suicide contained in the Prospectus of 1930 was void, it being against public policy on the well-settled rule that if a person, when in sound mind, deliberately and intentionally takes his own life and thus precipitates the event insured against, viz. his death, his heirs cannot be allowed to benefit by his felonious act. This point however was not raised in the Courts below and, in my opinion, cannot be allowed to be urged for the first time in second appeal. The circumstances in which Peshawari Lal put an end to his life, and whether at that time he was of sound mind and the act which he committed was deliberate and intentional, are questions of fact, which should have been agitated and adjudicated upon in the Courts below.

For the reason given above I would uphold the decision of the Courts below and grant the plaintiffs a decree for Rupees 8,722 6-0, but having regard to all the circumstances I would leave the parties to bear their own costs in all Courts.

Jai Lal, J.—I agree.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Lahore 687

JAI LAL, J.

Mt. Natho and others — Defendants — Appellants.

v.

Ghulam Mohammad and others—Plaintiffs—Respondents.

Second Appeal No. 710 of 1934, Decided on 2nd March 1936, from order of Addl. Dist. Judge, Lahore, D/- 21st December 1933.

(a) Punjab Courts Act (6 of 1918), S. 41—Certificate can be amended where point is omitted by District Judge through oversight.

Where a Judge grants a certificate under S. 41,

but misses to include a point in it through oversight, the certificate can be amended. It is not the case of a new application wherein the applicants have raised a new point on which they want a certificate. [P 688 C 1]

(b) Custom (Punjab)—Customary law of Lahore District by Mr. Bolster—Questions 61, 62 and 63—Answers of questions deal with rights of succession of both married and unmarried daughters.

The answers to questions 61, 62 and 63 of the Customary Law of Lahore by Mr. Bolster deal with the right of daughters to succeed; but question 63 deals with the question of right of maintenance of daughters and mention is made therein of unmarried daughters. This indicates that questions 61 and 62 are applied to daughters married and unmarried.

[P 688 C 1, 2]

(c) Custom (Punjab)—Will.

Customary Law of Lahore District by Mr. Bolster, question 106, states that a sonless proprietor can make a will of self-acquired property. [P 688 C 2]

Malik Mohd. Husain—for Appellants.

J. L. Kapur and Ganga Ram—for Respondents.

Judgment.—This second appeal has arisen out of a suit brought by the respondents for possession of land on the allegation that a will whereby it was given by Ilam Din to his sister and daughter was invalid because the land was ancestral and according to the custom which governed the parties the plaintiffs were the next heirs to the estate of Ilam Din who had died without leaving a son. The learned District Judge has held that the whole of the property in dispute is ancestral, that the parties are governed by custom and that according to custom daughters and sisters do not inherit and the plaintiffs who are collaterals of Ilam Din in the fourth degree are entitled to inherit. He has, therefore, granted them a decree. He, however, has granted a certificate under S. 41, Punjab Courts Act, to the defendants. When the appeal came up for hearing originally it was discovered that there was no certificate with regard to one point in controversy between the parties, that is to say, on the question whether the parties were governed by the Customary law in matters of succession or by their personal law, the Mahomedan law. It appears that an application had been made by the appellants for a certificate on that point also, but the District Judge had omitted to mention it in the certificate accidentally. The case was, therefore, adjourned to enable the appellants to have the certificate rectified. This has been done. Under

the circumstances there is no force in the contention of the respondents' counsel that the certificate could not be amended. It is not the case of a new application wherein the applicants have raised a new point on which they want a certificate. On the other hand the matter had been agitated before the learned District Judge and a certificate on it was applied for. The District Judge did not expressly decline to grant a certificate on this point, but merely by an oversight omitted to mention it in the certificate. Upon the merits, however, the appellants must fail on all the points raised by them except one. The first point raised is that the parties are governed by the Mahomedan law and not by custom. There is no reliable evidence in support of this contention. On the other hand the oral testimony of a number of the members of the family to which the parties belong is that they are governed by the Customary law of the District in matters of succession. It has also been found that the parties have settled in the village in dispute for generations and they cultivate land with their own hands. They were parties to the answers given to the questions asked from the village proprietors when the Customary law of the District was prepared and the answers indicate that they are governed by custom in matters of succession. Having regard to all these facts the conclusion of the learned District Judge that the parties must be deemed to be governed by custom in matters of succession is correct. It is then contended that the answers to questions 61, 62 and 63 in the Customary law of the Lahore District prepared by Mr Bolster do not really deal with the right of succession of unmarried daughters. There is no force in this contention because the answers to questions 61 and 62 deal with the right of daughters to succeed; but question 63 deals with the question of the right of maintenance of daughters and mention is made there of unmarried daughters. This indicates that questions 61 and 62 applied to daughters, married and unmarried. By another question and answer it has been provided that the case of sisters stands on the same footing as that of daughters. The answer to question 61 is that daughters are excluded by collaterals with certain exceptions specified therein. The

parties do not come within those exceptions. Then no distinction is made with regard to succession between ancestral and self-acquired property, that is, question 62. Question 63 deals with the matter of maintenance and it is provided that an unmarried daughter is entitled to maintenance and in certain circumstances a married daughter also.

The next question raised by the appellants' counsel is that the property in dispute has not been proved to be ancestral. The learned District Judge has expressed the opinion that the common ancestor was Lakha. It appears, however, that the common ancestor was Bahadur who was alive when the settlement of 1856 took place and also at the time of the subsequent settlement of 1868. It is common ground that any part of the property in dispute which was in possession of Bahadur would be ancestral property. We need not, therefore, go beyond Bahadur. It also appears from the revenue records that the property in dispute descended to Ilam Din partially from Bahadur and partially from Channu a collateral and it is conceded that the property which descended to Ilam Din from Channu would not be ancestral. The only ancestral property is that which descended from Bahadur. The parties' counsel are agreed that out of the property in dispute as described in the plaint 34 kanals $3\frac{1}{2}$ marlas with share in the shamlat, 27 kanals 3 marlas being $\frac{1}{6}$ th of 162 kanals 17 marlas khata 29 khatauni Nos. 172 to 187 khasra No. 410 734/491, 490/1, 63, 490/2, 499, 492, 489, 497/1, 489 min, 739/498, 98 min, 99, 101, 735/491, 736/491, 493, 737, 98 min, and 738/495 and 7 kanals $\frac{1}{2}$ marla being $\frac{1}{12}$ th of 84 kanals 6 marlas khata No. 32 khatauni 205, 206, 207, 208, 209, 210, 211 khasra No 60-102 min 106, 496, 102 min, 107-100 61 62, according to the above finding should be held to be non-ancestral and the rest ancestral.

In answer to question 106 of the Customary law of the District it is provided that a sonless proprietor can make a will in respect of self-acquired property. The will, therefore, must be held to be valid with regard to 34 kanals $3\frac{1}{2}$ marlas of land specified above and invalid with regard to the rest, but the plaintiffs can be granted a decree for possession of the land in suit only subject to the right of maintenance of the daughter. The case

under the circumstances will have to go back to the trial Court to determine how much land is necessary for the maintenance of the daughter. A decree for possession will be given to the plaintiffs-respondents for whatever land is not required for maintenance. In determining what land is required for the maintenance of the daughter the trial Court will take into consideration the area of land in respect of which the suit has been dismissed on the ground that the same was the self-acquired property of Ilam Din. Formally, therefore, the appeal must be accepted and the case sent back to the trial Judge for decision on the question of maintenance with due regard to the observations made above. The parties shall bear their own costs in this Court and in the Court of the District Judge.

D.L./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 689

COLDSTREAM, J.

Mistri Mohammad Hussain—Plaintiff
—Appellant.

v.

Municipal Committee, Sialkot—Defendant—Respondent.

Second Appeal No. 2326 of 1935, Decided on 26th February 1936, from decree of Senior Sub-Judge, Sialkot, D/- 2nd December 1935.

Punjab Municipal Act (3 of 1911), Ss. 172 and 232—Municipal Committee granting by resolution sanction to build platform—Sanction acted upon and platform built—Later Deputy Commissioner under S. 232 suspending resolution, and Committee serving notice under S. 172—Notice held invalid and summary procedure unjustifiable.

The Municipal Committee by passing a resolution granted sanction to the appellant to build a platform. The latter acted on it. Later the Deputy Commissioner acting under S. 232 suspended the resolution granting sanction and the Committee served the appellant with notice under S. 172 to demolish the platform:

Held: that the suspension of the resolution by the Deputy Commissioner under S. 232 could not affect the validity of the sanction granted and acted upon;

Held also: that circumstances were not such as to allow the Committee to proceed summarily under S. 172 and that the notice under S. 172 was invalid. [P 690 O 1, 2]

Barkat Ali and Mohammad Amin (Sheikh)—for Appellant.

Mohammad Amin (Malak)—for Respdt.

1936 L/87 & 88

Judgment.—In September 1928 Mistri Mohammad Hussain, the present appellant, a sports dealer in Sialkot, applied to the Municipal Committee for permission to construct a house in Greenwood Street. He was granted permission and built the house and also several platforms in front of it towards the street. The Municipality objected to the platforms and on 7th October 1929 the appellant executed an agreement with the committee in consideration of being allowed to build the platforms, in which he admitted that the ground below the platforms belonged to the Committee and promised to remove them or allow the Committee to remove them at his expense whenever the Committee wished. In 1931 by which time the appellant had been elected a member of the Committee he applied again for permission to build a platform at the same place and the application was sanctioned by resolution No. 266 of 20th July 1931. Permission was given and the appellant constructed or reconstructed a platform there.

In December 1933 the Deputy Commissioner acting under S. 232, Punjab Municipal Act suspended the resolution of 20th July 1931 granting sanction and on the 22nd of that month, more than two years after sanction had been given, the Committee served the appellant with a notice under S. 172 of the Act. Thereupon on 2nd January 1934 the appellant instituted the suit from which this appeal arises for an injunction to restrain the Committee from demolishing the platform. The Subordinate Judge struck two issues: (1) Whether the notice under S. 172 was valid, and (2) Whether the plaintiff was entitled to the injunction. The question of the appellant's title in the land below the platform was not put in issue, although he claimed to be owner and the Municipality had denied his claim. The learned Subordinate Judge decided that the site of the platform belonged to the Committee being the decision on the appellant's admission in the agreement executed in October 1929 and that therefore the notice was valid because the appellant had promised to allow demolition of the platform. An appeal against this decision was dismissed by the Senior Subordinate Judge who held that the notice was valid because the resolution granting the appellant sanction to build the platform had been suspended.

The learned Senior Subordinate Judge did not decide when the platform was built, nor whether the sanction given in 1931 was obtained by the exercise of improper influence.

Mohammad Hussain has come to this Court with the present second appeal. It is argued on his behalf that the notice under S. 172 is clearly invalid as sanction had been given to build the platform in dispute. In my opinion there is force in this appeal. It appears that at the trial the Committee at first did not admit that a resolution granting permission had been passed and refused to produce a copy of it. But this position appears to have been abandoned before the lower appellate Court and it is not denied now that sanction to build a platform was given to the appellant in accordance with a resolution of the Committee No. 266 of 20th July 1931 as stated by the appellant in the witness-box. For the Committee it is argued that the resolution and sanction were dishonestly procured by the appellant by misuse of his influence in the Committee of which he had become a member. But this dishonesty is not proved nor is it proved that the appellant had anything to do with the passing of the resolution. There is no doubt room for conjecture but no evidence. It was for the Municipality to prove that the sanction was improperly given. The appellant was not even asked in the witness-box if he was present at the meeting which passed the resolution. As already noted the question of the appellant's title was not put in evidence nor *prima facie* was it one necessary for the determination of the validity of the notice under S. 172. The appellant's case is that after the execution of his agreement he had reason to suppose that the site was admitted to be his. But he was not asked to prove this. It is now alleged that he could have done so had an issue been framed.

The suspension of the resolution No. 266 by the Deputy Commissioner under S. 232 could not affect the validity of the sanction granted and acted on. All that S. 232 allows is the suspension of the execution of a resolution or the prohibition of the doing of an act which is about to be done or is being done in pursuance of the sanction granted by the Committee. But the Deputy Commissioner did not suspend the execution of the resolution nor prohi-

bit the building of the platform. On the other hand, the Committee's case is that the platform had been built even before the sanction was given. I do not see how the Deputy Commissioner's order suspending the resolution could turn a platform the building of which had been sanctioned into a platform the building of which had not been sanctioned. The appellant's case now is that he built this particular platform after sanction had been given in 1931. The Committee have not proved that he did not do so, but the appellant's own statement in Court leaves no doubt that he had at any rate begun to build a platform at the same place in 1929. But even if he had built this same platform in 1929, the building of it was sanctioned in 1931. Consequently in my opinion the circumstances were not such as to allow the Committee to proceed summarily under S. 172. Possibly S. 175 would have been applicable, but it has been ruled that a notice under that section requires the tender of compensation to make it valid. Or it may be that the Committee have a cause of action for a regular suit based on the agreement to force the removal of the platform or the recovery of possession of the site below it. These are questions which do not arise here. For the reasons indicated above I accept the appeal with costs throughout and grant the appellant a decree to the effect that the notice given him under S. 172, Municipal Act, is invalid and that he is not bound to demolish the platform in compliance with that notice.

V.B.B./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 690

ADDISON AND ABDUL RASHID, JJ.

Padam Parshad and others—Plaintiffs—Appellants.

v.

Firm Mittar Sain-Ganeshi Lal and others—Defendants—Respondents.

Appeal No. 1328 of 1935, Decided on 16th March 1936, from decree of Dist. Judge, Ambala, D/- 18th March 1935.

Provincial Insolvency Act (1920), S. 63 — Secured creditor giving proof for whole debt and actually receiving dividend on whole debt—Creditor relinquishes his security.

Where a secured creditor not only has given proof for the whole debt but has actually received a dividend on the whole debt, the creditor must be taken to have relinquished his security because, unless he did so, he had no-

right to take the step which he did of proving the debt and still less had he any right whatever to receive the dividend which he did receive : 1929 Bom 258, Foll. [P 691 C 2]

Shamair Chand—for Appellants.

Tek Chand—for Respondents 1 to 3.

Addison, J.—A firm, Manohar Lal Uggar Sain, got into a bad financial state in 1921 and on 6th June of that year executed a mortgage-deed in favour of nineteen creditors, including the plaintiffs in this suit, who sued on the mortgage-deed and obtained a preliminary mortgage decree to the extent of Rs. 2,590 with costs and future interest. In this suit all the creditors were impleaded as defendants, including defendant 4 who had parted with some of his rights in favour of defendants 21 and 22. These defendants 4, 21 and 22, preferred an appeal to the District Judge who held that the whole property mortgaged must be sold in the plaintiffs' decree but he added a direction that the other mortgagee-creditors were entitled to a pro rata share in whatever was realized by the sale of the mortgaged property. The other mortgagee-creditors did not appeal and yet obtained by this order a share pro rata. Against this decision the plaintiffs have preferred this second appeal to the effect that the direction added by the District Judge should be cancelled. Defendants 4, 21 and 22, who alone were present and contested the appeal, have put in cross-objections to the effect that the District Judge should only have allowed one-third of the property to be sold as the other two-thirds had already been purchased by them in other proceedings.

At the time the mortgage-deed of 6th June 1921 was executed, defendant 4 was not present and did not consent to it. Many of the creditors however were present, including the present plaintiffs. The terms of the deed are important. Apparently the debts amounted to a sum of Rs. 20,000, the property being worth about Rs. 5,000. The amount of each debt was stated in the deed and future interest was allowed to each creditor at the rate of six per cent. per annum. It was laid down that each creditor was separately entitled to realize the amount due to him from the mortgaged property as well as from the person and other property of the mortgagors and that the property was jointly and severally mortgaged in their favour. Each creditor mortgagee

was thus given a separate mortgage of the whole property in his favour, on which he could sue, but there was a further condition that, if a person did sue, then whatever was realized would be liable to rateable distribution. It was on the basis of this mortgage that the present plaintiffs brought their suit. On 28th June 1924, defendant 4 sued the mortgagors, not on this mortgage, but on the basis of his book account. He relied on the mortgage to the extent of helping to prove his debt, and he obtained a simple money decree for Rs. 3,228-13-3 against his debtors. He has continued to execute this decree against the persons of his debtors and their other property as well as this property and has realized a considerable sum.

Three members of the debtor firm, Mangal Sain, Kalyan Rai and Uggar Sain were later adjudicated insolvents but the adjudication of the first named two was shortly afterwards annulled. In the insolvency of Uggar Sain however the Insolvency Court sold his one-sixth share in this mortgaged property and it was purchased by defendant 4. This sale took place in spite of the mortgage which was never set aside. Further, in execution of his money decree, defendant 4 purchased half of the mortgaged property, representing the share of another partner of the firm, Wazir Singh. This explains why he claims that only one-third of the mortgaged property remains liable to sale. The plaintiffs objected to the sale of this half-share of Wazir Singh but their objection was dismissed and the present suit was brought within one year. No question of limitation therefore arises. It is clear that in the insolvency proceedings of Uggar Sain, defendant 4 proved for the whole of his debt and did not claim anything under the mortgage-deed of 6th June 1921. That being so, it must be held that he relinquished and gave up his security. This is clear from the Insolvency Act as well as from 1929 Bom 258 (1), where it was held that where a secured creditor not only had given proof for the whole debt but had actually received a dividend on the whole debt, the correct view to take was that by his conduct the creditor must be taken to have relinquished his security because, unless

1. *Union Bank Bijapur v. Bhunrao Srinivas Rao*, 1929 Bom 258=119 I O 189=31 Bom L R 468.

he did so, he had no right to take the step, which he did, of proving the debt and still less had he any right whatever to receive the dividend which he did receive.

Again, defendant 4 did not sue on the security but obtained a personal decree against his debtors. It is quite clear therefore that defendant 4 became an ordinary creditor and that he gave up his security. Lastly, it is clear from the terms of the document that the plaintiffs are entitled to sue for the sale of the whole property and this they have done. Defendant 4 and his transferees, defendants 21 and 22, cannot claim under the mortgage. Nor can they set up the sale in execution of their simple money decree or the sale in their favour by the Insolvency Court; for both these transactions are subject to the mortgage in the plaintiffs' favour, as it has never been set aside. In any case, in the appeal instituted by defendants 4, 21 and 22, the District Judge could grant no relief in favour of those mortgagees who had not appealed, their interests being totally different from those of defendants 4, 21 and 22. This is no longer important as it must be held that defendants 4, 21 and 22 also are not entitled to any relief in this suit as they have relinquished their security. It might be added that, even if it be assumed that the other mortgagees were entitled to relief under the deed, it is doubtful if that relief could be given to them in this suit as the plaintiffs were entitled to bring this suit and it would be for the other mortgagees to sue them on the other term of the mortgage-deed that the realizations from the property would be subject in case of suit to pro rata distribution. This also however scarcely arises, now that it has been held that defendants 4, 21 and 22 have no right in the mortgage which they relinquished.

For the reasons given the appeal is accepted, the decree passed in appeal by the District Judge set aside and the decree of the trial Court restored. The parties will bear their own costs in the lower appellate Court and in this Court. The cross-objections are also dismissed.

D.L./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 692

AGHA HAIDAR, J.

Ali Muhammad—Defendant—Appellant.

v.

Shah Tamaz Khan and others—Plaintiffs and *others*—Pro forma Defendants—Respondents.

Misc. Second Appeal No. 2275 of 1935, Decided on 28th February 1936, from order of Dist. Judge, Mianwali, D/- 29th October 1935.

Mortgage—Suit for redemption—Mortgagors appearing before Collector and requesting him to stay further proceedings—Collector refusing request and proceedings ordered to be consigned to record room—No order on merits passed—Subsequent suit for redemption more than one year after Collector's order—Art. 14, Limitation Act, held did not apply.

In a suit for redemption of mortgage of certain lands, the mortgagors appeared before the Collector and requested that further proceedings might be stayed pending the decision of certain application. The Collector refused to grant this request. The mortgagors withdrew from the proceedings and the Collector recorded the proceedings to file without passing an order on merits. The mortgagors then filed another suit for redemption, but beyond one year from date of Collector's order:

Held: that Art. 14, Limitation Act, did not apply as the Collector did not pass any order on merits and that the suit was not time-barred: 1929 Lah 513, Rel. on; 1934 Lah 384 (F B), Disting. [P 693 C 1]

Ram Ditta Mal—for Appellant.

Bishen Narain Pandit—for Respondents (Plaintiffs).

Judgment.—I regret to say that in this appeal I have received no assistance whatsoever from the counsel for the appellant. This is a defendant's appeal arising out of a suit for redemption of a mortgage of certain lands detailed in the plaint. The plaintiffs are the representatives of the original mortgagor. The date of the mortgage is 5th January 1889. The mortgage was with possession with a condition that if not redeemed within a period of ten years, it would be treated as a sale. In the year 1929 an application was made by the mortgagor to the Collector under the provisions of S. 4, Redemption of Mortgages Act, 2 of 1913, praying that the land may be redeemed on payment of Rs. 40. Another application was made on behalf of the present plaintiffs asking the Court to stay its hands until the disposal of certain applications which the applicants stated were

pending in the revenue Court under the provisions of the Alienation of Land Act. The Revenue Officer did not accede to this request and the records were consigned to the record room. The order of the Revenue Officer is dated 17th June 1931.

The present suit was brought by the plaintiffs on 7th August 1933 for the redemption of the mortgage. The suit was on the face of it filed after the expiration of one year, calculated from 17th June 1931. The defendants took the plea of limitation. The trial Court held that the suit was time-barred under the provisions of Art. 14, Limitation Act, inasmuch as it was instituted after the expiry of more than a year computed from 17th June 1931. It accordingly dismissed the suit. The plaintiffs went up in appeal and the learned Judge relying upon 1929 Lah 513 (1) held that Art. 14 did not apply. He consequently allowed the appeal and remanded the case for disposal on the merits.

The defendant has come up to this Court in second appeal and has argued that the case was governed by the Full Bench decision in 1934 Lah 384 (2) and the suit was time barred in view of the provisions of Art. 14, Limitation Act. In my opinion the Full Bench decision has no application. In that case the Collector had ordered redemption of the mortgage on payment of Rs. 600 and, therefore, that order must be taken to have been an order passed on the merits. The order in the present case can by no stretch of imagination, be said to have been passed on the merits. The plaintiffs appeared before the Collector and made a request that further proceedings may be stayed pending the decision of certain application which they had made under the Alienation of Land Act, and when the Collector refused to grant this request the plaintiffs merely withdrew from the proceedings and the Collector had no other alternative except to put an end to further proceedings and consign the file to the record room. There was, therefore, no order passed by the Collector on the merits. In my opinion the Division Bench judgment in 1929 Lah 513 (1) applies to

the case. It is not in any way dissented from or adversely criticised by the judgment of the Full Bench. The Full Bench case was decided on its own facts and the present case clearly falls within the purview of the Division Bench judgment. I, therefore, affirm the order of the Court below and dismiss the appeal with costs.

R.W./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 693

COLDSTREAM, J.

Mani Singh—Defendant—Petitioner.
v.

Anand Parkash, Plaintiff and others,
Defendants—Opposite Parties.

Civil Revn. No. 700 of 1935, Decided on 20th February 1936, from decree of Senior Sub-Judge, Jhang, D/- 9th April 1935.

Limitation Act (1908), S. 5—Application for copy made personally to copying Department and accepted by it without objection and without demand for copying fee—Endorsement by copying Department that certain number of days have been requisite for supply of copy—That number must be presumed to have been so necessary—Applicant is entitled to deduct that time from period of limitation prescribed—Appellate Court refusing extension of period of limitation errs in exercise of its jurisdiction.

Where an application for a copy is made personally to the copying Department and is accepted by it without any objection and without any demand for deposit of the copying fee and the copying Department by an endorsement informs the applicant that a certain number of days have been requisite for the supply of the copy, that number of days must be presumed to have been so necessary, irrespective of the time when the copying fee has been paid. When a counsel receives a copy showing that an application was accepted on a certain day it is not for him to make enquiries from the copying Agency to discover whether that application was a proper one or not. If the application was accepted without any objection it should be assumed that it was a proper one and the applicant is entitled to deduction of the time required for obtaining the copies from the period of limitation prescribed and the appellate Court refusing an extension of the period of limitation under S. 5 errs in the exercise of its jurisdiction. [P 694 C 1, 2]

S. L. Puri—for Petitioner.

Yashpal Gandhi for J. L. Kapur and J. L. Kapur—for Opposite Parties.

Order.—The only question for decision in this case is whether the learned Senior Subordinate Judge of Jhang was correct in deciding that the petitioner's appeal in his Court was barred by limitation. The judgment was delivered on 18th May

1. Asa Ram v. Darba Mal, 1929 Lah 513=121 I C 879=80 P L R 440.

2. Gangu v. Mahanraj Chand, 1934 Lah 384=149 I C 661=15 Lah 389=86 P L R 337 (F B).

1934 and the petitioner applied for its copy on the 24th of the month. On the next day he was ordered to deposit the copying fee which he deposited on the 30th on which date the judgment was received by the Copying Agency. The copy was completed on the 31st May. The appeal in the Court of the Senior Subordinate Judge was instituted on the 21st June. Prima facie it was then barred by limitation but it was contended for the appellant that if the time requisite for obtaining copies was deducted the appeal had been filed within time. The Copying Agent's endorsement on the copy obtained by the petitioner for the purpose of the appeal does not show that any deposit was demanded from the petitioner when he made his application on 24th May 1934, nor does this endorsement show that any demand was ever made at all or that any delay took place in complying with it. All it shows is that the application was made on the 24th and the copy was ready for delivery on the 31st May. The learned Senior Subordinate Judge held that the appeal was barred by limitation for the reason that when the requisite copying fees are not filed with the application the date of the application must be considered to be that on which the fees are filed and that the time spent by the Copying Agent in preparing estimate and recovering the money from the applicant should not be considered to be time requisite for obtaining the copies because the Copying Agent is an agent of the appellant and not of the Court. As pointed out, however, in my judgment in 1936 Lah 120 (1), the rulings laying down that the Copying Agent must be regarded as an agent of the applicant and not of the Court do not apply to a case where the application is made personally to the copying Department of a district office and is accepted by that Department as an application in itself sufficient for further action by itself to be taken.

In the present case it is admitted that the application for the copy was accepted when it was made on the 24th May without any objection and without any demand for the deposit of a copying fee. There is no doubt in my mind that where an endorsement by the Copying Agency which is a Government Department in-

forms the applicant that a certain number of days have been requisite for the supply of his copy that number of days must be presumed to have been so necessary. The case would be different if that endorsement showed that a demand for deposit of copying fee had been made and had not been complied with or that the applicant had been negligent in any other way. It was not the appellant but his counsel who filed the appeal and I do not think that when a counsel receives a copy showing that an application was accepted on a certain day it is for him to make enquiries from the Copying Agency to discover whether that application was a proper one or not. We may surely assume that if the application was accepted without objection it was a proper one. The case appears to me to be one in which justice obviously demanded an extension of the period of limitation under S. 5, Lim. Act, and the Senior Subordinate Judge erred in the exercise of his jurisdiction in refusing this extension.

I accept this petition and setting aside the order of the lower appellate Court remand the appeal to the Senior Subordinate Judge for disposal upon its merits. The parties will appear before the Senior Subordinate Judge on Tuesday the 10th March. There will be no order as to costs of this Court.

R.M./R.K.

Petition accepted.

A. I. R. 1936 Lahore 694

JAI LAL AND DALIP SINGH, JJ.

Mai Dhan Sita Ram—Decree-holder
—Petitioner.

v.

Imperial Bank of India, Rawalpindi
—Judgment-debtor—Opposite Party.

Civil Revn. No. 123 of 1936, Decided on 20th April 1936, from order of Small Cause Court Judge, Rawalpindi, D/- 16th December 1935.

Civil P. C. (1908), S. 60 (k)—Amount standing to Imperial Bank employee's credit in Provident Fund is exempt from attachment.

Under S. 60 (k), Civil P. C. the amount standing to the credit of an employee of the Imperial Bank of India in the Provident fund established by that Bank for the benefit of its employees is exempt from attachment. [P 695 C 2]

Shamair Chand—for Petitioner.

H. J. Rustomji—for Opposite Party.

Order of Reference

Jai Lal, J.—The important question involved in this case is whether the

amount standing to the credit of an employee of the Imperial Bank of India in the provident fund established by the Bank for the benefit of its employees is exempt from attachment under S. 60 (k), Civil P. C. The decision of this question depends on whether the Governor-General in Council has by notification included the Imperial Bank of India in the list of institutions mentioned in the Schedule to the Provident Funds Act and, secondly, whether the Governor-General in Council has by notification directed that the provisions of the Provident Funds Act, 1925, shall apply to the Provident Fund established for the benefit of its employees by the Imperial Bank of India. There is no information available on this point on the record and the learned counsel for the Imperial Bank of India is unable to show any notification. He says that he has asked for information from the Imperial Bank but has not got it yet and asks for a short adjournment. The matter is important from the point of view of the creditors of the employees of the Imperial Bank of India and also of the employees of the Imperial Bank of India and a decision of the question in this case is likely to have a far-reaching effect.

The case before me has come up on a petition for revision and consequently normally there is no likelihood of a more authoritative decision in this case. I consider that the question involved should be decided by a Division Bench. I accordingly refer this case to a Division Bench to be heard at an early date. I understand that Dalip Singh, J. and myself are sitting on a Division Bench to hear a big case on the 20th of this month. If the Hon'ble the Chief Justice agrees this case also may be heard by the same Division Bench otherwise it will have to go to another Bench. Formally I adjourn the case to 20th April 1936.

Judgment of Division Bench.—This case has been referred to a Division Bench. The question involved is whether the amount standing to the credit of an employee of the Imperial Bank of India in the Provident fund established by the Bank for the benefit of its employees is exempt from attachment under S. 60 (k), Civil P. C. S. 60 (k) exempts from attachment all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act of 1897 for the time being applies in so far as

they are declared by the said Act not to be liable to attachment. Under S. 8 (3), Provident Funds Act, 1925, power is conferred upon the Governor-General in Council to add by notification to the list of institutions to which the provisions of the Provident Funds Act may be extended. These institutions are to be found in the Schedule to the Act. Under S. 8 (2) of the same Act the Governor-General in Council is empowered to extend the provisions of the Act to any of the institutions mentioned in the list. By Notification No. D-4243-R II of 29th December 1932 the Governor-General in Council has added the Imperial Bank of India to the list of the institutions mentioned in the Schedule to the Act and by Notification No. D-4243 (b)-R II the Governor-General in Council has extended the application of the Provident Funds Act to the Imperial Bank of India. It is therefore obvious that under S. 60 (k), Civil P. C. the amount standing to the credit of an employee of the Imperial Bank of India in the Provident fund established by that Bank for the benefit of its employees is exempt from attachment. We therefore dismiss this petition with costs.

D.S./R.K.

Petition dismissed.

A. I. R. 1936 Lahore 695

BHIDE, J.

Muhammad Yar—Petitioner.

v.

Khalil-ul-Rahman—Opposite Party.

Civil Revn. No. 745 of 1935, Decided on 12th February 1936, from order of Dist. Judge, Multan, D/- 8th October 1935.

(a) Charitable and Religious Trusts Act (1920), S. 3—Order under S. 3 is revisable.

The provisions of S. 115, Civil P. C., and S. 44, Punjab Courts Act are very wide and an order of the District Judge under S. 3, Charitable and Religious Trusts Act, is revisable: 1929 Oudh 225 (F B), Rel. on. [P 696 C 1]

(b) Charitable and Religious Trusts Act (1920), S. 3—Mosque built by public subscription and used by Mahomedan public—Admission by person in prior suit to be religious trust—Mosque held public trust.

Where a mosque was built with public subscriptions and used by the Mahomedan public for offering prayers and further was admitted by the respondent to be a religious trust in a prior suit:

Held: that such a mosque was a public trust and that an application under S. 3 calling upon the respondent to furnish certain information should be decided on merits. [P 696 C 1]

Shabir Ahmad—for Petitioner.

D. N. Saluja—for Opposite Party.

Order.—This is a petition for revision of an order of the District Judge, Multan dismissing a petition under S. 3, Charitable and Religious Trusts Act 1920. The petitioner wanted the respondent who is a mutwalli of a mosque to furnish certain information. The learned District Judge however held that it was not proved that the mosque was a public trust of a charitable or religious nature and dismissed the petition on this preliminary ground. A preliminary objection is raised that no petition for revision is competent. No authority is cited, but reference is made to S. 11 of the Act, which makes certain provisions of the Civil Procedure Code applicable to proceedings under the Act and to S. 12, which bars appeals. But the very fact that there is a specific provision taking away the right of appeal while there is no such provision relating to petitions for revision suggests that revision is competent. The provisions of S. 115, Civil P. C., and S. 44, Punjab Courts Act are very wide and I see no good reason why an order of the District Judge under the Charitable and Religious Trusts Act should not be held to be revisable. A petition for revision of a similar kind was entertained without objection by a Full Bench of the Chief Court of Lucknow in 4 Luck 429 (1).

On merits, I fail to understand why the learned District Judge considered that the mosque was not a trust of a public nature. The evidence shows that it was built with public subscriptions and was used by the Mahomedan public for offering prayers. In fact the respondent, who was a party to a compromise relating to this very mosque admitted therein that it was a "religious trust" within the meaning of S. 3, Act 14 of 1920: vide C. A. No. 1038 of 1933, decided by this Court on 8th May 1933. It seems to me that the learned District Judge has failed to exercise jurisdiction in this case, which was vested in him under the law. I accept the petition with costs and remand the same for decision on merits.

V.B.B./R.K.

Petition accepted.

A. I. R. 1936 Lahore 696

ADDISON AND ABDUL RASHID, JJ.

Punjab National Bank, Ltd., Amritsar
—Plaintiff—Appellant.

v.

Shamsher Singh and another—Defendants—Respondents.

Misc. First Appeal No. 904 of 1934, Decided on 13th January 1936, from order of Senior Sub-Judge, Gurdaspur, D/- 29th January 1934.

(a) Civil P. C. (1908), S. 36 — Civil Court can grant, in execution proceedings, farm of land belonging to judgment-debtor—Order of Court making lease money payable by instalment, although indiscreet is not illegal—S. 36 applies—Court can enforce payment of money by applying provision relating to execution of decrees.

A civil Court is competent in execution proceedings to grant a farm of the land of a judgment-debtor belonging to an agricultural tribe. If the Court in granting such a lease makes the lease money payable by instalments, it might be said that the Court has acted in an unwise or indiscreet manner by not demanding the entire lease money at once but it cannot be said that the Court has passed an order which it had no jurisdiction to pass. Such an order is not illegal or without jurisdiction and the provisions of S. 36 apply to the case and the Court can enforce payment of the lease money by applying the provisions of the Code relating to execution of decrees: 1920 Lah 456, Foll.

[P 698 C 1]

(b) *Res judicata*—Constructive *res judicata*—Principles apply to execution proceedings.

The principles of constructive *res judicata* are applicable to execution proceedings.

[P 698 C 1]

(c) *Execution*—*Executing Court*—Orders of—Court granting farm of land belonging to judgment-debtor—Lease money made payable by instalments—On failure to pay instalment Court ordering lessee to deposit balance in Court—Order not appealed against—Order is conclusive and binding on lessee.

Where the Court granting a farm of the land belonging to the judgment-debtor on lease, during the execution of a decree, and making lease money payable by instalments, directs the lessee on failure to pay some instalments, to deposit the balance of the lease money in Court and the lessee does not file any appeal against it, the order of the Court is conclusive and binding so far as the lessee is concerned.

[P 698 C 1, 2]

Har Gopal—for Appellant.

Nawal Kishore—for Respondents.

Abdul Rashid, J.—On 4-8-1921, the Punjab National Bank obtained a decree for Rs. 6,998-14-0, with costs and future interest at 6 per cent per annum against one Shamsher Singh. On 21st April 1925, the decree-holder applied for the execution of the decree after giving the judg-

ment-debtor credit for various payments that had been made till that date. On 23rd June 1925, the office reported that the amount due to the decree-holder was Rs. 2,615-9-6. In execution of the decree, the decree-holder got the agricultural land belonging to the judgment-debtor attached. This land had been leased to Rachhpal Singh till rabi 1928. Rachhpal Singh appeared in Court and agreed to take the land of the judgment-debtor on lease for a period of 13 years with effect from Kharif 1928, and offered to pay the decretal amount by 10 half yearly instalments. On 6th February 1926, the executing Court granted Rachhpal Singh a lease of the land belonging to the judgment-debtor for a period of 13 years from Kharif 1928. Rachhpal Singh was ordered to deposit the decretal amount in Court within the first five years by 10 equal instalments payable at every Kharif and rabi harvest.

It appears that the report made by the office to the executing Court that only Rs. 2,615-9-6 were due from the judgment-debtor to the decree-holder on 23rd June 1925, was wrong. In fact, a much larger amount was due to the decree-holder on that day. Up to 11th January 1930, the decree-holder was under the impression that Rachhpal Singh was liable for the entire decretal amount while Rachhpal Singh was under the impression that he had to pay only Rs. 2,615-9-6 in 10 equal instalments. On 8th March 1930, Rachhpal Singh filed objections to the effect that he was responsible for payment of Rs. 2,615-9-6, only, that he had paid two instalments already, and that he was liable only for payment of eight further instalments. The executing Court (Mr. Muhammad Akbar, Senior Subordinate Judge) by its order dated 3rd January 1931, held that Rachhpal Singh lessee was liable to the decree-holder only to the extent of Rs. 2,615-9-6 and that the remaining decretal amount was payable by the judgment-debtor. It also held that Rachhpal Singh could not deduct from each instalment the amount of the Government land revenue paid for the land leased to him as he was liable to pay it beside the amount of each instalment for which he was liable. On these findings, the Court ordered Rachhpal Singh to deposit the sum of Rupees 2,615-9-6 in Court after deducting the

amount that he had already deposited. Rachhpal Singh, lessee not having carried out the order of the Court, passed on 3rd January 1931, another application was made by the decree-holder for the realisation of the sum due from Rachhpal Singh. Mr. Abdul Rab, Senior Sub-Judge, Gurdaspur, has held that the amount due from the lessee could not be recovered from him by means of execution proceedings, and that the only remedy open to the decree-holder is to file a regular suit against the lessee. Against this order, the Punjab National Bank has preferred an appeal to this Court, which has been referred to a Division Bench by the learned Judge before whom it came on for hearing.

The learned counsel for the appellant contended that by its order dated 3rd January 1931, the executing Court had ordered the lessee to deposit the lease money in Court, and that as this order had not been carried out, the executing Court was entitled to apply the provisions of the Civil Procedure Code relating to the execution of decrees to enforce payment of the balance of the lease money from Rachhpal Singh. Reference was made in this connexion to S. 36, Civil P. C., which lays down that the provisions of the Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders. It was further contended by the learned counsel for the appellant that the Code was not exhaustive and that the Court had inherent powers to enforce its own order by summary process. The farming of agricultural land in execution of a decree is authorised by S. 72, Civil P. C., and it is almost invariably the case that the person who takes the land on lease is directed to deposit the lease money in Court before the Collector is asked to mutate the land in his favour. If the lessee fails to make the necessary deposit, no instructions are issued to the Collector to mutate the land in his name and the land is farmed to some other person.

It was contended by the learned counsel for the respondent that as there was no provision in the Code for granting a lease of the land of the judgment-debtor in such a way as to realise the lease money by means of instalments, the order of the Court sanctioning the farm on the condition that the lease money shall be

paid by 10 equal instalments was illegal and without jurisdiction. It was urged that the provisions of S. 36, Civil P. C., were only applicable to those orders of the Court which were not illegal or ultra vires, and that S. 36, Civil P. C., could not be availed of in enforcing the order of paying the lease-money in 10 equal instalments. In our opinion, this contention is without force. It has been laid down in I Lah 192 (1), that a civil Court is competent in execution proceedings to grant a farm of the land of a judgment-debtor belonging to an agricultural tribe. If the Court in granting such a lease makes the lease-money payable by instalments, it might be said that the Court had acted in an unwise or indiscreet manner by not demanding the entire lease money at once; but it could not be said that the Court had passed an order which it had no jurisdiction to pass. In our opinion, therefore the order of the Court, dated 6th February 1926, granting a lease of the judgment-debtor's land for 13 years to Rachhpal Singh, the lease-money payable by means of 10 equal instalments was not illegal or without jurisdiction. In these circumstances, the provisions of S. 36, Civil P. C., would be applicable, and the Court could enforce payment of the lease-money by applying the provisions of the Civil Procedure Code relating to the execution of decrees.

As mentioned above, Rachhpal Singh lessee filed a number of objections in the executing Court on 8th March 1930. At that time he did not file any objection to the effect that the executing Court had no jurisdiction to recover the balance of the lease-money from him, and that this amount could only be recovered by the decree-holder by a regular suit. The principles of constructive res judicata are applicable to execution proceedings and as Rachhpal Singh did not then object to the jurisdiction of the Court, he cannot after the passing of the order dated 3rd January 1931, object to the jurisdiction of the executing Court so far as the realisation of the balance of the lease-money from him is concerned. There is another way of looking at the matter. By its order dated 3rd January 1931 the executing Court ordered Rachhpal Singh to deposit the balance of the lease-money in Court. Rachhpal Singh did not file any

appeal against this order. The order of the executing Court directing him to deposit the money in Court must therefore be regarded as conclusive and binding so far as Rachhpal Singh is concerned. For the reasons given above, we accept this appeal, set aside the order of the executing Court dated 29th January 1934 and hold that the balance of the lease money can be realised by the executing Court from Rachhpal Singh in the execution proceedings. The parties will bear their own costs in this appeal.

R.M./R.K.

*Appeal allowed.***A. I. R. 1936 Lahore 698**

JAI LAL, J.

Ishar Singh — Decree-holder — Petitioner.

v.

Allah Rakha and another — Judgment-debtors—Opposite Parties.

Civil Revn. 880 of 1935, Decided on 10th March 1936, from order of Senior Sub-Judge, Sialkot, D-/ 25th November 1935.

(a) Interpretation of Statutes—Intention of legislature—It is to be gathered from language used.

The primary rule of the interpretation of statutes is that the intention of the legislature is to be gathered from the language used in the statute. Where the words of the statute are unambiguous it is not open to the Court to enter into speculation as to what the real intention of the legislature was.

[P 699 C 2]

(b) Punjab Pre-emption Act (1 of 1913), S. 11—Decree-holders applying for attachment of house purchased by judgment-debtors — Pre-emptor in pre-emption suit pre-empting sale of that house and depositing price of pre-emption in Court—Decree-holder held could not attach sum in custody of Court.

The decree-holders in execution of their money decree applied for the attachment of a house purchased by the judgment-debtors. Before the house could be attached, a suit for pre-emption of sale in favour of the judgment-debtors was instituted by the pre-emptor. The pre-emption suit was decreed and the pre-emptor deposited certain sum in Court. The judgment-debtors did not draw this sum. The decree-holders applied for the attachment of the sum deposited in Court:

Held: that under S. 11 it could not be attached: 1922 Lah 290, *Disting.* [P 699 C 1]

Mukand Lal Puri—for Petitioner.
Achhru Ram and Inder Dev — for Opposite Parties.

Order.—In this petition for revision the question involved relates to the in-

interpretation of S. 11, Punjab Pre-emption Act, 1913. The petitioner holds a simple money decree against the respondents and in execution of that decree he applied for the attachment of a house which had been purchased by the judgment-debtors. Before, however, the house could be attached a suit for pre-emption of the sale in favour of the judgment-debtors was instituted by one Hayat who deposited Rs. 400 as the amount for which he claimed that he was entitled to pre-empt the sale. The suit for pre-emption was ultimately decreed on payment of Rs. 400. The result was that the Rs. 400 which had been deposited by Hayat became payable to the judgment-debtors but was not drawn by them. As Hayat had obtained a decree for possession of the house by pre-emption and had apparently got possession of the house in execution of his decree, it could not be attached in execution of the money decree of Ishar Singh against the respondents. Ishar Singh consequently applied for the attachment of the money, that is Rs. 400, which had been deposited for payment to his judgment-debtors by Hayat in the pre-emption suit. This application was resisted by the judgment-debtors who contended that under S. 11, Punjab Pre-emption Act, 1913, the money deposited for them in Court in the pre-emption suit could not be attached. This objection was sustained by the executing Court and the order of that Court was upheld by the Senior Subordinate Judge on appeal by the decree-holder. The latter has consequently applied for revision of the order. I have heard counsel and am constrained to hold that the view of the Courts below is correct. S. 11, Punjab Pre-emption Act, reads as follows:

No sum deposited in or paid into Court by a pre-emptor under the provisions of this Act or of the Code of Civil Procedure shall, while it is in the custody of the Court, be liable to attachment in execution of a decree or order of a Civil, Criminal or Revenue Court or of a Revenue Officer.

It would be observed that according to the phraseology of the section so long as the money deposited in Court by a pre-emptor remains in the custody of the Court, it cannot be attached in execution of a decree or order, but the learned counsel for the petitioner contends that the intention of the legislature was to protect the pre-emptors, and, therefore,

the money could not be attached in execution of a decree against the vendees so long as the pre-emption suit remained pending, but as soon as it had been decided and the title in the property sought to be pre-empted passed to the pre-emptor the money became the property of the vendees and became liable for attachment in execution of a decree or order passed against the vendees, and the pre-emptor could not be injuriously affected by such execution. It may also be possible to argue that the intention of the legislature was also to protect the vendee and that so long as the pre-emption suit was pending the money could not be attached in execution of a decree against the pre-emptor. But these are matters with which, having regard to the phraseology of the section, I am not concerned. The primary rule of the interpretation of the statutes is that the intention of the legislature is to be gathered from the language used in the statute. The words used in the present case are unambiguous and it is not open to me to enter into speculation as to what the real intention of the legislature was. It may be, as was contended before me, that the section has been badly drafted and that it does not express the real intention of the legislature or that the law laid down in the section is unjust, but these are matters with which I am not concerned.

The learned counsel for the petitioner relies upon a judgment of a Division Bench of this Court in 3 Lah 141 (1), in which S. 15, Redemption of Mortgages (Punjab) Act 2 of 1913, which is almost analogous to S. 11, Punjab Pre-emption Act, 1913, was interpreted in the manner suggested by him for interpreting S. 11, Punjab Pre-emption Act. The learned Judges in that case were influenced by the fact that the provisions of S. 15, Act 2 of 1913, were primarily for the protection of the person depositing the money and that the intention of the legislature was that the money deposited under the provisions of the Act should be exempt from attachment in execution of a decree against the depositor. That authority, however, is not binding on me for the purpose of deciding the present case. In the present case I am concerned with the interpretation of a different Act, and if the language used in it

1. Mohna Mal v. Tulsiram, 1922 Lah 290=67 I C 718=3 Lah 141.

had been ambiguous the case cited by the learned counsel for the petitioner would have been a useful guide for determining the intention of the legislature, but, as I have already stated, there is no ambiguity in S. 11, Punjab Pre-emption Act, 1913, and therefore the case cited by the learned counsel is of no material assistance to me in the present case. In my opinion the matter is one for the legislature to put right if the section does not express its real intention, a question on which it is not necessary for me to express any opinion in this case. Consequently I dismiss this petition, but in the peculiar circumstances of the case make no order as to costs.

R.W./R.K. *Petition dismissed.*

A. I. R. 1936 Lahore 700

YOUNG, C. J. AND MONROE, J.

In re Peoples Bank of Northern India, Ltd. in liquidation; Re Settlement of the list of contributories; Re Khushi Nand Kohat—Objector.

Objection No. 154 in Civil Original No. 38 of 1935, Decided on 17 March 1936.

(a) **Company—Purchase of shares conditionally — Conditions carried out — Subsequent breach of condition—Remedy is action for damages and not for removing name from share-holders' register.**

Where a person purchases some shares on condition that he would be appointed Chairman of the Local Board and he is allotted shares and appointed Chairman, but subsequently there is breach of the condition by his dismissal, his remedy is by an action for damages and not for getting his name removed from the register of share-holders. [P 701 C 2]

(b) **Company—Purchase of shares conditionally — Conditions not satisfied — But share-holder acquiescing, receiving dividends and authorising company to sell his shares—Held he was not entitled to have his name removed from share-holder's register.**

Where a person purchases shares conditionally but allotment is made without conditions being carried out, and he acquiesces in that and further receives dividends, and authorises the company to sell his shares, he is not entitled subsequently to have his name removed from the register of share-holders.

[P 701 C 2]

(c) **Company — Share-holder — Right to have name expunged from register — No action taken for seven years—Right is barred.**

Where a share-holder who has a right to have his name expunged from the register of share-holders does not take any action to do so for over seven years, his right is barred.

[P 701 C 2]

Bhagwat Dayal for Official Liquidator—for Petitioner.

Lala Badri Das for Lala Khushi Nand—for Respondent.

Young, C. J.—This is an objection by Khushi Nand of Kohat to his name being settled on the list of contributories of the Peoples Bank of Northern India in liquidation. The Peoples Bank of Northern India had commenced business in 1925. Branches were instituted all over the Punjab. It was intended to have a branch in Kohat. An agent of the Bank was sent up to Kohat to arrange this. He apparently got into communication with Khushi Nand and persuaded him to apply for 150 shares at Rs. 100 each in the company. He also told Khushi Nand, and this is evidenced by a letter of 7th June 1926, that if he applied for these shares he would write to the Head Office and recommend him as Chairman of the Local Board. He also went on to say that "if the conditions are not accepted, they will return your cheque referred to above." We do not know whether the recommendation to the Head Office was made by the local agent or not. We presume that the local agent did not write to the Head Office as no document exists in the files of the Bank. In any event, however, Khushi Nand applied for the shares. The shares were allotted to him and a certificate issued. The certificate did not upon the face of it record any condition which it should have done if the condition were made and therefore Art. 23 of the Articles of Association would apply. Khushi Nand took his place as Chairman. According to the subsequent correspondence it appears that the Directors of the Kohat Local Board did not get on together with the result that on 13th November 1926 Khushi Nand wrote to the Head Office of the Bank the following letter:

I presume that Atma Ram has been appointed Local Director for my place, therefore please remit my share amount by return post.

On 26th November 1926 the Bank replied and stated:

Since you are yourself willing to sever your connexion with us, we are therefore desired to inform you that your shares will be sold shortly and their proceeds remitted to you.

Thereafter the Bank made a call upon Khushi Nand to pay an instalment due upon his shares. This call was not paid nor was any subsequent call paid. On 11th February 1927 Khushi Nand wrote

to the Head Office asking why his shares had not been sold and claiming that he was entitled to Rs. 25 for each meeting of the Bank up to date when his shares would be sold. On 18th March 1927, Khushi Nand sent to the Head Office the sum of Rs. 31 being the stamp duty payable on the transfer of his shares. On 23rd May 1928 Khushi Nand wrote a letter in which he wished to know what the state of his share account was, that is what dividend had been paid by the Bank and credited to his share account. He owed money for arrears of calls. By this letter he clearly recognised his position as a share-holder at that date. On 21st July 1928 the Bank served a notice on Khushi Nand to pay the balance due on his shares. On 11th August 1928 a lawyer wrote to the Bank on behalf of Khushi Nand. In this letter, it is suggested that the arrangement between the Bank and Khushi Nand was that the Bank should sell Khushi Nand's shares on his ceasing to be Chairman of the Local Board. Nowhere is the position stated, as Khushi Nand now contends, that he was not in fact a share-holder of the Bank. On 23rd September 1929 the Bank did in fact sell 12 shares on behalf of Khushi Nand and the money was remitted to, and thankfully received by, Khushi Nand. Eventually the Bank closed its doors in 1931 and in June 1932 notice was served upon Khushi Nand to pay Rs. 3,380 odd as arrears due on the shares. The shares eventually in 1933 were forfeited by the Bank for failure to pay the amount due on the shares. The position arising owing to the forfeiture has been dealt with in our judgment in Civil Original No. 38 of 1935. In that case we held that there was no valid forfeiture. It is, however, now contended on behalf of Khushi Nand that the shares were bought conditionally and allotted conditionally, that the conditions were never carried out and therefore his name ought to be struck off the share-holders' register.

In the first place we are very doubtful as to whether there ever was a condition as is suggested. It may well be that the person representing the Bank at Kohat made the promise. But as there is no evidence that any suggestion was placed before the Head Office in fact, the issue of the certificate without the condition endorsed upon it is strong evidence that

the Board knew nothing about the condition. The certificate also was received by the share-holder without objection. Secondly, if the condition was made, it was complied with. Khushi Nand was in fact after allotment made Chairman of the Local Board. It is quite true that he left the Board, but it is equally true that he left it willingly. He was not dismissed. The statement in the letter of 26th November 1926, in which the Bank records that Khushi Nand was himself willing to sever his connexion with the Bank, was never denied at that time by Khushi Nand. It is also clear that even if there had been a wrongful dismissal by the Bank, or a breach of contract on their part, the remedy would be by action for wrongful dismissal or damages. The condition having been carried out by appointing Khushi Nand Chairman the shares would remain, until transfer, the property of Khushi Nand. Even assuming that there was a breach of the condition or a breach of contract entitling Khushi Nand to have the register of share-holders rectified it is not within his power to have it done now; Khushi Nand acquiesced in the position that he continued to remain a share-holder by authorising the Bank to sell the shares in his behalf, by sending money for the Government stamp duty on a transfer, by writing on 23rd May 1928, about his "share account" and by receiving the proceeds of the sale of 12 shares on 23rd September 1929. He further received dividends paid by the Bank and these dividends were credited with his knowledge to his share account.

One more point may be noticed and that is that even assuming that Khushi Nand was entitled to repudiate the contract to take shares, and have his name removed from the register of share-holders, the fact that he lay idle for seven years and took no steps whatever to have his name removed from the register bars any claim of his now to have this done. Where there is a right of repudiation there must also be active steps taken to rectify the share register. The creditors of the company have an interest in the register. It is the uncalled capital of the company which constitutes part of the security for the creditors. Even if he had a right to have his name expunged from the register by allowing his name to remain on the regis-

ter, Khushi Nand is now estopped from having it removed. We hold that the condition, if any, was one which was carried out by the Bank and therefore there was no right whatever to repudiate these shares; and that, if the contrary were held, Khushi Nand by his actions has clearly waived any right he ever had to have his name removed from the register of the members of this company. We therefore dismiss this objection. We allow Rs. 100 costs.

V.B.B./R.K. *Objection dismissed.*

A. I. R. 1936 Lahore 702

SKEMP, J.

New Delhi Municipal Committee —
Petitioner.

v.

Ram Bai—Opposite Party.

Criminal Revn. No. 410 of 1936, Decided on 7th May 1936, as reported by Addl. Dist. Magistrate, Delhi, D/- 28th February 1936.

(a) Criminal P. C. (1898), S. 250 — Prosecution by Municipal Committee—Action not grossly careless or vindictive — Committee not called upon to show cause why order of compensation should not be passed — Compensation order held not proper.

Where in a complaint by a Municipal Committee against a resident an award of compensation was made against such public body without giving it an opportunity of explaining why compensation should not be awarded and the action of the Committee was not grossly careless or vindictive :

Held : this was not a case where compensation should have been awarded ;

Held further : that as the mandatory provisions of S. 250 were not complied with the order should be set aside. [P 703 C 1]

(b) Punjab Municipal Act (3 of 1911), Ss. 195 and 3 (5) (a)—Repairing walls of shed and putting roof thereon is not beginning, erecting or re-erecting, nor amounts to material alteration.

Section 195 lays down penalties "should a building be begun, re-erected or erected without sanction." Repairing the walls of a shed and putting thereon an iron corrugated roof *prima facie* does not come within the words "begun, erected or re-erected." The term erection implies causing to stand upright ; nor does it amount to material alteration within the meaning of S. 3 (5) (a). [P 702 C 2]

Malik R. L. Anand II — for Petitioner.

Order. — On 15th March 1935, Mr. F. H. Ginder, Building Inspector of the Municipal Committee, New Delhi, reported with reference to a house belonging to Shrimati Ram Bai :

Unauthorized structure. Corrugated iron roof on wood rafters has been constructed as a room on the first floor in the above premises. This structure has been reconditioned.

On 30th March 1935 a notice was issued in the name of the President of the Committee to Shrimati Ram Bai saying that it was reported that "you have constructed a room on the first floor with corrugated iron roof and wood rafters." On the back of this notice Shrimati Ram Bai's husband Dr. Tulsi Ram wrote :

This shed is standing for the last six years when the building was constructed. There is a sanction of construction over this area.

The Committee summoned Shrimati Ram Bai, and Mr. Ginder stated that

A tin shed was found with new corrugated iron sheet and a portion of brick near the rafters was repaired. The walls existed previously.

He proved his previous report. The trial Magistrate accepted Shrimati Ram Bai's contention that the tin shed existed for the last six years. He discharged her and further directed in view of the facts that the Municipal Committee should pay her ten rupees as compensation. The learned Additional District Magistrate has recommended that the order of compensation be set aside and that a further inquiry be ordered. The learned Additional District Magistrate said :

The Resident Magistrate in his order thinks only of the repairs of walls and ignores the material alteration of the shed by re-roofing it.

The prosecution was under S. 195, Municipal Act, which lays down penalties "should a building be begun, erected or re-erected without sanction." Repairing the walls of a shed and putting thereon an iron corrugated roof *prima facie* does not come within the words "begun, erected or re-erected." The term "erection" implies causing to stand upright. S. 3 (5) of the Act says "erect or re-erect any building includes" various things which in my opinion have no bearing. The learned counsel for the Municipal Committee relies on S. 3 (5) (a), "material alterations in any building." It does not appear that repairing the walls of a shed and putting a new roof thereon amounts to material alterations. Therefore in my opinion Shrimati Ram Bai has not infringed S. 195 of the Act, and I decline to order further proceedings. It does appear that in this case the Building Inspector had not got clearly in his mind the requisites of the section and that after Dr. Tulsi Ram's reply the prosecution by the Committee was lodged carelessly and on

an inadequate ground; but it was not grossly careless or vindictive, and I hardly think it was a case for compensation. Anyhow compensation cannot be awarded in this case because, as the Additional District Magistrate has pointed out, the Magistrate disregarded the mandatory provision of S. 250, Criminal P. C., and did not call on the Committee or its representative to show cause why they should not pay compensation. The order directing the Committee to pay compensation is set aside, and the sum if paid is to be refunded.

V.B.B./R.K.

*Petition accepted.***A. I. R. 1936 Lahore 703**

ADDISON AND ABDUL RASHID, JJ.

Mohammad Hayat Khan—Plaintiff—Appellant.

v.

(Firm) Jaspat Rai-Babu Ram and others—Defendants—Respondents.

First Appeal No. 1645 of 1935, decided on 2nd March 1936, from order of Sub-Judge, First Class, Lyallpur, D/- 30th May 1935.

Court-fees Act (1870), S. 7 (iv) (c)—Suit for declaration that plaintiff is owner of the house in suit and for declaring mortgage deed executed by defendants ineffective against him—Suit valued at certain amount for jurisdiction and Court-fees of Rs. 10 paid—Suit falls under S. 7 (iv) (c)—Ad valorem Court-fees must be paid on the value for jurisdiction.

Where the plaintiff sues for declaration that he is the owner of the house in suit and for declaring the mortgage-deed executed by the defendants ineffective against him, putting his own value for purposes of jurisdiction and pays a fixed amount of court-fees on the plaint, it is not only necessary that he should get a declaration that he is the owner but also that he should pray for the cancellation of the mortgage-deed, and the suit therefore falls under Cl. (iv) (c) of this Section. In a case like this the plaintiff cannot put one value for jurisdiction and another for court-fees, the value must be the same for both and when once he has put his own value for jurisdiction, ad valorem Court-fees must be paid on the value so stated: 1931 Lah 307; 1935 Lah 698; 1932 Lah 132 and 1927 Lah 499, Ref. [P 703 C 2]

*Mohammad Amin Khan—for Appellant.**F. C. Mittal—for Respondents.*

Addison, J. — The plaintiff instituted the present suit for a declaration that he was the owner of the house in suit, that defendants 2 and 3 had nothing to do with it and the mortgage deed dated 18th March 1931 executed by them was ineffective against him, being null and void.

He valued the suit for purposes of jurisdiction at Rs. 12,000 but he paid a Court-fee of Rs. 10 on the ground that Art. 17 (3), Sch. 2, Court-fees Act, applied. The trial Judge held that the case fell within S. 7 (iv) (c), Court-fees Act, and that he must pay Court-fees ad valorem on Rs. 12,000, the value he placed on the suit. The plaintiff refused to make good the Court-fees and the plaint was accordingly rejected. Against this decision the plaintiff has appealed.

It was brought out in the pleas that one Col. Ali Altaf Khan left two daughters, Mt. Umrao Begam defendant 2 and Mt. Fazal Begam. Abdul Majid defendant 3 is the husband of Mt. Umrao Begam and plaintiff Muhammad Hayat Khan is the son of Mt. Fazal Begam. On the death of their father Mt. Umrao Begam and Mt. Fazal Begam referred their disputes as regards the whole estate to arbitration on 8th November 1930 and an award was made on 13th November 1930 by which the house in suit was granted to Mt. Umrao Begam, defendant 2. This award was made a decree of the Court on 21st August 1931 when it was accepted by both parties. These facts were not made clear in the plaint but are not disputed. It will thus appear that the plaintiff is not only trying to get rid of a mortgage but also of a decree. In any case it is clear that the suit falls within the ambit of S. 7 (iv) (c) Court-fees Act. In the circumstances described it is necessary not only that he should get a declaration that he is the owner but that he should pray for the cancellation of the mortgage deed.

It was contended before us that it was for the plaintiff to state the amount at which he valued the relief he sought in a case covered by S. 7 (iv) (c). This may be so, but he has stated what that value is when he declared the value to be Rupees 12,000 for the purposes of jurisdiction. See in this connection 1931 Lah 307 (1), 1935 Lah 698 (2), 13 Lah 391 (3), 13 Lah 788 (4) and 8 Lah 531 (5). The authority

1. Jwala Singh v. Kala Singh, 1931 Lah 307=183 I O 120=32 P L R 193.
2. Jani v. Bishen Singh, 1935 Lah 698.
3. Sri Kishan Das v. Sat Narain, 1932 Lah 132=135 I O 499=13 Lah 391=32 P L R 729.
4. Jhanda Singh v. Gulab Mal-Bhagwan Das, 1933 Lah 246=137 I O 240=13 Lah 788=33 P L R 488.
5. Hakim Rai v. Ishar Das-Gorakh Rai, 1927 Lah 499=102 I O 46=8 Lah 531.

in 9 Lah 366 (6) was not followed by one of the Judges who decided it in 13 Lah 391 (3). In these circumstances we hold that the plaint was properly rejected and we dismiss this appeal with costs.

D.L./R.K.

Appeal dismissed.

6. Bura Mal v. Tulsi Ram, 1927 Lah 890=107 I C 609=9 Lah 366=29 P L R 27.

A. I. R. 1936 Lahore 704

ADDISON AND DIN MOHAMMAD, JJ.

Ganesh Das—Judgment-debtor — Appellant.

v.

Hari Chand—Decree-holder and others — Judgment-debtors—Respondents.

Letters Patent Appeal No. 110 of 1934, Decided on 26th March 1935, from order of Dalip Singh, J., Lahore, D/- 19th July 1934.

Execution — Decree binding — Executing Court cannot go behind decree.

Where a decree as it stands is against all the defendants, it is capable of being executed against their property whatever the nature of it or against the defendants personally an executing Court cannot go behind the decree.

Where a decree was passed in a suit on a promissory note against all the defendants and one of the judgment-debtors, resisted its execution on the ground that the suit having been based on the allegation that the debt was due from a joint Hindu family, he could not be held personally liable:

Held: his objection should be overruled as the executing Court could not go behind the decree: 1932 Bom 483, *Rel. on*; 1931 Pat 177, *Dissented*; 19 Cal 159 (P C), *Expl.* [P 704 C 2]

Badri Das and *Suraj Krishan*—for Appellant.

Nawal Kishore—for Respondent (Decree-holder).

Din Mohammad, J.—This is a Letters Patent Appeal from the decision of Dalip Singh, J. Hari Chand instituted a suit against Sham Narain, Ganesh Das and Parkash Chandar for recovery of Rupees 5,965-10-0 on the basis of a promissory note executed by Sham Narain alone in his favour. An ex parte decree was passed in favour of the plaintiff in the following terms:

It is ordered and decreed that the suit has been decreed with costs ex parte and that the sum of Rs. 424-12-0 be paid by the defendants to the plaintiff on account of the costs of this suit with interest on Rs. 5,000 at the rate of Rs. 6 per cent per annum from 29th April 1932 to the date of realization.

An appeal against this decree failed in the Chief Court, Oudh. Hari Chand sued out execution on this decree against one of the judgment-debtors only who resisted

it on the ground that the suit having been based on the allegation that the debt was due from a Hindu joint family, he could not be held personally liable under the decree. The Senior Subordinate Judge in whose Court the execution was proceeding, overruled this objection and held that the decree was free from ambiguity and that as an executing Court he could not go behind its terms. The judgment-debtor appealed to this Court and the appeal was heard by Dalip Singh, J. He agreed with the conclusion arrived at by the Senior Subordinate Judge and dismissed the appeal with costs. From that decision this appeal has been filed. Counsel for the appellant contends on the authority in 10 Pat 305 (1), that the executing Court could go behind the terms of the decree to find out what interpretation should be placed on its wording. With all respect however to the learned Judges who decided that case, we are not disposed to endorse this opinion. That case was mainly based on 19 Cal 159 (2), but in our opinion the Privy Council judgment does not go so far. Their Lordships of the Privy Council were dealing with a case under S. 13 (now S. 11), Civil P. C., and it was in that connexion that they remarked as follows:

When a decree simply dismisses a suit, it is necessary to look at the pleadings and judgment to see what were the points actually heard and decided.

This in no way enunciates what 10 Pat 305 (1) decides and can therefore be no authority for the proposition advanced therein. Rangnekar, J. has also dissented from that judgment in 1932 Bom 483 (3), and has held that where a decree as it stands is against all the defendants, it is capable of being executed against their property whatever the nature of it or against the defendants personally and an executing Court cannot go behind the decree. We agree with these remarks and consider that this is the correct legal position. We have no hesitation therefore in affirming the decision of Dalip Singh, J., and dismiss this appeal with costs.

V.B.B./R.K.

Appeal dismissed.

1. Sukhdeo Prasad v. Madhusudhan Prasad, 1931 Pat 177=132 I C 871=12 P L T 75=10 Pat 305.
2. Jagjit Singh v Sarabjit Singh, (1892) 19 Cal 159=18 I A 165=6 Sar 80 (P C).
3. Shankar Narayan v. Rikhandas, 1932 Bom 483=139 I C 205=34 Bom L R 941.

A. I. R. 1936 Lahore 705

AGHA HAIDAR, J.

Sampuran Singh—Defendant—Appellant.

v.

Devi Dayal—Plaintiff and another—Defendant—Respondents.

First Appeal No. 18 of 1936, Decided on 20th March 1936, from preliminary decree of Sub-Judge, First Class, Kasur, D/- 8th October 1935.

(a) Costs—Purchase of property subject to mortgage—Suit by mortgagee—Purchaser in possession of property putting off mortgagee and making profit out of delay in action—Purchaser should bear half costs of suit.

Certain property was purchased subject to a mortgage. Subsequently the mortgagee brought a suit on his mortgage. The purchaser, who was in possession of the property, had tried to put off the mortgagee and thus wanted to make as much money out of the delay as he could :

Held : that the purchaser should bear half the taxed costs of the suit : 1931 *Mad* 272 ; 1931 *Rang* 181 and 1936 *Lah* 76, *Disting.*

[P 706 C 1]

(b) Adjournment—Costs—Pleader asked to admit genuineness of document is entitled to consult client—Pleader demanding short adjournment should not be burdened with costs.

When a pleader is asked to admit the genuineness of certain documents there and then, he is entitled to consult his client ; and the Court, simply because the pleader wants a short adjournment to receive proper instructions, should not burden him with costs.

[P 706 C 1]

Sewaram Singh—for Appellant.*Ghulam Mohy-ud-Din Khan*—for Respondents.

Judgment.—This is a defendant's appeal in which the question of costs only has been raised. On 26th January 1925, Sheikh Amin Din mortgaged certain property to Lala Devi Dial. The mortgage money was Rs. 4,000 and the rate of interest 1 per cent. per mensem. The mortgage amount was to be recovered from the mortgaged property. Sardar Sampuran Singh, defendant-appellant, had a money decree against the mortgagor and put up for sale the property which was already subject to the mortgage of Lala Devi Dial and purchased it himself for Rs. 200. This property was distinctly put to sale subject to the rights of the mortgagee. On 7th October 1934, Sardar Sampuran Singh obtained possession of the property which he had purchased according to law. He succeeded, according to the evidence of the plaintiff, in letting out the property on a rent of Rs. 12 per

mensem. Correspondence followed between the parties, both of whom are pleaders, and the defendant no doubt made the absurd demand that the plaintiff should pay him a sum of Rs. 1,000 to buy him out of his rights in the property, in satisfaction of his mortgage. This offer the plaintiff naturally declined to accept.

The present suit was brought and it must be said that the defendant did not offer any serious resistance to the suit beyond pleading that the plaintiff should not be allowed future interest as the rate of interest under the mortgage was already a heavy one. He did not contest either explicitly or by implication the rate of interest stipulated in the mortgage. There was also some evidence led about the negotiations which had been going on between the parties and which the Court below has not accepted. The Court has, however, while decreeing the plaintiff's suit against the property and exonerating defendant 1 from liability under the mortgage, awarded costs against him in case the property is not sufficient to satisfy the whole decretal amount with costs.

The Court below has relied upon two cases, namely, 1931 *Mad* 272 (1) and 1931 *Rang* 181 (2). In 1931 *Mad* 272 (1) the learned Judges were of opinion that the defendant had been raising frivolous and vexatious pleas. This cannot be said to have been done in the present case. The facts of the Rangoon case are quite different and are distinguishable from those of the present case and do not require any detailed reference. The fact, however, remains that defendant 1 after taking possession of the property proceeded to receive a very handsome return on his small outlay and when the plaintiff demanded the amount, he put first him off and then made the offer that the plaintiff should pay him a sum of Rs. 1,000.

Mr. Ghulam Mohy-ud-Din for the respondent has relied upon the case reported in 1936 *Lah* 76 (3). In that case the learned Judges were naturally impressed by the fact that the defendant had unlawfully dispossessed the plaintiff from the property. The facts of this case are,

1. Rama Krishna Ayyar v. Raghunath Ayyar, 1931 *Mad* 272=131 I C 151.
2. O. A. M. K. Chettyar Firm v. P. R. P. L. S. Chettyar Firm, 1931 *Rang* 181=133 I C 93.
3. Piara Mal v. Sham Das, 1936 *Lah* 76.

however, different. As already stated, defendant 1 wanted to make as much money out of the delay as he could. On the other hand the plaintiff had no justification in delaying his action. Under all the circumstances of the case I think the Court below would have exercised its proper jurisdiction in allowing half the taxed costs against defendant 1.

There is a minor point raised by Sardar Sewaram Singh, the learned counsel for the appellant. He says that on a certain date the pleader for the defendant-appellant was asked by the Court if he was prepared to admit certain documents which were alleged to have been written by his client. The pleader stated that he could not answer this question without consulting his client. On this, the Court adjourned the case on payment of Rs. 30 as costs. In my opinion, when a pleader is asked to admit the genuineness of certain documents there and then, he is entitled to consult his client and the Court, simply because the pleader wants a short adjournment to receive proper instructions, should not burden him with costs. I, therefore, set aside the order of the Court below as regards this item of Rs. 30. As the parties have succeeded and failed in this Court fairly equally they shall bear their own costs.

V.B.B./R.K. *Appeal partly allowed.*

A. I. R. 1936 Lahore 706

BHIDE, J.

Suba Singh—Defendant—Appellant.

v.

Hadayat—Plaintiff and *others*—Defendants—Respondents.

Second Appeal No. 2092 of 1935, Decided on 19th February 1936, from decree of Dist. Judge, Gurdaspur, D/- 26th July 1935.

Punjab Tenancy Act (16 of 1887), S. 60—Transfer of occupancy rights without consent of landlords—Decree obtained by one landlord, setting aside transfer enures for benefit of all landlords—Waiver of decree-holder landlord to execute decree does not affect others—It enures to tenant's benefit—He can get decree only on refunding consideration received from transferee.

A decree obtained by one of the landlords, setting aside under S. 60 an alienation (mortgage) by an occupancy tenant of his rights, without the consent of the landlords enures for the benefit of all the landlords, and even if the decree-holder landlord waives the right to execute the decree such waiver does not affect

the other landlords. The decree also enures for the benefit of the occupancy tenant and he is entitled to recover possession of the occupancy land for the transferee. The occupancy tenant is, however, entitled to a decree only on condition of his refunding the consideration received by him. The transferee can claim the refund in the suit by the occupancy tenant for the recovery of his land and it is not necessary for him to bring a separate suit for refund of the consideration, which he is otherwise entitled to bring: 1927 *Lah* 871; 1934 *Lah* 853; 1929 *Nag* 241 and 1926 *Lah* 170, *Rel. on.*

[P 706 C 2; P 707 C 1]

Mukand Lal Puri—for Appellant.

H. S. Khorana — for Respondent (Plaintiff).

Judgment.—The material facts of the case giving rise to this second appeal may be briefly stated as follows: The plaintiff, who is an occupancy tenant under S. 6, Punjab Tenancy Act, mortgaged his occupancy rights in favour of defendant 1 without the consent of the landlords. Sant Singh, one of the landlords, sued to have the alienation set aside under S. 60, Punjab Tenancy Act, and obtained a decree. The landlords however took no steps to recover possession of the land from the mortgagee. On 10th February 1931 the present suit was instituted by the plaintiff for recovery of the land from the mortgagee. The mortgagee pleaded that the contract of mortgage was binding on the plaintiff and that in any case he was not entitled to recover without refunding the mortgage money of which he had received benefit. The Courts below have granted the plaintiff a decree for possession without any payment to the mortgagee, holding that the decree obtained by Sant Singh rendered the mortgage altogether void and that it was not binding even on the plaintiff.

The learned counsel for the defendant mortgagee who has come up in second appeal urged that the landlords had waived their right in the decree and therefore the decree was no longer of any avail to the plaintiff. As regards this point there was apparently no issue framed by the trial Court but the allegation of the appellant in this respect, even if it is accepted, will not help him, for all that is urged by him is that Sant Singh accepted Rs. 100 from him and did not execute the decree. The decree, however, was for the benefit of all the landlords, and even if Sant Singh waived his right to execute the decree the waiver could not affect the other landlords. Moreover it has been

held in a Full Bench decision of the Punjab Chief Court reported in 17 P R 1892 (1), which was followed in 1927 Lah 871 (2), that a decree of this kind enures for the benefit of the occupancy tenant also and that he is entitled to recover possession. It seems to me, therefore, clear that the plaintiff was entitled to obtain possession of the occupancy land on the basis of the decree obtained by Sant Singh.

The only other point which requires consideration is whether the appellant was entitled to claim refund of the mortgage money in the present suit. It has been held by a Full Bench of this Court recently in 1934 Lah 853 (3) that when an occupancy tenant has alienated the occupancy tenancy without the consent of the landlord and the landlord obtains a decree setting aside the alienation under S. 60, Punjab Tenancy Act, the mortgagee is entitled to sue the mortgagor for refund of the mortgage money. The learned counsel for the respondent contended that although the mortgagee was entitled to a refund, he could not claim the same in the present suit. This contention, however, appears to be opposed to the view taken by the Court of the Judicial Commissioner of Nagpur in 116 I C 497 (4) which appears to be a case of a similar kind. The facts in 7 Lah 35 (5) also were of a similar character. In that case a Mahomedan minor sued for possession of certain property mortgaged by his mother on the ground that the transaction was void.

The plaintiff's contention was upheld and he was given a decree but only on condition of his refunding the amount received by him. I see no reason why the plaintiff, who himself entered into the mortgage transaction, should not on the same principle be required to refund the mortgage money to the appellant in the circumstances of this case. I accordingly accept the appeal and direct that the plaintiff will be entitled to recover possession of the land in suit only on pay-

met of Rs. 835 to the appellant. The amount due, it may be noted, was not disputed before me. In view of all the circumstances I leave the parties to bear their costs in this Court.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 707

DALIP SINGH, J.

Lal Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1262 of 1935, Decided on 27th March 1936, from order of Magistrate, First Class, Jullunder, D/- 31st October 1935.

(a) Criminal P. C. (1898), Ss. 164 and 364—Oral confessions—Magistrates telling accused that they are Magistrates—Omission to record same in memos—Precautions under Ss. 164 and 364 not observed—Such confessions are of little evidentiary value.

Where oral confessions are made before Magistrates some of whom have no power to record a confession at all, and Magistrates all state that they told the accused that they were Magistrates but omit to record the same in memos, prepared by them, the precautions laid down in Ss. 164 and 364, Criminal P. C., being not observed, such confessions are of little evidentiary value. [P 708 C 2]

(b) Evidence Act (1872), S. 114—Police Officer asked to remember certain date refusing to refresh memory—Adverse inference can be drawn.

Where a Police Officer is asked to remember the date of an arrest and he refuses to refresh his memory, an adverse inference may be drawn against him by the Court. [P 708 C 2]

Jhanda Singh—for Appellant.

A. G. Maurice for Govt. Advocate—for the Crown.

Judgment.—Seven persons were challenged by the police before the learned trial Court charged with offences under Ss. 395/397, I. P. C. One Nikku was said to be absconding and proceedings were taken against him in his absence. Toti and Rala Singh were acquitted. Five persons, Banta, son of Ishar Singh, Sher Singh, son of Gurmukh Singh, Lal Singh, son of Bhan Singh, Banta Singh, son of Bhola Singh, and Sadhu Ram, son of Munshi, were convicted by the learned trial Court under Ss. 395/397, I. P. C., and sentenced to seven years' rigorous imprisonment each. Four of these have appealed. Banta Singh, son of Bhola Singh, has not appealed. Three of the appellants have appealed through jail. Sardar Jhanda Singh has appeared for Lal Singh. The story for the prosecution is that Rala

1. Khuda Bakhsh v. Fazal Din, (1892) 17 P R 1892 (F B).

2. Sham Singh v. Hardit Singh, 1927 Lah 871 = 100 I O 916.

3. Labh Singh v. Jamnun, 1934 Lah 853 = 151 I O 1 = 15 Lah 751 = 36 P L R 233 (F B).

4. Sadia v. Ambhirla, 1929 Nag 241 = 116 I O 497.

5. Rang Ilahi v. Mahbub Ilahi, 1926 Lah 170 = 94 I O 25 = 7 Lah 85 = 27 P L R 210.

Singh, acquitted accused, and Sohan Singh complainant were at enmity with each other because of debts due by Rala Singh to Sohan Singh. On the evening of 14th March Sohan Singh was sitting with his wife Mt. Bishen Kaur when six persons entered. Three were armed with kirpans, one with a takwa, the 5th had a dang and the 6th had a gun. They assaulted and robbed Sohan Singh and his wife Mt. Bishen Kaur of cash and ornaments, etc., and used the gun to keep off any help from the villagers. Sohan Singh, received, a grievous wound with a sharp-edged weapon and had two other injuries. Bishen Kaur, his wife, had three simple injuries. On 28th March the investigating Inspector is supposed to have got a clue from Rala Singh, accused. Banta Singh, appellant, was arrested by a Sub-Inspector of Ferozepore District in connexion with another robbery. He gave some information as a result of which the various persons challaned were arrested. Identification parades were held at Moga on 5th April when various persons identified Sher Singh and Banta Singh, appellants. Another identification parade was held on 14th April and Lal Singh was identified. Another identification parade was held on 12th May at Faridkot in which Sadhu Ram and Banta Singh, son of Bhola Singh (not appealing), were also identified.

There can be no doubt about the factum of the dacoity or that Sohan Singh was injured, which is amply proved by his own statement and that of other witnesses and corroborated, if necessary, by the medical evidence. The only question is whether the appellants are proved to have taken part in the dacoity. (His Lordship dealt with the appeals of Sher Singh, Banta and Sadhu Ram and proceeded with the appeal of Lal Singh.) Lal Singh is identified by Sohan Singh, Mt. Bishen Kaur, Puran and Nabbu. He is also supposed to have made an oral confession before Chaudhri Rattan Singh, Magistrate, First Class, Jullunder. He has produced certain alibi witnesses who have been rejected by the trial Court for reasons which do not seem convincing to me. The witnesses are respectable. They actually aided the police in arresting Sher Singh, accused in this case, and the reason for remembering the date is that 1st Chet is a Sangrand date and hence the witnesses might well remember that date,

though they do not remember other dates of later months. Lal Singh appears to have been arrested originally on information supplied by Sher Singh. As already stated, the relatives of Lal Singh had taken a prominent part in having Sher Singh arrested and Sher Singh might well have attempted to implicate Lal Singh in return. I am not altogether satisfied with the identification evidence. Nabbu and Puran are obviously unreliable and Sohan Singh and Mt. Bishen Kaur, though more reliable, are not altogether free from doubt.

As regards the oral confession before the Magistrate, I do not think it is at all fair to avoid the precautions laid down in Ss. 164 and 364, Criminal P. C., and endeavour to prove oral confessions made to Magistrates some of whom had no power to record a confession at all. It may be legal—a matter which is somewhat doubtful—but I do not propose to attach any weight to confessions so obtained. These Magistrates all state that they told the accused that they were Magistrates. Curiously enough all forgot to record this fact in the memos prepared by them. The Assistant Sub-Inspector (P. W. 35) stated in Court, when asked, that he did not remember the date of Lal Singh's arrest and refused to refresh his memory from the ziminsi. An adverse inference can be drawn against him from this refusal and as I have no means therefore of ascertaining how long after his arrest the identification parade was held, the whole of the identification of Lal Singh is rendered extremely dubious. I have once before had occasion to note that the trial Court should as a rule try to induce the police witnesses to refresh their memory on a matter of this kind, but if he finally refuses to do so, an adverse inference will be drawn against him by this Court. I therefore give the benefit of doubt to Lal Singh, and accepting his appeal I acquit him.

D.S./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 708

JAI LAL, J.

Nur Mohammad and others—Plaintiffs—Appellants.

v.

Amir—Defendant—Respondent.

Second Appeal No. 1508 of 1935, Decided on 18th December 1935, from decree of Dist. Judge, Lyallpur, D/- 4-5-1935.

(a) Registration Act (1908), S. 17 (2) (viii)—**Partition—Compromise pending proceedings—Application reciting terms of compromise made to Revenue Officer for giving effect to them does not require registration.**

Where pending partition proceedings the parties applied to the Revenue Officer reciting terms of a certain compromise and requested him to give effect to those terms :

Held: either it was an application to effect a partition, or it was a recital of partition, which had already been effected by the parties. The document itself was not an instrument of partition. An instrument of partition would have followed the order passed by the Revenue Officer, directing partition according to the terms contained in the application. The application therefore made by the parties did not require registration: 1923 All 438; 1921 All 248; 1926 All 103 and 1931 Oudh 296, *Ref.*; 1926 Lah 586, *Disting.* [P 710 C 1]

(b) **Second Appeal—Matter within discretion of lower appellate Court not to be raised in second appeal.**

A matter which is entirely in the discretion of lower appellate Court cannot be raised in second appeal. [P 709 C 2]

Khalifa Shuja-ud-Din for M. A. *Majid*—for Appellants.

S. C. Manchanda—for Respondent.

Judgment.—The parties to this appeal being joint owners of land, one of them made an application to the revenue authorities under the provisions of the Land Revenue Act for partition of the joint land. When the proceedings before the Revenue Officer for the partition of the land were pending, the parties entered into a compromise whereby the joint property was divided in a certain manner. An application was made to the Revenue Officer embodying the terms on which the partition had been effected by the parties and requesting him to give effect to the same. This application was signed by the parties concerned. The Revenue Officer after recording the statements of the parties directed that mutation should be entered in the revenue records in accordance with the compromise effected by the parties. One of the terms of the compromise was that in order to equalize the shares of the parties one of them had to pay some cash to the other party.

The suit out of which this second appeal has arisen was instituted to recover part of the money so payable and also for an injunction. The learned District Judge held that the application in which the terms of the compromise were recited and which was presented to the Revenue Officer required registration, and not being registered was inadmissible in

evidence. He however remanded the case to the trial Court to ascertain the terms of the compromise independently of the petition made to the Revenue Officer. The suit was ultimately dismissed by the trial Judge and an appeal was preferred again to the District Judge. In the meantime another District Judge had succeeded the District Judge who had remanded the case and he was of opinion that the document did not require registration, but that he could not go behind the order of his predecessor who had held that the document did require registration. He was further of opinion that on the conclusion that the document required registration, no evidence could be given as to the terms of the partition and consequently he agreed with the trial Judge in dismissing the suit. This is an appeal against the decree of the District Judge and it is contended that the learned Judge was competent to go behind the finding of his predecessor after he had clearly expressed the opinion that the document did not require registration. This however was a matter entirely at the discretion of the learned District Judge and cannot be raised on second appeal. The question therefore is whether the document required registration or not.

Dr. Shuja-ud-Din for the appellants has relied upon a number of cases in which it has been held that petitions made to Revenue Officers reciting either family arrangements as to the enjoyment of joint property by partition or the fact of partition effected by joint owners, praying the Revenue Officer to give effect to the same in mutation proceedings, do not require registration as they merely amount to information to the revenue Court of what is a completed transaction. 71 I C 619 (1), 43 All 1 (2), 1926 All 103 (3) and 132 I C 537 (4) were the principal authorities cited by the learned Counsel. They support his contention. But the learned Counsel for the respondent relies upon 1926 Lah 586 (5), in which a Division Bench of this Court held that an

1. *Sita Ram v. Har Sahai*, 1923 All 438=71 I C 619.
2. *Baldeo Singh v. Udal Singh*, 1921 All 248=58 I C 732=43 All 1=18 A L J 877.
3. *Misri v. Rajmatl*, 1926 All 103=89 I C 849.
4. *Triloki Nath v. Ram Manorath*, 1931 Oudh 296=132 I C 537=8 O W N 764.
5. *Ghulam Muhammad v. Jaggo*, 1926 Lah 586=96 I C 227.

application evidencing a transaction of transfer of immoveable property presented to a revenue Court does not cease to be an instrument of that nature merely because it is written out in the form of an application. In that case the dispute was between the widow and the collaterals of a deceased proprietor. Mutation had been effected in favour of the widow, and the collaterals had preferred an appeal to the Collector and there was a compromise of the dispute, and an application was presented to the Collector which recited that a major portion of the land had been given to the collaterals and a smaller portion thereof to the widow. In my opinion that case is distinguishable from the present case, because in that case each party claimed to the exclusion of the other and both of them could not inherit the property jointly. Therefore the application contained an arrangement whereby one party relinquished his or her right in the property in favour of the other.

Much depends upon the nature of the transaction in respect of which an application has been made to the Court and also on the terms of the application. In the present case, as I have already stated, there was an application pending in the revenue Courts for effecting partition of the joint property and the Revenue Officer was competent to make a partition of the property either with the consent of the parties or without their consent. The mode of partition was entirely in the hands of the Revenue Officer, and if he had passed a final order effecting partition, an instrument of partition could have been executed which admittedly did not require registration, under S. 17 (2) (viii), Registration Act. In the present case therefore the parties merely applied to the Revenue Officer requesting that the partition may be effected in a certain manner. Either it was an application to effect a partition or it was a recital of partition which had already been effected by the parties. The document itself was not an instrument of partition. An instrument of partition would have followed the order passed by the Revenue Officer directing partition according to the terms contained in the application. Therefore in my opinion, in this case the application made by the parties did not require registration and the view of the District Judge who re-

manded the case is erroneous and the view of his successor is correct.

I accept this appeal, set aside the order of the District Judge and send the case back to him with direction to decide the appeal on the merits on the assumption that the document in question did not require registration. The court-fee on the memorandum of appeal shall be refunded to the appellants; other costs will abide the result.

V.B.B./R.K. *Appeal accepted.*

A. I. R. 1936 Lahore 710

TEK CHAND, J.

Mehr Singh and others—Plaintiffs—Appellants.

v.

Sohan Singh and others—Defendants—Respondents.

Second Appeal No. 616 of 1930, Decided on 28th April 1936, from decree of Dist. Judge, Amritsar, D/- 3rd January 1930.

(a) Practice—Death of parties—Number of parties very large—Death of some of them—Appeal pending long and no negligence in applying for substitution of legal representatives—Delay in bringing on record legal representatives of deceased held should be excused.

An appeal had abated, as the application to bring on record the representatives of the deceased respondents had been made beyond time: The number of parties to the case was very large and the appeal had remained pending for a long time. There was no negligence in making applications for substitution of legal representatives:

Held: that in the peculiar circumstances of the case the delay in making the application should be condoned and the abatement set aside. [P 711 C 1]

(b) Punjab Tenancy Act (16 of 1887), S. 77—Suit for declaration that petitioners were in possession of certain land as co-sharers in village and not as tenants—Suit is cognizable by Civil Court and not barred by S. 77—Dismissal of suit in revenue Court contesting notice of ejectment does not operate as *res judicata*.

The petitioners brought a suit for a declaration that they were in possession of certain portion of land, in their capacity as co-sharers in the village, and not as tenants and therefore not liable for ejectment until partition:

Held: such suit was not barred under any Clause of S. 77 or any other provision of law. The suit was clearly cognizable by a civil Court. And the dismissal of a suit by plaintiff in the Revenue Court contesting a notice of ejectment does not operate as *res judicata*: 1927 Lah 452 (F B), *Disting.* [P 711 C 2]

V. N. Sethi—for Appellants.

Harnam Singh—for Respondents.

Judgment.—A preliminary objection is taken that this appeal has abated as applications to bring on record the legal representatives of four respondents, namely Gehna Singh, Chanchal Singh, Hazura Singh and Lachhman Singh, were not made within 90 days of their death as provided by law. It appears that Gehna Singh died on 27th December 1932 and the application for substitution of his representatives was made on 14th March 1933; Chanchal Singh, Hazura Singh and Lachhman Singh died in February 1932, January 1932 and August 1931 respectively, while a joint application for substitution of their legal representatives was made on 15th June 1932. These applications were granted subject to just exceptions by a learned Judge in Chambers. Mr. Harnam Singh now objects that no sufficient cause has been shown for not making the applications within time, or for setting aside the abatement. It will, however, be seen that the number of parties in this case is very large and the appeal has remained pending for a long time. The appellants cannot be said to have been negligent in making applications for substitution of legal representatives. I think, therefore, that in the peculiar circumstances of the case, the delay in making the application should be condoned and the abatement set aside. The appeal must, therefore, be decided on the merits.

The admitted facts are that the land in dispute is a part of the shamilat of taraf Ghelan, mauza Gandiwind, Tehsil Taran, District Amritsar. It was originally in possession of one Guranditta. Sometime in 1912-13 Guranditta abandoned his possession of the land, which reverted to the proprietary body. The plaintiffs managed to get possession of the land. Their allegation is that they entered into possession as co-sharers in the shamilat and that their possession cannot be disturbed until partition. In 1915, however, mutation of this land was sanctioned in favour of "Guru Granth Sahib" purporting to be at the instance of the proprietary body. As to whether this was done with the consent of all the proprietors or of some of them only, is a matter on which the parties are at issue and as no decision has been given thereon I shall say nothing about it here.

In 1925 the defendants acting on behalf of "Guru Granth Sahib" got a notice for ejectment issued to the plaintiffs. The

plaintiffs brought a suit in the Revenue Court to contest this notice. This suit was, however, dismissed by the Assistant Collector on 13th July 1928.

On 4th January 1929, the plaintiffs brought a suit in the Civil Court for a declaration that they were in possession of this portion of the shamilat land in their capacity as co-sharers in the village, and not as tenants of "Guru Granth Sahib" and, therefore, they were not liable to ejectment until partition. The defendants, who are the other proprietors in the village resisted the suit on numerous grounds, one of which was that it was not cognizable by a Civil Court. The trial Judge overruled the plea as to jurisdiction and, finding for the plaintiffs on the merits, passed a decree in their favour granting them the declaration asked for.

The defendants appealed to the District Judge, who held that the suit was not cognizable by the Civil Court, and that the decision of the Revenue Court that the plaintiffs were liable to ejectment was *res judicata*. Accordingly he accepted the appeal, without going into the merits and dismissed the plaintiffs' suit with costs throughout.

The plaintiffs have come in second appeal, and the only question for decision is whether the suit as framed was cognizable by a Civil Court. There is little doubt that on the plaint as framed, the suit is clearly cognizable by a Civil Court. The plaintiffs do not admit that they are tenants under the proprietary body or "Guru Granth Sahib", but they claim to be in possession of this portion of the shamilat in their capacity as co-sharers in the village. Such a suit is not barred under any clause of S. 77, Punjab Tenancy Act, or any other provision of law. In support of his conclusion, the learned District Judge has relied on a Full Bench decision of this Court reported in 9 Lah 38 (1). The learned Judge appears, however, to have wholly misunderstood that decision. In that case both parties had admitted that the plaintiffs were the tenants and the defendants were the landlords. The sole point in dispute was as to the status of the tenants i. e. whether they were occupancy tenants, as alleged by them, or tenants-at-will, as claimed by the defendants.

1. *Cheta v. Baija*, 1927 Lah 452=105 I O 507=9 Lah 38 (F B).

Such a suit is obviously cognizable by a Revenue Court only. The further question raised before the Full Bench, was as to whether after dispossession of the tenant from the tenancy under a notice issued under S. 43, and dismissal of a suit brought by him in the Revenue Court under S. 45, the tenant could again bring a suit in the Civil Court to have it declared that he was an occupancy tenant. Obviously the facts of the present case are entirely different. Here the plaintiffs have never admitted their status as tenants. In fact this is one of the main questions to be decided in the suit. Mr. Harnam Singh who appears for the defendants-respondents has frankly admitted that he is unable to support the decision of the learned District Judge on the question of jurisdiction.

This being so, and the suit being clearly cognizable by a Civil Court, the decision of the Revenue Court cannot possibly operate as *res judicata*.

For these reasons I accept the appeal, set aside the judgment and decree of the learned District Judge and remand the case to him under O. 41, R. 23, Civil P. C., for decision of the remaining points raised in the appeal before him. Court-fee on this appeal will be refunded; other costs will be costs in the cause.

V.B.B./R.K. *Appeal accepted.*

* A. I. R. 1936 Lahore 712

JAI LAL, J.

Manohar Lal and others—Appellants.

v.

Rup Lal and others—Respondents.

Misc. First Appeal No. 1410 of 1935, Decided on 17th December 1935, from order of Dist. Judge, Gujranwala, D/- 1st July 1935.

* Civil P. C. (1908), S. 141 and O. 9, R. 9—O. 9, R. 9 applies to probate proceedings—Application for probate dismissed for default—Application to set aside dismissal dismissed—Appeal is competent.

Having regard to the phraseology of S. 299, Succession Act, read with S. 295 and also S. 141 Civil P.C., it is clear that O. 9, R. 9, does apply to probate proceedings. Hence an appeal is competent from an order dismissing an application to set aside an order of dismissal in default of an application for probate: 14 C W N 924 and 1926 Cal 1057, *Dissent.*; 1919 Mad 112; 17 All 106 and 1927 Cal 584, *Rel. on.* [P 713 C 2]

Shamair Chand—for Appellants.

Mela Ram, Mehr Chand Mahajan, Brij Nandan Singh and Fakir Ullah—for Respondents.

Judgment.—An application was made to the District Judge of Gujranwala for grant of probate of a will. The applicants were three minors who were represented by their next friend, Dina Nath. On the date of the hearing of the application most of the respondents appeared; some of them, however, had not been served. Out of the applicants only one, Chaman Lal, minor was present their next friend and their counsel both being absent. The District Judge dismissed the application in default. In his order it is stated that Chaman Lal, minor, was present: it is, however, contended that as a fact Manohar Lal, minor, was present. This, however, is immaterial for the purposes of the present appeal. An application was made on behalf of the minors to set aside the dismissal of the application in default, but it was dismissed on the ground that no reasonable excuse had been shown for the absence of the guardian and the counsel of the applicants. On the merits, in my opinion, the order of the learned District Judge cannot be sustained. One of the applicants was present, though he was a minor, and it was alleged that the guardian was ill and the counsel also was unavoidably absent because he had to attend a cremation.

An objection, however, has been taken on behalf of the respondents that no appeal lies from an order refusing to set aside a dismissal in default of an application for grant of probate. It is in fact contended that the provisions of O. 9, R. 9, Civil P. C., do not apply in probate proceedings and that the only remedy of the applicant in such cases is to make a fresh application for grant of probate and that such an application is not barred by the provisions of O. 9, R. 9. It is not necessary for me to decide whether under the circumstances a fresh application for probate lies for that question is not involved in this case. The question, however, whether an appeal lies to this Court from an order refusing to set aside a dismissal of the application in default, raises some difficulty. It was held in 14 C W N 924 (1), which was followed in 1926

1. *Ramani Debi v. Kumud Bandu*, (1910) 14 C W N 924=7 I C 126=12 C L J 185.

Cal 1057 (2), that O. 9, R. 9, Civil P. C., does not apply to probate proceedings. The contrary view, however, was expressed in 1919 Mad 112 (3), where it was held that the rule does apply to probate proceedings. Under S. 141, Civil P. C., the provisions of the Code are made applicable to all proceedings of a civil nature pending before the Courts and consequently O. 9, R. 9, appears to be applicable because the proceedings relating to grant of probate are proceedings of a civil nature pending before a Court. Under S. 295, Succession Act, the proceedings relating to grant of probate have to take the form of a civil suit in which the applicant is the plaintiff and the opponent is the defendant. S. 299 of the Act provides that an appeal shall lie to the High Court from all orders passed by the District Judge in connexion with proceedings pending before him for grant of probate. Therefore, so far as the statutory provisions of the Indian Succession Act read with the Civil Procedure Code are concerned there does not appear to be any prohibition to an appeal from an order refusing to set aside the dismissal of an application in default. In fact I should say that S. 299 seems to permit an appeal from such an order. S. 141, Civil P. C., has been made applicable to probate proceedings in 17 All 106 (4) and also in 54 Cal 405 (5). I am, therefore, constrained to differ from the view expressed in the two earlier Calcutta cases that the provisions of O. 9, R. 9, do not apply to probate proceedings.

The question had arisen before that Court in those two cases because after the dismissal of the applications for probate in default fresh applications were made for grant of probate and it was held that the applications were not barred by res judicata as O. 9, R. 9, did not apply to probate proceedings and, therefore, there was no bar to a fresh application for grant of probate. The logical conclusion of the view taken by the Calcutta High Court is that no application to set aside a dismissal in default of an applica-

tion for grant of probate is maintainable even where such an application has been dismissed in absence of the opponents to the grant. The learned counsel for the respondents sought to distinguish the two Calcutta cases on the ground that O. 9, R. 9 does not apply to probate proceedings only so far as it contains a prohibition to the institution of new proceedings, but there is no good ground for such a distinction because, in my opinion, either O. 9, R. 9 applies in its entirety or it does not apply at all. In my view, having regard to the phraseology of S. 299, Succession Act, read with S. 295, and also S. 141, Civil P. C., O. 9, R. 9 does apply to probate proceedings. I accordingly accept this appeal, and setting aside the order of the learned District Judge send the case back to him with direction to proceed with the application for grant of probate in accordance with law. The point raised on this appeal, however, was a difficult one and I make no order as to costs of this appeal.

K.S./R.K.

Appeal accepted.

* A. I. R. 1936 Lahore 713

ADDISON AND ABDUL RASHID, JJ.

Sir T. Vijaya Raghavacharya—Petitioner.

v.

Commissioner of Income-tax, Lahore—Opposite Party.

Civil Ref. No. 58 of 1935, Decided on 25th February 1936, from Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, Lahore, D/- 29th July 1935.

(a) Income-tax Act (1922), S. 60—Notification under S. 60 exempting pay, leave salaries paid outside India and in case of persons residing outside India, is superfluous.

The notification issued under S. 60, Income-tax Act, exempting pay, leave salaries paid outside India, in case of persons residing outside India, is superfluous. It is difficult to hold that pay accrues in British India if it is paid outside.

(P 715 O 1)

* (b) Income-tax Act (1922), S. 4 (2)—Assessee receiving in United Kingdom payments of pension granted under civil service regulations—Payments not brought in British India—They are not income accruing or arising in British India.

The words 'accruing' and 'arising' in S. 4 (2) denote the same idea and are used in contradistinction to the word 'receive' and indicate a right to receive. Income cannot be said to have accrued or arisen in a particular country merely by reason of the fact that it is earned in that country. It accrues or arises in the country

2. Surjya Kumar Deb v. Jayanarayan Deb, 1926 Cal 1057=98 I O 374=53 Cal 578.

3. Rallabandi Veeramma v. Subba Rao, 1919 Mad 112=52 I O 639.

4. Thakur Prasad v. Fakir Ullah, (1895) 17 All 106=22 I A 44=6 Sar 526 (P O).

5. Sarat Krishna Bose v. Bisheshar Mitra, 1927 Cal 584=103 I O 69=31 O W N 576=54 Cal 405.

where there is a right to demand payment of it or where it is in fact paid.

Where an assessee receives in the United Kingdom payments of pension granted by the Madras Government under the Civil Service Regulations of the Government of India, such payments, when not brought into British India are not income accruing or arising in British India within the meaning of S. 4 (1): 1925 Cal 34; 1929 Rang 1 and 1921 Mad 427, Rel. on; 1932 All 151, Dissent. [P 715 C 2]

Mehr Chand Mahajan—for Petitioner.
J. N. Aggarwal, S. M. Sikri and M. Aslam Khan—for Opposite Party.

Addison, J.—Under S. 66 (2), Income-tax Act, the Commissioner of Income-tax, Punjab, has stated the case of Diwan Bahadur Sir T. Vijaya Raghavacharya, K. B. E., for the assessment year 1933-34 and has referred for the opinion of this Court the following question of law:

The assessee having received in the United Kingdom payments of pension granted by the Madras Government under the Civil Service Regulations of the Government of India (as further described in the case) were such payments in so far as they were not brought into British India with the effect of attracting sub-s. (2), S. 4, Income-tax Act, income accruing or arising in British India within the meaning of S. 4 (1) of the Act?

The facts have been very fully stated by the Commissioner and need only be briefly referred to. The assessee was appointed to the Madras Provincial Civil Service in 1898 and served there except for certain periods when he was employed under the Central Government on deputation outside India and for a period when he was a member of the Public Services Commission. Since 15th September 1929 he has been Vice-Chairman of the Imperial Council of Agricultural Research and continues to hold that post though he retired from the Madras Civil Service on 27th August 1930 when he was granted a superannuation pension of Rs. 9,500. Art. 933, Civil Service Regulations is to the effect that when a pension is stated in rupees, it is payable at any treasury in India, or, at the pensioner's option, at the Home treasury. The assessee for the year in question was a resident in British India but he drew the pension in London. The Income-tax authorities have held that he was liable to pay income-tax on £743 with respect to that pension in addition to other income. This amount £743 converted back into rupees at the current rate of exchange comes to Rs. 9,907, and this is the sum in contention. S. 4 of the Act runs as follows:

4. (1) Save as hereinafter provided, this Act shall apply to all income profits or gains, as described or comprised in S. 6, from whatever source derived, accruing or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India.

(2) Income, profits and gains accruing or arising without British India to a person resident in British India, shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be income, profits and gains of the year in which they are so received or brought, notwithstanding the fact that they did not so accrue or arise in that year.

In the present case it is admitted that the money was not brought into British India. The assessee's contention was that the income did not accrue or arise in India nor was it received in India and that he had a vested right to draw it in London. Under S. 60 of the Act a notification has been issued exempting pay, leave salaries, and pensions paid outside India in the case of persons residing out of India, so that this exemption does not help the assessee, but it was contended before us that this exemption is a superfluity, as the word "accrues" cannot be held to apply to pensions drawn as of right in the United Kingdom. The subject is discussed at length at pages 327 et seq of Sundaram's Law of Income-tax in India, and his view is that the exemption in question is superfluous. The difficulty arises from the meaning to be attached to the words "accruing" or "arising." Do they mean receivability in a particular place or do they involve the concept of the income either being earned in that place or being derived from a source of income situated in that place? Now the words "from whatever source derived" in S. 4 (1) have no meaning if they refer only to the sources described in S. 6, and the natural meaning to be given to them would be to construe them as referring to sources both within and outside British India. If that is so, the word "accrue" cannot mean earned or derived from a source in British India and the meaning to be attached to it would be that of receivability, or rather perhaps the right to receive it in a particular place. S. 4 (2) of the Act suggests that "accruing" refers more to the receiving or right to receive than to the place of origin. In this connexion S. 18 (2a) may be referred to. It runs as follows:

Notwithstanding anything hereinbefore contained, for the purpose of making the deduction

under sub-section (2), there shall be included in the amount payable any income chargeable under the head "salaries" which is payable to the assessee out of India by or on behalf of Government, and the value in rupees of such income shall be calculated at the prescribed rate of exchange.

By this sub-section salaries payable to Government servants out of India by or on behalf of Government are taxable, but this does not necessarily mean that they accrue or arise in British India. S. 4 (1) starts with the saving words "save as hereinafter provided," and S. 18 (2a) may, therefore, be treated as an exception to S. 4 (1). Again, as already mentioned, leave salaries and pensions paid out of India have been exempted under S. 60 of the Act and the argument therefore is that they are taxable, i. e., that they have accrued in British India. If this is so, accruing would mean earned. See again S. 7 (2) of the Act which runs as follows:

Any income which would be chargeable under this head (of salaries) if paid in British India shall be deemed to be so chargeable if paid to a British subject or any servant of His Majesty in any part of India by Government or by a local authority established by the Governor-General in Council.

It might be argued from this sub-section that salary paid to an Indian Government servant in India but outside British India does not accrue in British India. This shows the confusion with respect to this question. Under S. 7 (2) the salary of a political officer in a Native State is taxable, but an Indian Government servant, who draws his pay or leave-salary in England, is protected by the notification under S. 60. It would follow that either S. 7 (2) of the exemption about pay of officers on deputation in the United Kingdom or a Colony is superfluous. In our opinion it is the notification that is superfluous as it is difficult to hold that pay accrues in British India if it is paid outside.

Further, pension is different from pay. It is a right to receive a certain sum of money annually at a particular place. In the present case it can be paid in India or in London. The pensioner has the right to receive it in London and he receives it there. The subject was touched upon in 6 Rang 598 (1). Ormiston, J. at the bottom of p. 601 of the report said:

1. Commissioner of Income-tax v. Phra Phraison Salarak, 1929 Rang 1 = 114 I O 296 = 6 Rang 598 (F B).

In Murray's Oxford Dictionary the words 'accrue' and 'arise' are regarded as synonymous. In the Century Dictionary the word 'accrue' is defined to mean 'to become a present or enforceable right to demand.' Stroud defines 'arising in the United Kingdom' as 'coming into the person's hands in the United Kingdom.'

In 52 Cal 1 (2) at p. 30, Mukerji, J. after discussing the theoretical distinction between "accruing" and "arising" arrives at the conclusion that the words denote the same idea or ideas very similar, and that both words are used in contradistinction to the word "receive" and indicate a right to receive. They represent, he says, a stage anterior to the point of time when the income becomes receivable and connote a character of income which is more or less inchoate. These definitions do not support the view that income accrues or arises in a particular country by reason of the fact that it is earned in that country and on the contrary go to show that income accrues or arises in the country where there is a right to demand payment of it or where in fact it is paid. With great respect we are in agreement with the argument set forth by Ormiston and Mukerji, JJ., and if it is accepted, it is decisive of the present case. Another decision which may be referred to is 44 Mad 65 (3). At p. 75 it is brought out that the Board of Revenue in Madras interpreted the words "accruing and arising" as meaning "becoming the subject of a right to receive." Again at the bottom of p. 78 it was said:

The words 'accrue' and 'arise' are no doubt usually confined to moneys which are due but not received and hence are used as alternatives to 'received.'

There is a decision of the Allahabad High Court 54 All 223 (4), where a certain allowance was held to come within the term "salary" and, though payable in London, was held to accrue or arise in British India. It was sought to argue from this decision that the word "accruing" means "earned" and that the assessee's pension was earned in India. With great respect it seems to us that this is to go too far. Reliance is also placed on behalf

2. Rogers Pyatt Shellac & Co. v. Secy. of State, 1925 Cal 34 = 83 I O 278 = 28 C W N 1074 = 52 Cal 1.

3. Secretary to the Board of Revenue Income-tax, Madras v. Arunachalam Ohettiar, 1921 Mad 427 = 59 I O 482 = 44 Mad 65 (S B)

4. Saunders Right Rev. In the matter of, 1932 All 151 = 137 I O 84 = 1931 A L J 1107 = 54 All 228.

of the Commissioner on 54 Bom 460 (5) where the words "accruing" or "arising" were held to be different from the expression "received" and indicated some origin or source of growth for the income in question. It may be admitted that this decision is more in favour of the Commissioner than of the assessee. On the whole we are of opinion that the question referred should be answered in the negative and we also hold that the assessee should have his costs here.

R.M./R.K. *Answer accordingly.*

5. Commissioner of Income-tax, Bombay v. Bansi Lal Moti Lal, 1930 Bom 381=125 I C 691=32 Bom L R 671=54 Bom 460.

A. I. R. 1936 Lahore 716

JAI LAL, J.

Muhammad Yasin — Defendant—Appellant.

v.

Mumtaz Begam — Plaintiff — Respondent.

Second Appeal No. 1519 of 1935, Decided on 3rd January 1936, from decree of Dist. Judge, Ambala, D/- 30th July 1935.

Mahomedan Law — Divorce — Parents of wife securing agreement from husband that he would lead respectable life, maintain his wife and live in house approved by wife and her parents—Wife entitled to divorce husband in case of default—Agreement is not invalid and opposed to public policy—Wife is entitled to divorce in case of default.

Where an agreement is secured from the husband by the parent of a Mahomedan wife, whose husband has been neglecting her and leading a life of idleness, that the husband would lead a respectable life, would earn his livelihood and maintain his wife and would live a house approved by the wife and her parents and would otherwise properly behave towards his wife and that if he makes default in the performance of any of the conditions the wife shall be at liberty to divorce him, such an agreement is not invalid and opposed to public policy and the wife, on failure of the husband to keep all the conditions entered into by him, is entitled to divorce him: 1919 Cal 691, *Rel. on*; 1926 All 615; 1920 Lah 328; 17 Cal 670; 1914 Cal 369 and 1916 Cal 223, *Disting.*

[P 717 C 2]

Ghulam Mohy-ud-Din Khan—for Appellant.

Kalifa Shuja-ud-Din — for Respondent.

Judgment. — The appellant and the respondent are husband and wife. After they had lived with each other for some time there were disputes and it appears the husband neglected his wife and took to a life of idleness. Consequently the parents of the wife secured an agreement

from him in favour of the wife that the husband would lead a respectable life, would earn his livelihood and maintain his wife and would live in a house approved by the wife and her parents and would otherwise behave properly towards his wife and that if he made default in the performance of any of these conditions the wife shall be at liberty to divorce him. It appears that the husband failed to keep all the conditions entered into by him and consequently the wife divorced him. The suit out of which this appeal has arisen was instituted by the wife for a declaration that she has validly divorced her husband. The suit was necessitated by another suit which had been instituted by the husband for restitution of conjugal rights but which had been dismissed on the ground that he was suffering from gonorrhoea and therefore no decree could be passed in his favour till he recovered from the disease. Incidentally the Court also remarked that the wife was not entitled to divorce the appellant as the agreement referred to above was invalid being opposed to public policy. The District Judge has held that the finding in the first suit for restitution of conjugal rights, that the agreement is invalid being opposed to public policy is not res judicata in this case and that there is nothing invalid in the conditions mentioned above. He has therefore held that the respondent has validly divorced the husband.

On this second appeal before me Mr. Ghulam Mohy-ud-Din has not attacked the conclusion of the District Judge that the present suit is not barred by res judicata. The only ground urged in support of the appeal is that the conditions of the agreement are opposed to public policy and are therefore, invalid, and therefore the wife could not validly divorce her husband. Reliance in support of this contention is placed on 1926 All 615 (1), 1 Lah 597 (2), 17 Cal 670 (3), 21 I C 87 (4) and 32 I C 707 (5). In the last two cases power was given to the wife to divorce her husband

1. Khatun Bibi v. Rajjab, 1926 All 615=94 I C 224.
2. Fatima Bibi v. Nur Muhammad, 1920 Lah 328=60 I C 88=1 Lah 597.
3. Hamid-un-Nissa Bibi v. Zahir-ud-Din Sheikh, (1890) 17 Cal 670.
4. Imam Ali Patwari v. Arfat-un-Nissa, 1914 Cal 369=21 I C 87=18 O W N 693.
5. Imam Ali Patwari v. Arfat-un-Nissa, 1916 Cal 223=32 I C 707.

if the latter declined to live with the parents of the wife. In the remaining cases the husband had undertaken to live in the house of the parents of the wife and a suit for restitution of conjugal rights was defended by the wife on the ground that the condition had been broken by the husband, but it was held in all the cases that such a condition was opposed to Muhammadan law and therefore the husband had not been validly divorced in the last two cases and his suit for restitution of conjugal rights could not be defeated in the other cases on the breach of the condition to reside in the house of the parents of the wife. The circumstances of this case however are different. I may mention here that the proposition does not seem to have been definitely laid down in all the cases mentioned above that a condition to reside in the house of the parents of the wife is necessarily opposed to Muhammadan law but most of these cases do lay down that proposition. The condition in this case is that the husband shall reside in a house approved by the parents of the wife and by the wife. This is different and I think to a condition to live in the house of the parents nothing unreasonable or opposed to public policy in such a condition. The husband is not tied down to one house, only his choice is restricted to a house approved by the wife and her parents. No objection is raised to the other conditions mentioned in the deed.

In two cases decided in this Court and cited by the learned District Judge, 1921 Lah 194 (6) and 1931 Lah 134 (7), liberty was given to the wife to divorce the husband if the latter failed to carry out the most unreasonable wishes of the wife in the first case, and if he married another wife in the second case. In both these cases the divorce by the wife was upheld by the Courts and it was remarked in the latter case that under the Muhammadan law normally the husband has the right to divorce the wife and the conferment of power of divorce on the wife under certain contingencies is really a delegation by the husband of his power to her.

In this case the agreement was entered into after the marriage and such an agreement has been held to be valid in 48 I C

609 (8). Due to the antecedents of the husband the parents were anxious to safeguard the interests of their daughter and with that object in view they insisted on his executing the agreement mentioned above. It has not been shown that such an agreement is invalid or opposed to public policy. The cases cited are distinguishable from the facts of this case. The view of the learned District Judge is therefore correct and I dismiss this appeal with costs.

R.M./R.K.

Appeal dismissed.

8. Sainuddin v. Latifan Nessa, 1919 Cal 631 = 48 I C 609 = 46 Cal 141 = 22 C W N 924.

A. I. R. 1936 Lahore 717

ADDISON AND ABDUL RASHID, JJ.

Emperor.

v.

Mr. O, an Advocate—Respondent.

Civil Misc. No. 96 of 1936, Decided on 8th April 1936.

Legal Practitioners' Act (1879), S. 13—Advocate of 19 years standing convicted of criminal breach of trust—Offence held grave—Serious notice of conduct recommended—But dismissal held too grave punishment.

An advocate of 19 years standing was convicted for the offence of criminal breach of trust with his client in discharge of his professional duty. During this period his conduct was not open to any objection :

Held : it is essential for the protection of the litigant public, and also in the interest of the legal profession, that serious notice should be taken of the conduct of an advocate who abuses the confidence reposed in him by his client. The question of punishment, in a case of this type, deserves serious consideration. An order of dismissal would be too severe a punishment in this case, while a mere censure or fine would be inadequate in view of the serious nature of the offence.

[P 713 C 1, 2]

Ram Lal—for the Crown.

J. W. Fairlie and the Advocate in person—for Respondent.

Order. — On 14th February 1936, notice was issued to Mr. O, Barrister-at-Law, an Advocate of this Court, to show cause why he should not be struck off the rolls, suspended or otherwise dealt with under S. 13, Legal Practitioners' Act, and Cl. 8, Letters Patent, on the ground that he had been convicted of an offence of criminal breach of trust and had been sentenced to six months' rigorous imprisonment on 30th September 1935. It appears that the Rev. Mr. Revnell of Ambala Cantonment had a dispute with Mr. Mubai with respect to the sale of a bungalow. As Mr. Mubai had served a notice on him

6. Saharjan v. Abdul Raoof, 1921 Lah 194.

7. Muhammad Amin v. Amina Bibi, 1931 Lah 184 = 192 I C 578 = 32 P L R 181.

to refund the earnest money by a certain date, the Rev. Mr. Revnell wanted to engage a counsel to settle his dispute with Mr. Mubai. He wrote a letter to the Rev. Mr. Kerr asking him to engage a counsel to defend him in case. A suit was instituted by Mr. Mubai. The Rev. Mr. Kerr engaged Mr. O. Mr. O wrote to the Rev. Mr. Revnell to send him a cheque for Rs. 293 in favour of Mr. Mubai so that the whole dispute might be settled out of Court. He sent the required cheque and Mr. O instead of paying the money to Mr. Mubai cashed the cheque and misappropriated the money. He thus committed criminal breach of trust in respect of money entrusted to him by his client for the settlement of a dispute with Mr. Mubai. As mentioned above, Mr. O was sentenced to six months' rigorous imprisonment in respect of the offence committed by him and he has served his sentence.

The learned counsel for Mr. O admitted that the conduct of his client was highly reprehensible. He however urged that as soon as a report was made to the police, the Rev. Mr. Revnell was offered the sum of Rs. 293 by some friends of Mr. O, but he refused to receive the money as the case was being investigated by the police. It was also contended that Mr. O meant to file an appeal challenging his conviction but that he was prevented from having recourse to the appellate Court as he had no money and a friend of his who promised to lodge an appeal failed to do so until the limitation had expired. These facts were brought to the notice of the Court with a prayer that Mr. O should be leniently dealt with. Mr. O is 57 years of age. He has been practising as an advocate for the last 19 years and during this period his professional conduct has not been open to any objection. On the other hand it must be remembered that he has been guilty of a very grave offence. He misappropriated the money that had been entrusted to him by a client in the discharge of his professional duties. It is essential for the protection of the litigant public, and also in the interest of the legal profession, that serious notice should be taken of the conduct of an advocate who abuses the confidence reposed in him by his client.

The question of punishment, in a case of this type, deserves serious consideration. An order of dismissal would be too

severe a punishment in this case, while a mere censure or fine would be inadequate in view of the serious nature of the offence committed by Mr. O. In 1925 Cal 238 (1), a Pleader who had committed criminal breach of trust in respect of a sum of Rs. 66 was suspended for a period of six months. In the case reported as 1929 Cal 771 (2) a Pleader had committed criminal breach of trust in respect of two sums of Rs. 1,002 and Rs. 1,350 respectively. He was suspended from practice for a period of one year. In the case reported as 1930 Mad 927 (3), the Pleader concerned was suspended for a period of 1½ years. He had previously been suspended for a period of six months and on both occasions he had been guilty of criminal breach of trust. In the present case we are of the opinion that Mr. O should be suspended from practice for a period of eighteen months, and we order accordingly.

D.L./R.K.

Order accordingly.

1. Emperor v. Brahmananda, 1925 Cal 238=81 I C 949=25 Cr L J 1125.
2. In the matter of, Girija Bhushan Sirkar, 1929 Cal 771=1929 Cr C 515=123 I C 243=33 C W N 829=57 Cal 337.
3. In the matter of, Veeraraghava Chari, 1930 Mad 927=1930 Cr C 1176=129 I C 233=32 Cr L J 266 (F B).

* A. I. R. 1936 Lahore 718

ADDISON AND ABDUL RASHID, JJ.

Kanti Chandra Mukerji, Official Receiver and another—Appellants.

v.

Badri Das and others—Respondents.

First Appeal No. 215 of 1935, Decided on 14th November 1935, from decree of Senior Sub-Judge, Delhi, D/- 31st October 1934.

* Limitation Act (1908), Arts. 59 and 60—Money deposited with banker and payable on demand—Art. 60 Limitation Act applies for suit to recover such money.

A suit for the recovery of money deposited with a banker and repayable on demand is governed by Art. 60 and not Art. 59: 1926 Bom 168; 1927 Bom 362; 1915 All 78; 140 I C 96; 18 Mad 390 and 1917 Mad 916, *Foll.* [P 720 C 1, 2]

Mehr Chand Mahajan, Bishen Narain and Bhagwat Dayal—for Appellants.

Ram Kishore and Nawal Kishore—for Respondents.

Judgment.—The plaintiff Badri Das, a retired Military Accountant, deposited his savings from time to time with Seth Raghu Mal Khandelwal, who carried on

business under the style Messrs. Madho Ram-Budh Singh, Bankers, General Iron Merchants, Founders and Direct Importers, Chawri Bazar, Delhi. Raghu Mal died in September 1926, leaving a will by which defendants 2 to 6 were made his executors. This will was admitted to probate by the Calcutta High Court and the executors have been impleaded as representing the estate of the deceased. As certain disputes arose between the executors and an administration suit was brought by one of them in the High Court at Calcutta, the Official Assignee of Calcutta was appointed Receiver of the estate. He, therefore, was also impleaded as a defendant, sanction being obtained for this purpose from the High Court at Calcutta. The suit was brought for Rs. 24,000, made up of various deposits made by the plaintiff with Messrs. Madho Ram-Budh Singh, together with interest at Rs. 0-8-6 per cent per mensem. The first deposit was one of Rs. 2,700 made on 25th November 1922 and the last was one of Rs. 4,600 made on 1st May 1926, a few months before the proprietor of the firm died. There were also certain withdrawals from time to time, the first of which was Rs. 100 in cash through Lala Bhola Nath on 26th November 1922. The last withdrawal in the lifetime of the proprietor of the business was one of Rs. 55-13-6 on 31st May 1925. The last withdrawal was on 21st November 1929 when the executors apparently allowed the withdrawal of Rs. 2,000. The total withdrawals came to Rs. 3,044-15-9 and the deposits, with interest up to the date of the suit, namely 13th May 1931, came to Rs. 27,044-15-9, the balance due being Rs. 24,000 which sum is in suit.

The claim has been contested by the Official Assignee, who was appointed Receiver, on the ground that this is not a case of deposits but of ordinary loans made by the plaintiff to Messrs. Madho Ram-Budh Singh and that Art. 59 Limitation Act, therefore applied and not Art. 60. There is good evidence that Bhola Nath, the uncle of the plaintiff, was a trusted servant and Munim of Seth Raghu Mal and that it was for this reason that the plaintiff commenced to deposit his money with him. The deposits and withdrawals have been proved and it has also been established that the plaintiff used to get an annual statement of account showing the amount due to him. There is also no

doubt that the money was repayable on demand. On these findings the trial Judge has held that the plaintiff's claim related to money of a customer in the hands of his banker, advanced under an agreement that it shall be payable on demand, and that apart from this agreement, which has been established by the evidence, it was clearly implied by the course of dealings between the parties. On this finding the trial Judge held that Art. 60 applied and it is not disputed that if that article applied the claim is within time. The suit was decreed and the Official Assignee along with one executor Hans Raj, has preferred this appeal against the decree of the trial Court.

We have no hesitation in holding that the facts are as stated above and that they do not admit of any other interpretation than that placed upon them by the trial Court. The sole question, therefore, in this appeal is whether in these circumstances Art. 59 or Art. 60, Limitation Act, applies. Numerous authorities have been cited before us. The first was 13 Bom 338 (1) where it was held that the relationship between a native banker and a person depositing money with him in the ordinary way of business is that of borrower and lender, and the money lodged can be recovered as money lent. To such a transaction it was held Art. 59, Limitation Act (15 of 1877), applied. By the amending Act of 1908 however certain words were added to Art. 60, namely, 'including money of a customer in the hands of his banker so payable.' Art. 59 and 60 now run as follows:

59.—For money lent under an agreement that it shall be payable on demand.	Three years	When the loan is made.
60.—For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable.	Do.	When the demand is made.

Since that amendment the decisions of the various Courts are for the most part to the effect that Art. 60 applies in the case of a customer's money in the hands of his banker, when payable on demand. This view seems to have now been taken by the Bombay High Court as well. Kemp, J., in 1927 Bom 362 (2), held that the word 'deposit' in Art. 60 covers all payments of a customer's moneys made to a banker which make up the credit balance in favour of a customer in the banker's hands. He further held that in order to create the relation of banker to his customer there is no necessity that the banker should carry on only the trade of a banker. It suffices if, with regard to the particular transaction, he was a banker as regards the particular customer. In 28 Bom L R 73 (3) a Division Bench of the Bombay High Court held that:

Under Art. 60, Limitation Act, it was not necessary to prove that the borrower was carrying on business only as a banker. A man might become a banker or place himself in the position of a banker with regard to a particular customer, and if the dealings with the lender and the borrower are such that the Court is satisfied that it can be said that the borrower is in the position of a banker to the lender, then the money so lent can be considered as a deposit.

The Allahabad High Court in 29 All 773 (4) took the view that a suit to recover money deposited with a banker on a current account is governed as to limitation by Art. 59 and not Art. 60. This was before the amendment of the Indian Limitation Act. In 37 All 292 (5) the same Court went on to hold that there was no doubt, since the passing of the Indian Limitation Act, 1908, that a suit for the recovery of money deposited with a banker and repayable on demand is governed by Art. 60 and not Art. 59, and a similar view was taken by another Division Bench in 140 I C 96 (6). The Lower Burma Chief Court in 57 I C 908 (7) took the view that in such a suit as

the present, Art. 57 and not Art. 60 applied. The Judges who decided that case said that the words 'on demand' in Art. 60 were not used in the legal sense of "at once without demand" but in the popular sense of "on express demand being made." On the other hand, even before the Limitation Act was amended, a Division Bench of the Madras High Court in 18 Mad 390 (8) held that in such a suit as the present Art. 60 applied and not Art. 59, while in 39 Mad 1081 (9) another Division Bench held that under Art. 60, Limitation Act, as amended, money left in the hands of a trader who is not a banker will be a deposit in circumstances such as would make it money of a customer where the depositor is a banker and that Art. 60 and not Art. 59 applied to a suit to recover money so deposited, even though it is payable on demand. Again the Calcutta High Court in 16 Cal 25 (10) held that Art. 60 and not Art. 59 applied to a suit like the present.

A similar case came before a Division Bench of this Court and the decision has been reported in 15 Lah 242 (11). The argument there was as to whether Art. 60 or Art. 57 applied, but this is a distinction without a difference. It was held that Art. 60, as amended, applies in terms to money of a customer in the hands of his banker, advanced under an agreement that it should be payable on demand, and its operation is not restricted to those cases only in which the agreement to pay the amount due on demand is 'expressed.' As in the present case there is no doubt that these were deposits by a customer to his banker, on the authorities we have no hesitation in holding that Art. 60 applies and that the suit is not barred by limitation. We, therefore, dismiss the appeal with costs.

B.D./R.K.

Appeal dismissed.

2. Moti Gauri v. Naranji Dwarka Das, 1927 Bom 362=102 I C 408=29 Bom L R 423.

3. Bhimanna Kumaji Sonar v. Veni Chand, 1926 Bom 168=93 I C 215=28 Bom L R 73.

4. Dharm Das v. Ganga Devi, (1907) 29 All 773=4 A L J 628=1907 A W N 263.

5. Juggi Lal v. Kishen Lal, 1915 All 78=28 I C 949=37 All 292=13 A L J 402.

6. Sohanpal v. Mustafa Hussain, (1932) 140 I C 96.

7. M. M. K. K. Chetty v. Palaniappa Chetti, 1920 L B 74=57 I C 908=10 L B R 161.

8. Perundevitayar Ammal v. Nammalvar Chetti, (1895) 18 Mad 390=5 M L J 203.

9. Subramania Chettiar v. Kadiresan Chettiar, 1917 Mad 916=32 I C 965=39 Mad 1081=30 M L J 245.

10. Ishur Chunder v. Jiban Kumari, (1889) 16 Cal 25.

11. Gulab Rai Gujar Mal v. Sandhi, 1934 Lah 42=151 I C 712=15 Lah 242=37 P L R 56.

* * A. I. R. 1936 Lahore 721

FULL BENCH

COLDSTREAM, MONROE AND BHIDE, JJ.

Balmukand and another — Judgment-debtors—Appellants.

v.

Punjab National Bank, Ltd., Ambala — Decree-holder and Auction-purchaser and others—Judgment-debtors — Respondents.

Misc. First Appeal No. 1206 of 1935, Decided on 10th June 1936, from order of Senior Sub-Judge, Ambala, D/- 28th June 1935.

* * Companies Act (1913), S. 152—S. 152 is enabling and not mandatory — It is not obligatory on company governed by Arbitration Act to make reference, only in pursuance of Arbitration Act and file award in Court of District Judge — Reference made outside Arbitration Act is valid — Award filed in Court of Senior Sub-Judge — Decree passed on basis of award is valid.

Section 152 is an enabling section, and it merely confers power on companies to refer disputes to arbitration under the Arbitration Act by an agreement in writing, when this course is preferred. It is not obligatory on a company governed by the Arbitration Act, to make a reference to arbitration out of Court in the Province of Punjab, only in pursuance of the provisions of the Arbitration Act and to file an award made on such reference in the Court of the District Judge as required by the Arbitration Act. It is permissible for the company, although governed by the Arbitration Act, to make a reference outside the Arbitration Act, and although the award on such reference is filed in the Court of the Senior Subordinate Judge, the decree passed on basis of it is perfectly legal: 1915 All 234, Ref.; 1929 Lah 246 and 1933 Pesh 66, Explained; 1931 Lah 555; 1933 Lah 44 and 1933 Pat 49, Disting. [P 725 O 2]

Charinjiva Lal Aggarwal, Mela Ram, Asa Ram Aggarwal and Jinda Mal — for Appellants.*M. L. Puri and Har Gopal* — for Respondents.

Bhide, J.—The appellant in this case is a firm named Sita Ram Bal Mukand of Jagadhari in the Ambala District, while the respondent is the Punjab National Bank, which is a company registered under the Companies Act. The appellant firm being indebted to the respondent company the parties referred the matter to arbitration without going to Court. The arbitrator gave an award in favour of the respondent Bank on 22nd March 1931. The award was filed in the Court of the Senior Subordinate Judge, Ambala, 1936 L/91 & 92

under Sch. 2, Civil P. C., and a decree passed thereon in accordance with the provisions of the said schedule. In execution of the decree certain properties at Jagadhari were sold and the decree was partly satisfied; but when the decree-holder sought to sell other properties at Simla, an objection was raised that the decree itself was a nullity and could not therefore be executed.

This objection was based on the contention that the Punjab National Bank being a company registered under the Companies Act, the arbitration must be taken to have been under the Arbitration Act as required by S. 152 of that Act. If the arbitration was under the latter Act, the award could only be filed in the Court of the District Judge, and it was therefore contended that the proceedings in the Court of the Senior Subordinate Judge regarding the filing of the award and the decree passed thereon were a nullity. In support of this contention reliance was placed chiefly on 1933 Lah 46 (1) and 1934 Lah 652 (2). The learned Judge of the executing Court held, following the former ruling, that the decree was a nullity, but that the objection could not be raised in execution proceedings, as it had not been raised when the award was filed and was made a rule of the Court under Sch. 2, Civil P. C. From this decision an appeal was preferred to this Court. As the appeal involved some points of importance and difficulty the case was referred to a Division Bench and the Division Bench has referred the following points for decision to a Full Bench:

(i) Can a company governed by the Arbitration Act make a reference to arbitration out of Court in this Province, only in pursuance of the provisions of the Arbitration Act and must an award made on such a reference be filed in the Court of the District Judge as required by that Act? (ii) Is a decree passed by a Senior Subordinate Judge in this Province on the basis of an award made on a reference to arbitration out of Court to which a company is a party, a nullity? (iii) Can a Court to which an application is made for execution of such a decree entertain an objection that the decree is a nullity and

1. Chaman Devi v. Punjab National Bank, 1933 Lah 46=140 I O 180.
2. Asmat Ullah v. Forbes, Forbes Campbell & Co., 1934 Lah 652=152 I O 135=35 P L R 482.

refuse to execute it on that ground? (iv) Is such an objection not maintainable on the principle of constructive res judicata or for any other reason, if the objection is not taken when the decree is passed or when proceedings for its execution are commenced. The decision of the first point depends on the proper construction of S. 152, Companies Act, 1913, which runs as follows :

(1) A company may by written agreement refer to arbitration, in accordance with the Arbitration Act, 1899, an existing or future difference between itself and any other company or person. (2) Companies, parties to the arbitration, may delegate to the arbitrator power to settle any terms or to determine any matter capable of being lawfully settled or determined by the Companies themselves, or by their directors or other managing body. (3) The provisions of the Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations between companies and persons in pursuance of this Act.

The contention of the learned Counsel for the appellant is that the provisions of this section are mandatory, and the section means that whenever a company is a party to an arbitration out of Court, the arbitration must take place in accordance with the provisions of the Arbitration Act, and the award must be filed in the Court of the District Judge, as required by that Act. This contention appears, in the first place, to be opposed to the plain wording of the section. The section merely says that a 'Company may by a written agreement refer to arbitration in accordance with the Arbitration Act, 1899, an existing or future difference between itself and any other company or person.' The learned Counsel for the appellant contends that a company is a juristic person and has only such powers as are conferred upon it by the Companies Act. But this contention does not seem to be tenable. The Companies Act of 1929, in England for instance, contains no similar provision as regards arbitration. But it cannot, therefore, be said that companies in England have no power at all to resort to arbitration out of Court. Reference to arbitration is a kind of contract between the parties and in the absence of any specific provision of law to the contrary there is no reason why any person who has the power to contract should not be held to have the power to resort to arbitration, independently of any specific provision conferring such

power. As regards the powers of companies under the Act of 1929 in England, the following statement is to be found at p. 400, vol. 5, Halsbury's Laws of England:

Its (i. e. a company's) powers are limited to: (1) those expressly given by the Act of 1929; (2) those which are incidental to its being a statutory corporation; (3) those expressly given by its memorandum of association; and (4) those incidental to the powers so given.

There is nothing in the Companies Act, so far as I can see, to show that the position of Companies in India is different in this respect. It would appear from the above statement that it is not correct to say that a company has no powers except those which are expressly conferred upon it by statute. The Companies Act does not appear to contain any express provision conferring upon a company power to enter into a contract. This is presumably assumed to exist, when it is necessary for the carrying out of the objects of the Company. In the present case, for instance, the respondent is a Banking Company and it must have power to enter into contracts necessary for the purposes of its business. It was urged that S. 88, Companies Act, does confer power upon a Company to enter into a contract, and that any contract not covered by the section would be ultra vires. This interpretation of the section does not appear to me to be sound. This section only enables a company to enter into contracts through a duly authorised agent. It would be obviously inconvenient for the whole body of the members of a company to enter into such contracts as may be necessary for its business, and the section appears to be intended only to facilitate the business of a company by enabling it to enter into contracts through authorised agents. The same remarks apply to S. 90, which was also referred to by the learned counsel for the appellant.

It was next urged that by the enactment of the provisions of S. 152, Companies Act, the power of a company to resort to arbitration, even if it existed independently of the Act, has been restricted by the legislature to the mode prescribed by that section. This contention also does not appear to me to be borne out by the language of the section. I have already referred above to the use of the word 'may' in sub-s. 1 of S. 152, which prima facie indicates that the provision is only an enabling one and not obligatory. There are other indications

also in the section and other parts of the Act which lead to the same conclusion. For instance, if the procedure laid down in S. 152 were obligatory the words 'in pursuance of the Act' occurring at the end of sub-s. 3 of the section would seem to be wholly redundant. On the other hand, if the section is merely an enabling one the words would be perfectly intelligible; for they would serve to show in that case that the provisions of the section would apply only when the parties decide to go to arbitration 'in pursuance of the Act,' i. e., when they agree that the arbitration proceedings should be governed by the Arbitration Act. It must be borne in mind in this connection that the Arbitration Act applies only in cases where if the subject matter referred to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency town: vide S. 2 of the Act.

The proviso to S. 2 enables the Local Government to extend the Act to other local areas, by declaring them to be 'Presidency towns' for the purposes of the Act. It would thus appear that Companies outside Presidency towns or areas notified as 'Presidency towns' would not ordinarily be able to take advantage of the provisions of the Arbitration Act. S. 152, Companies Act, was, therefore, necessary in order to enable companies to avail themselves of the provisions of that Act.

The provisions of S. 214, Indian Companies Act, would seem to support further the above view. That section refers to the mode of determining the price, when there is a dispute between a liquidator and a shareholder about the price of the latter's interest. It provides that if the dispute cannot be determined by agreement it shall be settled by arbitration. Further, sub-s. (2), S. 214 provides that the provisions of the Indian Arbitration Act shall apply to all arbitrations in pursuance of the section. If S. 152 were intended to make the Indian Arbitration Act necessarily applicable to all arbitrations to which a company was a party, the second sub-section of S. 214 would hardly have been needed.

Turning to the provisions of the Civil Procedure Code, there seems to be nothing therein to indicate that arbitrations to which a company was a party were intended to be excluded from the scope of Sch. 2 of the Code. S. 89 no doubt says

that references to arbitration shall be governed by the provisions of Sch. 2 of the Code, "save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force." But this section throws no light on the question whether the provisions of S. 152, Indian Companies Act, were intended to be mandatory or otherwise. Para. 20 (1), Sch. 2, Civil P. C. runs as follows :

Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

According to the General Clauses Act, 1897, the word "person" includes any company or association or body of persons, whether incorporated or not, *prima facie*, the paragraph would therefore apply to arbitrations to which companies are parties.

The learned counsel for the appellant next urged that the previous history of S. 152 shows that its provisions were intended to lay down an exclusive procedure for arbitration in the case of companies. There seems little force in this contention. It is true that in the Indian Companies Act of 1882 there were detailed provisions in respect of arbitration (Ss. 96 to 123) and these were replaced by S. 152 when the Indian Companies Act, 1913, was enacted. But in the corresponding section of the Indian Companies Act of 1882 also the word used was "may" and not "shall," and consequently the Act of 1882 also does not show that the procedure for arbitration laid down in it was intended to be obligatory. The detailed provisions as to arbitration in that Act were necessary as no Arbitration Act was then in force. But when a convenient procedure for arbitration was provided in a separate Act, these provisions were replaced by S. 152. The provisions of the Act of 1882 only show that it was considered desirable to provide a certain special procedure for arbitration in the case of companies, if they chose to avail themselves of it; but they do not show that the procedure was intended to be exclusive or obligatory.

In 37 All 273 (3) the plaintiff company which was registered under the Indian

8. Ganges Sugar Works, Ltd. v. Nuri Miah, 1915 All 284=28 IC 384=37 All 273=18 ALJ 912.

Companies Act, 1882, had entered into a contract with the defendant, in which it was provided that if any dispute arose between the parties it should be referred to the arbitration of one Hazarilal, whose decision was to be final. Disputes having arisen, the plaintiff company made an application under Sch. 2, R. 17, Civil P. C., to file the contract as to submission to arbitration in order that the matter should be settled in accordance with the provisions of the Code. This application was refused by the trial Court on the ground that the contract was not under seal as required by S. 96, Indian Companies Act, 1882. On appeal, the decision was sought to be supported on the ground that under Ss. 96 to 123 of the Act, an agreement to refer disputes to arbitration by a company to be legal must necessarily be under seal. According to S. 67, the company could enter into a contract without using its seal. But it was contended that that section was subject to the special provisions of Ss. 96 to 123 relating to arbitration. The learned Judges, after taking into consideration the use of the word "may" in S. 96, and after referring to the corresponding provisions of the English Companies Act (25 and 26 Vic. Ch. 89), expressed the view that it was probably the intention of the legislature when providing for the method in which a particular arbitration should be carried out to give the parties the option of having the arbitration in accordance with the Act if they thought fit. It was accordingly held that the contract to refer to arbitration, though not under seal as required by S. 96 of the Act of 1882, was not illegal, but was a contract which can be given effect to in the ordinary way. The appeal was accordingly allowed and the case was remanded for decision according to law. This case thus shows that the arbitration provisions of Ss. 96 to 123 of the old Companies Act of 1882 were held to be not obligatory but optional and an agreement to refer to arbitration, which did not fulfil the requirements of S. 96 of that Act was allowed to be dealt with under the provisions of Sch. 2, Civil P. C.

I have already mentioned above that the operation of the Indian Arbitration Act of 1899 is practically restricted to the Presidency Towns by virtue of the provisions of S. 2 of that Act. Evidently the Legislature did not consider the Act

suitable for application everywhere in India and it was therefore left to the discretion of the Local Governments to extend it to other local areas when they thought it fit to do so. In the Punjab, even when the Act was extended to certain local areas in the Province, it was considered desirable to provide by a special enactment (Punjab Act 1 of 1911) that the Indian Arbitration Act should apply only when the parties expressly declare by an agreement in writing that the arbitration shall be governed by the Act.

The policy of the legislature has thus been to restrict the operation of the Indian Arbitration Act only to those areas which are considered to be suitable for its application and in the Punjab, even in such areas, it has been left to the option of the parties to avail themselves of its provisions. The provisions of the Indian Arbitration Act have their advantages and disadvantages. The arbitrator has wider powers under the Arbitration Act and he has also the power to seek the opinion of the Court on a point of law. On the other hand, the award, under that Act when filed is final, and there is no right of appeal given by the Act. It may therefore have been considered advisable to leave it to the option of the companies outside the Presidency Towns to avail themselves of its provisions or not as they liked just as it was left to the option of the parties to do so in Punjab Act 1 of 1911.

It was urged by the learned counsel for the appellant that it will be prejudicial to public interests if the companies are allowed to go to arbitration without resorting to the provisions of the Indian Arbitration Act. But he was unable to point out any particular mischief likely to result from such a course. Reference was made in this connection to the provisions of sub-s. 2 of S. 152, Companies Act. But that sub-section only enables companies to delegate to the arbitrator certain powers. Even in the case of arbitration outside the Indian Arbitration Act, the arbitrator cannot presumably settle any terms or determine any matter which is not capable of being lawfully settled or determined by the company itself. The sub-section only enables the company to delegate to the arbitrator further powers to settle disputes or determine matters which can be settled or

determined by the Directors or the managing agents.

Coming now to the case-law on the subject, no reported case directly in point was cited with the exception in 1929 Lah 246 (4). In that case, however, the point was conceded, and there is no discussion of the law on the point. The learned Judge was inclined to the view that the provisions of S. 152, Companies Act, applied to all references to arbitration by companies; but he expressly qualified his decision by remarking that he should not be taken to express any considered opinion on the point. In 1933 Pesh 66 (5) also there is a remark that the mere fact that the company entered into the arbitration showed that the reference was under the Arbitration Act but no discussion on the point. The other cases cited were 1931 Lah 555 (6), 14 Lah 249 (7) and 1933 Pat 49 (8). But these cases are really not directly in point. The point which arose for decision in all these cases was whether a company can resort to arbitration under the Arbitration Act in areas outside the Presidency Towns, which had not been declared to be Presidency Towns. It was held in the first case, 1931 Lah 555 (6), that a company could not do so unless the local area where the arbitration took place had been declared a Presidency Town under S. 2, Arbitration Act. In the other two cases a contrary view was taken and it was held that even where the local area in question has not been declared a Presidency Town, the arbitration would be permissible in view of the provisions of S. 152 (3), Companies Act, read with the provisions of S. 2, Arbitration Act. So far as I can see no question arose in these cases whether a company could or could not proceed to arbitration independently of the provisions of the Indian Arbitration Act, 1899. There are no doubt certain remarks in 14 Lah 249 (7), as well as in 1933 Pat 49 (8), which might be taken to

favour the opinion expressed in 1929 Lah 246 (4). But these remarks can only be taken as 'obiter dicta' and cannot be said to represent any considered opinion of the learned Judges on the point now before us.

The language of S. 152, Companies Act, is not happy and its interpretation is not free from difficulty; but after carefully considering the wording of the section as it stands, and the general policy of the legislature, which appears to be not to make the provisions of the Indian Arbitration Act obligatory outside the Presidency Towns, it seems to me that the proper construction to place on the section would be to hold that it is an enabling one and that it merely confers power on companies to refer disputes to arbitration under the Indian Arbitration Act 1899, by an agreement in writing, when this course is preferred. If the intention was to make the Indian Arbitration Act, applicable in the case of all arbitrations to which a company is a party the object could easily have been achieved by a slight amendment of S. 2, Arbitration Act, by adding the words 'or where a company registered under the Indian Companies Act, 1913, is a party to the arbitration,' at the end of the first clause. I would answer the first question in the negative.

If a reference to arbitration, outside the Indian Arbitration Act was permissible the decree passed by the learned Senior Subordinate Judge on the basis of the award was perfectly legal and consequently the other questions referred to the Full Bench do not arise. I would accordingly return the case to the Division Bench with the above answer to the first question.

Coldstream, J.—I agree.

Monroe, J.—I agree.

R.M./R.K. *Answer accordingly.*

A. I. R. 1936 Lahore 725

AGHA HAIDAR, J.

Bur Singh—Petitioner.

v.

Anjuman Dehi Sohal and others—Respondents.

Civil Revn. No. 433 of 1935, Decided on 7th January 1936, from order of Senior Sub-Judge, Gurdaspur, D/- 9th March 1935.

Civil P. C. (1908), Ss. 47, 151—Substance of application and not section quoted should

4. Attock Oil Co. v. Abdul Majid, 1929 Lah 246 = 118 I O 533.

5. Punjab National Bank v. Keval Krishna, 1933 Pesh 66 = 148 I O 435.

6. Sundar Mal Lakhu Mal v. Paris Business Corporation, Ltd., 1931 Lah 555 = 132 I O 399 = 82 P L R 444.

7. Behari Lal Madho Prasad v. Sirsa Trading Co., Ltd., 1933 Lah 44 = 141 I O 64 = 83 P L R 1048 = 14 Lah 249.

8. Ruplal Agarwala v. Dhansar Coal Co., 1933 Pat 49 = 136 I O 445 = 18 P L T 169.

be examined to find out true nature—Decree held to be fully satisfied before executing Court—Application to inquire what money was due by judgment-debtor headed under S. 151, Civil P. C.—Application falls under S. 47 and not under S. 151, as it relates to matters of discharge or satisfaction, and hence order is appealable.

In considering whether an application is under S. 47 or not, a Court must examine the substance of the application to find out its true nature and should not be guided solely by the heading given to it by the applicant.

Where the money decree was fully satisfied before executing Court, and an application under S. 151, Civil P. C., was made to inquire how much money was due by the judgment-debtor :

Held : reading the application as a whole there could not be any manner of doubt that it related to matter touching the discharge or satisfaction of the decree and was therefore in reality and substance an application under S. 47 of the Code and therefore the order was appealable : 1933 *All* 429 ; 1934 *Pat* 202 and 1933 *Mad* 130, *Rel. on* ; 1930 *Lah* 496, *Disting.*

[P 727 C 1]

Ram Lal Anand (Malik) I—for Petitioner.

L. M. Dutta—for Respondents.

Order.—This is a revision under S. 115, Civil P. C. Bur Singh owed a sum of Rs. 471 to Nawab Din under a money decree. Nawab Din was indebted to the Anjuman Dehi, Sohal. In satisfaction of his debt, Nawab Din transferred the decretal amount which was due to him from Bur Singh to the Anjuman and the Anjuman took out execution against Bur Singh. On 12th December 1933 Bur Singh put in an application in which he pleaded that the decree had been fully satisfied by various payments made by him to Nawab Din. He detailed those payments supported by receipts in the following manner : (1) Paid Rs. 21, on 3rd August 1930 ; (2) Paid Rs. 50 on 10th February 1932; and (3) Paid Rs. 400 on 7th May 1933.

The Anjuman admitted the payments under the first two receipts and therefore we are not concerned with them. The Anjuman however challenged the genuineness of the receipt for Rs. 400. On 21st December 1933 one Abbas Ali, the Mukhtar of the Anjuman, appeared before the executing Court and stated that the receipts were correct and that the decree had been satisfied. On this statement, the Court dismissed the application for execution holding that the decree had been fully discharged. On 15th January 1934 an application was made by the Anjuman through another Mukhtar,

namely, Mohammed Bakhsh, asking the Court to inquire how much money was due by the judgment-debtor and what amounts had been realised by Nawab Din and Abbas Ali. The heading of the application mentioned S. 151, Civil P. C., under which the application was alleged to have been made. On 22nd January 1934, Abbas Ali also made an application in which he stated that he was illiterate and had made the statement on 21st December 1933 as a result of deception practised upon him. The trial Judge held that the receipt dated 7th May 1933, in respect of Rs. 400, had been executed for consideration and in full satisfaction of the decree and dismissed the application. The Anjuman as well as Nawab Din preferred an appeal to the Senior Subordinate Judge. The Senior Subordinate Judge allowed the appeal and held, after a consideration of evidence, that the receipt for Rs. 400, was not a genuine document. He set aside the order of the lower Court, holding that only a sum of Rs. 71 had been paid by the judgment-debtor to Nawab Din and that the balance was still due by him. The amount of the claim being below Rs. 500 the judgment-debtor has come up to this Court in revision as no second appeal lay under S. 102, Civil P. C.

The first contention raised by the learned Counsel for the applicant is that the appeal to the lower appellate Court was incompetent, inasmuch as the order of the trial Court was one under S. 151, Civil P. C. He relies upon 1930 *Lah* 496 (1) in support of his contention. There cannot be any doubt that the application dated 15th January 1934 made by the Anjuman refers to S. 151, Civil P. C., in the heading. But the case cited is distinguishable from the present case because there the trial Court had explicitly cited S. 151, Civil P. C., as the authority empowering it to pass the order which was sought to be challenged in appeal. In the present case, the trial Court does not purport to act under S. 151, Civil P. C., and in fact there is no suggestion in the order that the Court was acting under the provisions of that section. Furthermore, the mere fact that the application mentions in the heading S. 151, Civil P. C., is not conclusive. Most of the applica-

1. Harbhajan Singh v. Santokh Singh, 1930 *Lah* 496=131 I C 282=81 P L R 171.

tions are drawn up carelessly in this province by the clerks of pleaders and S. 151, Civil P. C., is frequently quoted in the heading indiscriminately and almost as a matter of course. But we must look to the substance of the application and not to the mere mechanical quotation of the section in order to do substantial justice between the parties. Reading the application as a whole, there cannot be any manner of doubt that it related to matters touching the discharge or satisfaction of the decree and was therefore in reality and substance an application under S. 47, Civil P. C., and the order of the executing Court was therefore appealable. I may mention that in 1933 All 429 (2), a Division Bench of the Allahabad High Court held that S. 47 was applicable to execution proceedings as much after an order had been passed declaring the decree satisfied as before an order has been made to that effect. It was also pointed out that :

Where a decree has been held to have been discharged and one of the parties comes to the Court on the ground that the order has been wrongly passed and should be reconsidered, the case would fall under S. 47 and the order would be appealable.

In 1934 Pat 202 (3), after an auction-sale in execution of decree had taken place, the judgment-debtor moved the Court to enter full satisfaction of the decree on the date of the confirmation of the sale. This was done. The decree-holder then filed an application purporting to be under S. 151 and O. 47, R. 1, Civil P. C., praying that the order of full satisfaction of the decree be set aside and the sale be confirmed on the ground that the application for full satisfaction had been fraudulently filed by his parokars in collusion with the judgment-debtor. It was held that, although in his application the decree-holder had referred to O. 47, R. 1, and S. 151, Civil P. C., yet the application was essentially one under S. 47, Civil P. C., relating to the discharge of the decree. It would thus appear that the facts of this case are very similar to those of the present case. In 1933 Mad 130 (4) it was laid down that in considering whether an application is

under S. 47 or not, a Court must examine the substance of the application to find out its true nature and should not be guided solely by the heading given to it by the applicant. In view of all these authorities, I am of opinion that the application made by the Anjuman on 15th January 1934, was in substance an application under S. 47, Civil P. C., and therefore an appeal lay against the order of the executing Court, dated 24th November 1934. As regards the finding of the Senior Subordinate Judge, in appeal, that the receipt for Rs. 400 is not a genuine document, I cannot, sitting in revision, go behind it as it is a pure question of fact. The application is therefore dismissed with costs.

V.B.B./R.K. *Application dismissed.*

*** * A. I. R. 1936 Lahore 727**

ADDISON AND DIN MOHAMMAD, JJ.

Sewa Singh—Plaintiff—Appellant.

v.

Milkha Singh and others—Defendants—Respondents.

Letters Patent Appeal No. 4 of 1935, Decided on 8th April 1935, from decree of Rangi Lal, J., Lahore, D/- 22nd October 1934, reported in 1935 Lah 141.

*** * Mortgage—Unpaid balance of mortgagee consideration in hands of mortgagee cannot be attached in execution of decree against mortgagor as debt due to mortgagor: 1935 Lah 141, Reversed.**

A suit for specific performance of a contract to advance money on a mortgage is incompetent and, therefore, any unpaid balance of the mortgage consideration cannot be attached in execution of a decree against the mortgagor on the ground that it is a debt due to the mortgagor. The mortgagor has only a remedy in a suit for damages: 1935 Lah 141, Reversed; Case law discussed.

[P 728 C 1]

Durga Dass—for Appellant.

Achhru Ram—for Respondents.

Addison, J.—This is a case of a mortgage where part of the consideration was left in the hands of the mortgagees to redeem a mortgage of other land of the mortgagor in favour of a third person. The mortgage appears to be the usual anomalous mortgage with possession, interest being set off against the right to receive the income. A fourth party obtained a decree against the mortgagor and in execution of that decree has attached the balance left with the mortgagees to redeem the land mortgaged with the third party. This balance is

2. Madho Lal v. Dull Chand, 1938 All 429=144 I O 468=1938 A L J 738.

3. Sheodahin Tiwari v. Ramjanam Tiwari, 1934 Pat 202=148 I O 549.

4. Bullayya v. Subbayya, 1933 Mad 130=140 I O 779.

Rs. 2,000 and the mortgage was effected some eight years before the present suit. The mortgagees preferred objections to the effect that this unpaid amount could not be attached in their hands. Their objections were dismissed and they instituted the present suit under O. 21, R. 63, Civil P. C., for a declaration that this unpaid amount was not liable to attachment and sale. The trial Court decreed the suit. The District Judge on appeal reversed this decision and an appeal to this Court was dismissed by a Single Judge against whose decision this Letters Patent Appeal has been preferred.

It was held in 30 All 252 (1) that where money promised as a loan by a mortgagee is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance: he cannot sue for specific performance of the agreement to lend the full sum promised, and the non-payment of a portion of the loan does not constitute a debt which can be the subject of attachment and sale under the Code of Civil Procedure. This was a decision by Sir John Stanley and Sir William Burkitt. Another Division Bench of the Allahabad High Court held in 52 All 761 (2) that although a mere contract to lend money cannot be specifically enforced, the case of a usufructuary mortgage must stand on a different footing, particularly when possession has been delivered and the stipulation is that the profits are to be set off against the interest. For this reason a suit by the mortgagor to recover from the usufructuary mortgagee the money for which the mortgage was made and possession delivered was not really one for the specific performance of a mere contract to lend money, but to compel the defendant to perform his part of the contract. It was said that the mortgage in 30 All 252 (1) was not a possessory mortgage though this is not clear from the report itself.

A Single Bench of this Court, without discussion took the view in 78 I C 445 (3), that a suit was maintainable by the mortgagor to recover the unpaid balance of the mortgage money from the mort-

gagee. Another Judge of this Court, sitting alone, held in 140 I C 495 (4) that where money was reserved with the mortgagee in trust for payment to the creditors of the mortgagor a suit by the mortgagor to recover the money so reserved, on default of payment, was maintainable, and that no question of specific performance of the contract to lend money arose. This was a case where possession of the mortgaged property had not been given and it was said that the learned Judges who decided 52 All 761 (2) did not lay down that the giving of possession by the mortgagor to the mortgagee was a condition precedent to enable the former to institute a suit for the recovery of the mortgage money. With all respect that does seem to be the distinction the learned Judges made in that case. Another Single Bench of this Court followed 140 I C 495 (4) in Civil Appeal 1577 of 1933. On the other hand, the Madras High Court has in 47 Mad 698 (5) laid down that a suit to enforce an agreement to lend money on a mortgage is not maintainable, though it is open to the mortgagor to sue the mortgagee for damages for the breach of the agreement to lend money. It was further held that an assignee from a mortgagor of a part of the consideration due for a mortgage, which was not paid by the mortgagee, was not entitled to recover it in a suit against the mortgagee, and in this judgment 2 Mad 79 (6), 34 M L J 342 (7) and 43 Cal 59 (8) were followed.

A Division Bench of the Calcutta High Court held in 43 Cal 59 (8) that a suit for specific performance of a contract to lend or borrow money on a mortgage was not maintainable. Certain English cases are cited there which clearly lay down this principle and suggest that the proper remedy is an action for damages. A Full Bench of the Punjab Chief Court held in 53 P R 1916 (9) that a mortgage was complete not when the consideration for

1. Fulchand v. Chand Mal, (1908) 30 All 252=5 A L J 491=1908 A W N 105.

2. Sheopati Singh v. Jagdeo Singh, 1931 All 95=124 I C 764=52 All 761.

3. Imam Din v. Dittu, 1925 Lah 174=78 I C 445.

4. Thakur Singh v. Jagat Singh, 1933 Lah 1=140 I C 495.

5. Yadavendra Bhatta v. Srinivasa Babhu, 1925 Mad 62=80 I C 5=47 Mad 698.

6. Annakaran Kasmi v. S. Avulla, (1878) 2 Mad 79.

7. Rajagopala Aiyar v. Davood Rowther, 1918 Mad 364=45 I C 161=34 M L J 342.

8. Galim v. Sadarijan Bibi, 1916 Cal 530=29 I C 621=43 Cal 59.

9. Allah Ditta v. Nazer Din, 1916 Lah 155=33 I C 474=53 P R 1916 (F B).

it was paid but when the mortgage contract was entered into regardless of whether and when the consideration was paid or made good. It was further held that a mortgage, of which the whole consideration had not been paid, was valid to the extent of the money advanced. Similarly, a sale is complete when entered into though the seller retains a lien on the property sold to the extent of the unpaid purchase money. Apart from the Single Bench decisions of this Court the weight of authority is towards the view that a suit for specific performance of a contract to advance money on a mortgage is incompetent and that any unpaid balance of the mortgage consideration cannot be attached in execution of a decree. The Master of the Rolls (Sir John Romilly) said that :

It certainly is new to me that this Court has ever entertained jurisdiction in a case where the only personal obligation created is that one person says if you lend me the money I shall repay it and give you good security and the terms are settled between them. The Court has said that the reason for compelling specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said that the remedy here is inadequate or defective? It is a simple money demand; the plaintiff says, I have sustained pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is a mere matter of calculation, and a jury would easily assess the amount of the damage which the plaintiff has sustained.

Similarly, attempts to compel a man to borrow money were held incompetent. The correct view is that such a contract cannot be specifically enforced, though the mortgagor has a remedy in a suit for damages. It follows that the so-called debt attached in this case could not be validly attached. I would accept this appeal, set aside the decision of the District Judge and the Single Bench of this Court and restore the judgment of the trial Court decreeing the claim. The appellants will have their costs of this Letters Patent appeal and of the trial Court, and parties will bear their own costs before the District Judge and the Single Bench.

Din Mohammad, J.—I agree.

K.S./R.K.

Appeal accepted.

* A. I. R. 1936 Lahore 729

SKEMP, J.

Abdul Rahman and others—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No 1687 of 1936, Decided on 11th February 1936, from order of Addl. Dist. Magistrate, Rohtak, D/- 30th October 1935.

(a) Criminal P. C. (1898), S. 423—Powers of appellate Court—Appeal by accused—Sentence of fine cannot be enhanced by reducing imprisonment.

Where the trial Court passed a sentence of four months' imprisonment and a fine of Rs. 20 each against the accused, and the appellate Court on appeal by the accused and not by the Crown against the sentence, reduced the period of imprisonment but enhanced the fines:

Held: that it was objectionable on appeal to enhance the sentences of fine as, under S. 423, an appellate Court cannot, in an appeal by the accused from conviction, enhance the sentence passed by the lower Court. [P 730 C 1]

* (b) Criminal P. C. (1898), S. 423—Powers of appellate Court—Second Class Magistrate passing sentence of fine—Accused members of same family—Appellate Court cannot pass sentence of fine for aggregate amount beyond the maximum allowed to Second Class Magistrate.

Where a Second Class Magistrate passed a sentence of fine on the accused who all were the members of one family, aggregating Rs. 120, the Additional District Magistrate, on appeal, has no power to pass a sentence of fine aggregating an amount beyond the maximum allowed to a Second Class Magistrate.

[P 730 C 1]

Muhammad Amin—for Petitioners.

Order.—The six petitioners are Sarfraz Ali and his three sons, Abdul Rahman, Abdul Ghani and Mohammad Ali, his brother Sadiq Ali and his nephew Akbar Ali. The four younger men were sentenced to four months' rigorous imprisonment and Rs. 20 fine each, and the two elder ones to imprisonment till the rising of the Court and Rs. 20 fine. Rs. 50 was awarded to the complainant as compensation. These sentences were passed by a Magistrate of the 2nd Class. On appeal the Additional District Magistrate found that the complainant gave the original act of provocation and altered the convictions to S. 335 read with S. 149, I. P. C. He altered the sentences to the imprisonment already undergone and a fine of Rs. 50 in the case of four younger men only. He disallowed compensation to the complainant, who, he found, was partly to blame.

Monroe, J. issued notice on the ground that it was objectionable on appeal to enhance the sentences of fine, there being no appeal by the Crown. Mr. Muhammad Amin also points out that the petitioners are all members of one family and that the aggregate sentence of fine amounts to Rs. 240. In my opinion both these grounds are cogent, and I reduce the sentences of fine to the original amounts, namely Rs. 20 each.

D.S./R.K.

*Petition allowed.***A. I. R. 1936 Lahore 730**

DIN MOHAMMAD, J.

Emperor.

v.

Jiwan Lal Gauba—Accused.

Criminal Misc. Petn. No. 108 of 1936,
Decided on 6th May 1936.

Criminal P. C. (1898), S. 497 (5)—Proceedings under—Accused, released on bail, misusing concession given to him—He by seeing prosecution witness impeding, minimising and destroying evidence against him—He is liable to be re-arrested under S. 497 (5).

The granting of bail in a non-bailable offence is a concession allowed to an accused person and it presupposes that this privilege is not to be abused in any manner and that the accused person has not come into contact with the prosecution witnesses or to exert any undue influence on them so as to destroy the evidence or to minimise its effect against him. It is a sort of trust reposed in him by Court and if it is found that he has betrayed this trust in any manner or that he has misused the liberty thus granted to him by the Court, he disentitles himself to the privilege so granted and he can be re-arrested and put into custody under S. 497 (5), Criminal P. C. This is more specially so, when he happens to occupy a dominating position in relation to the witnesses concerned and can injure or benefit them by his own fiat. The object of S. 497 (5) is not punitive, but it is equally true that the interests of the administration of justice demand that nobody should be allowed to impede the course of justice or hamper its administration in any manner.

[P 731 C 1]

*(Diwan) Ram Lal—for the Crown.**M. Sleem—for Accused.*

Order.—Jiwan Lal Gauba is involved in a case under S. 409, I. P. C. The charge against him is that in the capacity of a Director of the Bharat Insurance Company he committed criminal breach of trust in respect of Rs. 19,000 odd by issuing two cheques in favour of the Peoples' Bank with a view to purchase two decrees outstanding against his father Lala Harkishan Lal who has lately been adjudged an insolvent. Jiwan Lal was arrested on

30th April 1936 but was released on bail by the District Magistrate on the same day. On 4th May the present application was made by the Government Advocate under S. 497, sub-s. (5), Criminal P. C., for cancellation of Jiwan Lal's bail on the ground that he had abused his liberty and made an attempt to tamper with the prosecution evidence. This application was supported by three affidavits sworn by Khawaja Nazir Ahmad, Bar-at-Law, Mr. Swami and Muhammad Din. Khawaja Nazir Ahmad is the receiver of the estate of Lala Harkishan Lal and as such has a substantial interest in the affairs of the Bharat Insurance Company. The other two deponents are the employees of the Bharat Insurance Company.

Notice was issued to Jiwan Lal Gauba to show cause why he should not be arrested and committed to custody. He appeared with his counsel Mr. Sleem and contended that the allegations made against him both in the application and the affidavits were false. At his own request he was examined on solemn affirmation and in the course of his examination he admitted that he had made a request to the Manager and the Assistant Manager of the Bharat Insurance Company to let him know the gist of the statements made by them to the police and also commissioned them to procure similar statements from the other employees of the Company. He further produced all those statements which had been supplied to him in compliance with his wishes.

The question is whether the material brought on the record justifies this Court in taking action under S. 497, sub-s. (5), Criminal P. C. From the statement made by Jiwan Lal it is established that he brought himself into contact with some of the prosecution witnesses in the case against him. To some he made a direct request; the others he approached through the General Manager and the Assistant Manager. It is also proved that he wanted to secure this information either in their own handwriting or over their signatures. It is clear that he exercises plenary powers in relation to his employees. He has admitted that in certain cases he imposed fines on verbal orders and directed their payment to charity rather than to the coffers of the Company. He has also stated that in the case of one employee who refused to address him as

Director-in-charge, a designation which he says he has coined himself, he suspended him. Now if a man of his position and influence has recourse to this novel procedure of extracting information from his own employees, either in their own handwriting or over their signatures, however innocent the matter may appear to him to be, it cannot but be interpreted otherwise by the employees themselves who may be led to believe that their safety lies in his safety and that if they wanted to retain the means of their livelihood they should not do anything which may prejudice his case in any manner. This to my mind is nothing less than an indirect attempt to intimidate or terrorise the prosecution witnesses.

The granting of bail in a non-bailable offence is a concession allowed to an accused person and it presupposes that this privilege is not to be abused in any manner and that the accused person has not to come into contact with the prosecution witnesses or to exert any undue influence on them so as to destroy the evidence or to minimise its effect against him. It is a sort of trust reposed in him by Court and if it is found that he has betrayed this trust in any manner or that he has misused the liberty thus granted to him by Court, he disentitles himself to the privilege so granted. This is more specially so, when he happens to occupy a dominating position in relation to the witnesses concerned and can injure or benefit them by his own fiat. It is no doubt true, as contended by Mr. Sleem, that the object of S. 497 (5) is not punitive, but it is equally true that the interests of the administration of justice demand that nobody should be allowed to impede the course of justice or hamper its administration in any manner. I hold therefore that the application made by the Government Advocate is not without foundation and that Jiwan Lal in thus making an attempt to approach the prosecution witnesses and require them to supply him with the gist of the statements made by them to the police abused the opportunity granted to him by the Court and has thus disentitled himself to enjoy the concession any longer.

Before I close I may remark that the Government Advocate has also argued that as the offence is punishable with transportation for life, it was not competent to the District Magistrate to enlarge the accused on bail, inasmuch as there

appeared reasonable grounds for believing that the offence had been committed by him. I however intentionally refrain from making any observations on that point, as I apprehend that any remark made by me one way or the other may prejudice the trial of the case. Under sub-s. (5), S. 497, Criminal P. C., I order that Jiwan Lal Gauba be immediately arrested and committed to custody. He will be treated as an under-trial prisoner of class (1).

R.W./R.K.

Petition accepted.

*** A. I. R. 1936 Lahore 731**

YOUNG, C. J. AND ABDUL RASHID, J.

Phullu and another—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1501 of 1934, Decided on 17th January 1935, from order of Sess. Judge, Multan, D/- 5th November 1934.

*** Criminal Trial—Accomplice — Woman cognizant of intention of her paramour of killing her husband, not disclosing it to her husband—Her testimony is of no higher value than that of accomplice.**

Where a woman, although cognizant of the fact that her paramour intended to kill her husband, does not disclose the fact to her husband, she must be regarded as an accomplice in the crime. In any case, her testimony cannot carry any higher value than the testimony of an accomplice. [P 732 C 1]

M. L. Puri and Krishen Swarup—for Appellants.

Nazir Hussain—for Opposite Party.

Young, C. J.—The appellants Phullu and Gullu have each been sentenced to death, under the provisions of S. 302, I. P. C., for the murder of Anwar, their first cousin. They have preferred an appeal to this Court and the case is also before us under S. 374, Criminal P. C., for the confirmation of the capital sentence. Briefly stated the case for the prosecution is that Mt. Shadan (P. W. 2), the wife of Anwar deceased had contracted illicit intimacy with Phullu appellant. The deceased Anwar was an elderly man of 50, while Mt. Shadan is a young woman of about 25 years of age. Phullu appellant was living in the neighbourhood of Anwar, and Shadan had ample opportunity to carry on her illicit intrigue without any hindrance. Anwar discovered that his wife Mt. Shadan was carrying on with Phullu appellant, and he went to live at another well situated

at a distance of about a mile from the residence of Phullu.

The principal evidence in the case consists of the statement of Mt. Shadan who is the only eye-witness. According to her testimony Phullu had offered to procure poison so that she might administer it to her husband. She however did not agree to carry out his wishes. Phullu then told her that he would kill Anwar himself without any assistance from her. She stated in the Court of the Sessions Judge that she did not agree to the suggestion put forward by Phullu appellant but tried to dissuade him from carrying out his plan. Before the committing Magistrate however Mt. Shadan had admitted that she kept quiet when Phullu told her that he would murder her husband and that she did not disclose this to her husband. Anwar was murdered on his thrashing-floor where he and his wife Mt. Shadan were sleeping on two separate cots. It seems to us clearly established by the statement of Mt. Shadan herself that she was cognizant of the fact that Phullu intended to kill her husband and that in spite of this she did not disclose the fact to her husband. In these circumstances she must be regarded as an accomplice. In any case, her testimony cannot carry any higher value than the testimony of an accomplice.

On behalf of the prosecution reliance was placed on the statements of four other witnesses namely, Sawan (P. W. 3), Kamal (P. W. 4), Naza (P. W. 5) and Mt. Sarwar (P. W. 7). All these witnesses depose that soon after the murder they were told by Mt. Shadan that her husband had been killed by the two appellants. Their source of information being the statement of Mt. Shadan, their evidence cannot be regarded as corroborative of the evidence of the accomplice. The only other evidence in the case consists of the statements of Allah Wasaya (P. W. 10) and Nuran (P. W. 11). Allah Wasaya alleges to have seen the two appellants armed with dangs shortly before the murder, and Nuran alleges to have seen them a short time after the murder had been committed. These witnesses did not make any mention of the incident to the police for three days after the occurrence. Their evidence is otherwise also unsatisfactory. No reliance can therefore be placed on their testimony. The evidence summarised above, in our

opinion, does not establish the guilt of the appellants beyond all reasonable doubt. We therefore give the appellants the benefit of the doubt, accept their appeal and order that they be set at liberty forthwith.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 732

ADDISON AND ABDUL RASHID, JJ.

Emperor.

v.

G, a Pleader, Gujrat—Accused.

Civil Misc. No. 84 of 1936, Decided on 25th March 1936.

Legal Practitioner — Misconduct—Pleader attempting to bring influence on Judge through his relative is guilty of gross misconduct—Serious notice should be taken of such acts—Pleader concerned, inexperienced admitting his guilt and expressing penitence—Offence not viewed with disfavour by public—He need not be punished so severely as he deserves.

A pleader attempting to bring influence on a Judge, before whom he is arguing an appeal, through a relative of the Judge, is guilty of gross misconduct. His act is highly reprehensible and it is in the interests of the legal profession that serious notice should be taken of such acts and severe punishment is called for in such a case.

Where however the pleader concerned is inexperienced, and expresses his penitence at once and makes no denial of what he had done, and the offence is not viewed by the public with the disfavour it should, he need not be punished as severely as he deserved.

Pleader severely censured and warned and ordered to pay the costs of the proceedings.
[P 788 C 1]

Ram Lal (Diwan)—for Petitioner.

Asad Ullah Khan and Abdul Aziz—for Respondent and Respondent in person.

Addison, J—Notice issued to the respondent to show cause why he should not be dealt with under S. 13, Legal Practitioners' Act, in that, while he was holding a certificate to practice as a pleader issued by this Court, in a criminal appeal pending before the Sessions Judge, Gujranwala, he arranged to get a relative of the Sessions Judge from Kohat with a view to his influencing the Sessions Judge in the decision of the appeal. With this object the respondent brought the relative to the residence of the Sessions Judge and himself waited outside. The Sessions Judge, having discovered what had happened, wrote him a letter, to which he replied admitting that he had done so,

expressing his regret and adding that he was compelled by force of local circumstances to adopt the course he did. It may be added that the accused in the case before the Sessions Judge had been a supporter of the pleader in the District Board election. The case was reported to this Court by the Sessions Judge who suggested that a warning might suffice as perhaps this was the first case in which a Judge had taken such a step with respect to safarish.

The respondent is 32 years old and has only been practising for four years. It may thus be said that he is inexperienced. He admitted his guilt straight away and there is no doubt that public opinion is weaker than it should be in respect of this matter. It is frequently looked upon as a venial offence despite the fact that it implies as much moral obliquity as corruption outright. It was pleaded before us that in view of his youth, the vitiated atmosphere prevailing and the wrong angle of vision taken with respect to this sort of thing, along with the circumstance that he expressed his penitence at once and made no attempt to deny what he had done, we should treat him more leniently than his act merits. In view of these facts and especially of the circumstance that it appears that this offence is not viewed with that disfavour it should, we think perhaps that in the present case the respondent need not be punished so severely as he deserves. At the same time, we wish to state that such acts are highly reprehensible and that it is in the interest of the legal profession that serious notice should be taken of them and we hope that in the future what we have said will act as a check to such acts, even if we have failed to punish the first person who has come before us severely. We consider that punishment is necessary and we direct that he be severely censured and warned and ordered to pay the costs of these proceedings, which we tax at Rs. 450. This sum will include the Government Advocate's fee.

R.M./R.K.

Order accordingly.

A. I. R. 1936 Lahore 733

BHIDE AND CURRIE, JJ.

Secy. of State—Defendant—Appellant.

v.

Tikka Jagtar Singh — Objector — Respondent.

First Appeal No. 2124 of 1931, Decided on 29th November 1935, from decree of Addl. Dist. Judge, Lyallpur, D/- 30th August 1931.

(a) Land Acquisition Act (1894), Ss. 9 and 25—Particulars of claim must be given.

Under S. 9 of the Act a claimant must give particulars of his claim. And if an item is not specified, merely because the amount awarded does not exceed the total amount claimed, he will not be awarded compensation on that score: 1933 Sind 21, *Disting.* [P 735 C 1]

(b) Land Acquisition Act (1894), S. 9—Service on servant held good.

Where a claimant was served with notice under S. 9 through his servant, who accepted service on behalf of his master, communicated with his master and received instructions from him and preferred a claim:

Held: that the service was valid and good under S. 9. [P 735 C 1]

*Dewan Ram Lal and Asadullah—*for Appellant.

*Sardar Harnam Singh—*for Respondent.

Currie, J. — Certain lands in Chaks Nos. 296 R. B. and 233 R. B. were acquired for the projected Chananwala-Lyallpur Railway. The Land Acquisition Collector awarded compensation at the rate of Rs. 480 per acre in the case of Chak No 296 R. B. and Rs. 520 in the case of Chak No. 233 R. B. On objections by Tika Jagtar Singh in respect of the land belonging to him in Chak No. 296 R. B. and Chak No 233 R. B. and by Nathu Ram in respect of land in Chak No 233 R. B. references were made to the District Judge. These references were consolidated and dealt with together. The learned District Judge raised the rate for the land to Rs. 900 in each case. In addition he allowed compensation for severance to Tika Jagtar Singh at the rate of Rs. 250 per square but allowed Nathu Ram nothing under this head on the ground that he had preferred no claim before the Land Acquisition Collector. This award has led to three appeals which may conveniently be decided in one order.

The Secretary of State has appealed in both cases while Nathu Ram has preferred a cross-appeal. In both cases the Secretary of State contested the market value

of the land as fixed by the learned District Judge. In the case of Tikka Jagtar Singh he also contended that the reference was barred by limitation and that Tika Jagtar Singh was not entitled to any compensation for severance because he had not preferred any claim to such compensation before the Land Acquisition Collector, or in the alternative had failed to prove any damage by severance. Nathu Ram in his appeal claimed that he should have been awarded compensation for the land at Rs. 1,200 per acre and also claimed compensation on account of seven marlas occupied by a watercourse for which no compensation has been allowed by the District Judge, on account of two trees and on account of severance.

To take the appeal of the Secretary of State against Tika Jagtar Singh first, it is clear that there is no force in the objection regarding limitation. The award was pronounced on 23rd February 1930 and the application for reference was presented on 8th April 1930. It is, however, pointed out that 6th and 7th April were holidays in Lyallpur and that thus the application was within time. That this was so appears from the order of the learned District Judge on p. 18 of the paper book in connexion with the case of another objector. The learned District Judge remarks that 6th April was a Sunday and the next working day was 8th April. Hence it is clear that the application for reference was within time and is not barred by limitation. As regards the second point the objection that no claim for severance had been preferred before the Collector was raised before the learned District Judge, but he held that the Tika Sahib had not been properly served under S. 9 and therefore the claim could be entertained. It appears that notices under S. 9 were issued to the Tika Sahib and were received by Kahn Singh.

This man is the Sarbrah Lambardar for Tika Jagtar Singh and described himself as the Mukhtar, though subsequently he stated that he had no power-of-attorney. He certainly appeared before the Collector and in his statement before the District Judge he admits service of the notice and states that he had written to the Tika Sahib a week before the date of hearing but got no reply. When he appeared he stated that his statement was the same as that of Nathu Ram who had

claimed Rs. 4,000 per acre compensation. On 20th April 1929 he made a statement in which he claimed that land in exchange should be given in Chak No. 289, and when asked whether he was prepared to accept land elsewhere he stated that he would not answer but would consult his master. He admits that before he made that statement he had already consulted his master. Finally, on 30th April, Ram Singh who held the general power-of-attorney from the Tika Sahib presented a petition in which he stated that he was not prepared to take land at a distance. Neither in this petition nor in the statement of Kahn Singh was any claim preferred on account of severance. It is therefore urged by the learned Government Advocate that the District Judge could not award anything on this score in view of the provisions of S. 25, Land Acquisition Act. In this connexion he has cited 7 Lah 416 (1), 40 I C 274 (2) and 46 I C 906 (3) which clearly support his contention.

On the other hand it is contended on behalf of the respondent that where it is intended to apply the provisions of S. 25, Land Acquisition Act, it is necessary that the provisions of S. 9 should have been strictly complied with. The learned Counsel for the respondent has cited in this connexion 1930 Cal 471 (4) and 1930 Mad 836 (5) in both of which cases it was held that 15 days clear notice must be given under S. 9. Reference was also made in 1933 Sind 21 (6), but in that case compensation on the score of severance had been claimed before the Collector though the amount had not been specified and the learned Additional Judicial Commissioner remarked that that would indubitably afford a sufficient ground for condonation and more so when the respondent had placed materials showing what his expert considered to be a fair compensation, and the Land Acquisition Officer

1. Orient Bank of India v. Secy. of State, 1926 Lah 401=94 I C 245=7 Lah 416=27 P L R 656.
2. Ram Prasad v. Collector of Aligarh, 1917 All 52=40 I C 274.
3. Umar Bakhsh v. Secy. of State, 1918 Lah 160=46 I C 906.
4. Tara Prasad v. Secy. of State, 1930 Cal 471=127 I C 666=57 Cal 837=34 O W N 323.
5. Venkatarama Iyer v. Collector of Tanjore, 1930 Mad 836=128 I C 147=53 Mad 921.
6. Secy. of State v. F. E. Dinshaw, 1933 Sind 21=146 I C 1040=27 S L R 84.

dealt with the claim on the materials placed before him without demur and without requiring the respondent to make the claim more specific. He remarked that he was prepared to go further and hold that the respondent was under no obligation to specify the amount as claimed under this item and that in any event, as he had claimed compensation at the rate of Rs. 20 per square yard plus something more, S. 25, Cl. (2), was no bar to his being awarded a total compensation in respect of all items in excess of that awarded by the Land Acquisition Officer provided it was not more than Rs. 20 per square yard.

In the present case, however, it is clear that though a total amount of compensation largely in excess of the amount awarded by the Collector was claimed no mention was made of any claim in respect of severance. It is clear from the perusal of S. 9, Land Acquisition Act, that a claimant must give particulars of his claim. Construing the section liberally the view taken by the learned Additional Judicial Commissioner in 1933 Sind 21 (6), viz., that, where a claim to compensation on the score of severance has been made though the amount has not been specified, it can be entertained provided that the total amount of compensation eventually awarded does not exceed the total amount claimed by the objector, would not apply in the present case. The sole question is whether the Tika Sahib was served with notice. Mr. Harnam Singh points out that the notice itself was in many ways defective. That is true, but the objection was not taken earlier. He further contends that S. 9 (3) contemplates personal service and that Kahn Singh was not an agent authorized to receive service on behalf of Tika Sahib as he had no power-of-attorney. Now, in the present case it is clear that Kahn Singh did accept service on behalf of the Tika Sahib and communicated with him and was receiving instructions from him. The Tika Sahib himself, who is the only person in a position to say whether he had received intimation, refrained from appearing in the witness box, and in these circumstances I should have been prepared to hold that he had been duly served with the notice under S. 9 and failed to prefer any claim on the score of severance before the Collector.

It is unnecessary, however, to record any definite finding on that point as the appeal of the Secretary of State as regards the compensation awarded for severance must succeed on the short ground that the objector has failed to produce any evidence to show what damage he would suffer on this score. The proposed railway line for which the land was acquired indeed cuts across his land, but considerable areas remain on either side and there is no evidence to show that the value of these lands would be decreased by severance or that any extra expenditure would be necessary to cultivate them efficiently. It is clear on the evidence of the Executive Engineer (P. W. 4) that the railway would provide necessary culverts and new watercourses if necessary. This disposes of the evidence of the Patwari (P. W. 5) who merely states that if a railway line passes through this land, the out-off portion will lose its means of irrigation unless culverts are provided. The only other evidence produced by the respondent on the question of severance was the vague statement made by P. W. 2 Anup Singh who estimated that in his case in another Chak the value of the square had been reduced by one half as separate supervision was required on either side while borrow-pits attracted rain water. On such meagre data it is impossible to uphold any claim for compensation on the score of severance.

As regards the market value of the land the learned Government Advocate contends that the value placed upon it by the learned Additional District Judge is too high, while on behalf of Nathu Ram it is contended that the price should be enhanced. The Patwari states that prices reached their highest level in 1926-27 and that the two Chaks are of the same value. We have one instance of sale by auction, viz., one killa of nehari land in Chak No. 296 in the year 1926 for Rs. 555. The statement of private sales printed at pp. 78 and 79 of the paper book gives on four transactions an average value in Chak No. 233 of Rs. 1,016 per acre. Two sales in 1924 of considerable areas give rates of Rs. 936 and Rs. 896 respectively per acre. The average, however, is swollen by the remaining two sales in 1927. In both cases the vendor was one Charanjit Singh. In May 1927 he sold by a registered deed 55

kanals 10 marlas for Rs. 7,500 giving an average of Rs. 1,089. A reference to the sale deed shows that only Rs. 4,000 was actually paid before the Sub-Registrar, Rs. 2,000 being described as earnest money, while a pro-note was taken for the balance of Rs. 1,500. Though Charanjit Singh was placed in the witness box by the objector this deed was never put to him and he was never questioned regarding the receipt of cash.

The second sale by him was an oral transaction by which he sold 124 kanals 12 marlas for Rs. 18,900 in July 1927. This gives an average rate of Rs. 1,216 per acre. The mutation Ex. P-4, which was sanctioned in September, shows that only Rs. 10,700 was paid at the time of the attestation of the mutation entry it being alleged that Rs. 5,700 had been paid as earnest money and Rs. 2,500 more had been paid on the day the report was made to the Patwari. The vendor, when examined, was very vague about this transaction. He first stated that the area was about 13 acres and then stated that it was about 20 acres and gave no details regarding the price. Though this sale took place a couple of months after the other sale, the vendor states that it was a year or two later. The vendee Hari Singh (P. W. 3) is also somewhat vague in giving the area as 120 kanals. Neither of these two transactions by Charanjit Singh is of much value as the actual payment of the alleged price has not been established. As regards the oral sale it seems extraordinary that a transaction of this magnitude should be carried out in such a manner. I, therefore, am of opinion that these two transactions are of no help in determining the value.

The learned District Judge relied on calculations of the capitalized value of rents in reaching his estimate of the market value, but neither party attaches any importance to this and in my opinion these rents are not a safe guide. After a consideration of the available evidence and hearing counsel I am of opinion that the figure of Rs. 900 per acre assessed by the learned Additional District Judge is a fair price in view of the fact that in 1928 prices had according to the Patwari begun to go down from the peak level reached in 1926-27. I can see no ground for reducing the figure as suggested by the learned Government Advocate or enhancing it as urged by Nathu Ram's counsel. I,

therefore, accept it as a fair valuation. As regards the appeal of Nathu Ram the learned Government Advocate concedes that he is entitled to receive compensation for the area of 7 marlas occupied by a watercourse passing under the line. He suggests that compensation should be nominal as the railway will afford facilities for passing water under the line. It is clear, however, that the proprietary right in the land has been acquired, and though the land may at present be used as a watercourse it might at any time, in the event of re-organisation of the irrigation arrangements, be cultivated. I would, therefore, award compensation for this area at the same rate as that of the cultivated land, viz. Rs. 900 per acre. This comes to Rs. 39.6.0 for 7 marlas. As regards the remaining claims preferred by Nathu Ram admittedly he preferred no claim to compensation for the two trees or on the score of severance when he appeared before the Collector and therefore in view of the rulings cited above his claim was rightly rejected by the learned District Judge.

One further point remains in both cases. The learned Government Advocate has contended that the learned District Judge erred in awarding the objectors proportionate costs. That was a matter within the discretion of the District Judge and I see no ground for interference. The actual calculations of the costs appear to be correct as far as pleader's fee is concerned. In view of the above findings I would dismiss in toto the appeal of the Secy. of State as against Nathu Ram with costs. As regards Nathu Ram's appeal I would accept it to the extent of increasing the amount awarded to him by Rs. 39.6.0 on account of 7 marlas of watercourse with proportionate costs. His appeal is otherwise dismissed with costs. As regards the appeal of the Secy. of State as against Tika Jagtar Singh I would accept the appeal to the extent of disallowing the compensation awarded on account of severance, that is to say, Rs. 1,250. To that extent the appeal is accepted and the amount awarded by the learned District Judge is reduced by Rs. 1,250. As the appeal has only been partially successful I would leave the parties to bear their own costs in this appeal.

Bhide, J.—I agree.

V.B./R.K. Appeal partly accepted.

A. I. R. 1936 Lahore 737

COLDSTREAM, J.

Gurbakhsh Singh—Judgment-debtor—Appellant.

v.

(Firm) *Lal Chand-Darshan Lal*—Decree-holders—Respondents.

Misc. First Appeal No. 1858 of 1935, Decided on 24th February 1936.

(a) Execution—Exemption from attachment—Jagirdars promised freedom from attachment of property by Board of Administration—Such immunity held did not apply to property of their successors.

Where the letter of the Board of Administration promised a number of jagirdars of the time being freedom from attachment of their property:

Held: that such immunity was not attached by the Board's order to the property of all their successors and that jagirdar was not a Ruling Chief and that the Civil Procedure Code made no mention of exemptions allowed by executive order. [P 738 C 1]

(b) Custom (Punjab)—Ancestral property—Includes both lands and houses—Exempt from attachment.

Ancestral property which devolves in accordance with Punjab agricultural custom includes both lands as well as house and such property is exempt from attachment in execution: 4 P R 1913 and 28 P R 1913, *Rel. on.* [P 738 C 2]

(c) Estoppel—Agreement to exempt judgment-debtor from personal liability in consideration of making all his property liable—Judgment-debtor cannot raise plea that property is ancestral in execution proceedings.

The judgment-debtor agreed with the decree-holder that in consideration of the latter's undertaking not to have him arrested all his property would be liable. Later in execution proceedings he raised the plea that his ancestral properties were not liable to attachment:

Held: he was estopped from raising this plea. [P 738 C 2]

(d) Civil P. C. (1908), S. 60 (1) (c)—Person not tilling land and earning livelihood thereby wholly or partly is not agriculturist.

An agriculturist is a professed cultivator of and, a farmer or husbandman. In S. 60, Civil P. C., the term does not exclude a large landowner or a person who does not depend solely or mainly on cultivation for his livelihood. But a person who does not himself till land and earn his living thereby, wholly or partly, is not an agriculturist within the meaning of the section. [P 739 C 1]

(e) Civil P. C. (1908), S. 60—Agriculturist disclaiming right to object to attachment of his land—Whether decree-holder is entitled to attach in spite of S. 60—*Quaere*.

Quaere—Whether a judgment-debtor agriculturist's compromise with the decree-holder by which he disclaims any right to object to the attachment of his land entitles the decree-holder to attach it in spite of the provisions of S. 60. [P 739 C 1]

Shamair Chand—for Appellant.

M. L. Puri—for Respondents.

1936 L/93 & 94

Judgment.—Sardar Bahadur Gurdit Singh, a Jat Sikh Jagirdar of Shamgarh, and his son Sardar Gurbakhsh Singh struck a balance on 22nd October 1929 acknowledging a debt of Rs. 29,500 due to the firm Lal Chand-Darshan Lal of Ladwa. On 6th January 1934, by which time Sardar Bahadur Gurdit Singh had died, the firm sued Gurbakhsh Singh to recover the debt which had increased to Rs. 36,000. The suit was compromised, the Sardar agreeing to a decree for Rupees 36,000 with Rs. 1,481-4-0 costs being passed against him. The compromise deed declared that,

the decretal amount would be recoverable from every sort of property of Sardar Gurdit Singh deceased as also from every kind of property of the defendant, that the defendant would not be personally liable, in other words the plaintiffs decree-holders would not be entitled to ask for the judgment-debtor's arrest and imprisonment.

After examining the parties the Senior Subordinate Judge, Karnal, passed a decree which was worded as follows:

It is ordered that in terms of the compromise arrived at between the parties the plaintiff is hereby allowed a decree for Rs. 36,000 with three-fourths costs Rs. 1,481-4-0 against the defendant. The defendant will not be personally liable.

In execution of this decree the plaintiffs attached Sardar Gurbakhsh Singh's residence in Shamgarh. The property it seems is a substantial mass of buildings known as a fort. The Sardar objected to the attachment on the grounds that under the orders of Government (the Board of Administration) communicated in a letter sent to an ancestor by the Commissioner of Ambala in 1850, his property was not liable to attachment in execution of the decrees of a civil Court, that according to the decree he was not personally liable, which meant that his property could not be attached, that the fort was exempt from attachment under S. 60 (1) (c), Civil P. C., and that the fort was ancestral property to which the principle laid down in 4 P R 1913 (1) was applicable.

The Senior Subordinate Judge decided on the evidence that the Sardar was not an agriculturist for the purpose of S. 60 (1) (c), Civil P. C., and that though the ruling in 4 P R 1913 (1) was applicable to his ancestral property he was bound by his compromise under the terms of which he had agreed to the decretal

1. Jagdip Singh v. Narayan Singh, (1913) 4 P R 1913=15 I O 366.

amount being recovered from his personal property. He overruled the objection based on the orders of the Board of Administration, and holding that the wording of the decree did not relieve the Sardar's property from attachment and sale, but only his person from arrest, dismissed the objection. The Sardar has appealed and it is contended that the learned Subordinate Judge's decision is wholly incorrect because : (1) the Board of Administration had exempted the Jagirdar of Shamgarh's property from attachment in execution of civil decrees, (2) the fort was ancestral property and not liable to attachment as decided in 4 P R 1913 (1), (3) the decree itself exempted the Sardar from personal liability and did not merely provide that he was not to be arrested and (4) under S. 60 (1) (c) the fort could not be attached in execution of a decree, the Sardar being in fact an agriculturist. The letter of the Board of Administration promised a number of Jagirdars of the time being, (and these were all referred to by name) freedom from attachment of their property but it is not shown that such immunity was attached by the Board's order to the property of all their successors. The Jagirdar is not a Ruling Chief and the Procedure Code makes no mention of exemptions allowed by executive order. I find no force in this plea.

I have no doubt that the Senior Subordinate Judge interpreted the decree correctly as meaning that the judgment-debtor will not be liable to arrest. This is clear from the compromise. The decree is meaningless unless read along with the compromise and it expressly purports to be in the terms of the compromise which allowed the decree-holder to proceed against all the property of the judgment-debtor. On this point also there is no force in the appellant's argument. The decree-holder's counsel contends that the principle laid down in 4 P R 1913 (1) is not applicable to ancestral house property but only to ancestral land ; (it is admitted that the fort is ancestral property), and that in any case the Sardar was estopped by his conduct in agreeing to the terms of the compromise from pleading immunity from attachment for his property. He also argues that the Sardar was at liberty to contract himself out of the scope of this ruling, and did do so, and that even if he is an agriculturist,

S. 60, Civil P. C., will not prevent the attachment of his property because he has expressly waived his privilege under that section.

Neither counsel has referred me to any authority on the question whether the principle enunciated in 4 P R 1913 (1) extends to ancestral house property or not. The judgment throughout speaks only of landed property but I am unable to see why the ruling should not apply to all ancestral property which devolves in accordance with Punjab agricultural custom and the view that it does apply is supported by the judgment in the Civil Revision judgment printed at page 28 of P R 1913 (2). The learned Senior Subordinate Judge has held that it does apply.

But the principle is not embodied in any statute and I agree with the lower Court's decision that the Sardar cannot be allowed to rely on it in face of his agreement with the decree holder made in consideration of the latter's undertaking not to have him arrested. The Sardar is estopped from raising this plea although possibly the rights of other persons concerned may not be affected by his conduct. It remains to consider the question whether the Sardar's houses can be attached in spite of the provisions of Cl. (c), sub-s. (1), S. 60, Civil P. C. The learned Senior Subordinate Judge has found upon the evidence that the property is not let on rent or lent to others or left vacant. If therefore he is an agriculturist the provisions of that section as amended by S. 35, Punjab Relief of Indebtedness Act, will prevent its attachment unless it be held that the Sardar waived the privilege given by that enactment and his waiver binds him. It has frequently been observed that in such a case the onus is on the judgment-debtor to establish that he is an agriculturist in fact and not in name only. See for instance 1927 Lah 810 (3). The Sardar is, it is true, a large landowner and derives a large portion of his income from the rent of his landed property. Being a Jat Sikh he is a member of an agriculturist tribe. From his jagir (it is not shown whether this is a grant of the revenue of his own land or not) he receives an annual income of about

2. Adwar v. Allahiyar, (1913) 28 P R 1913=16 I C 967.

3. Bute Shah v. Guranditta, 1927 Lah 810=100 I C 104.

Rs. 4,000. He owns some squares of colony land which are leased and yield an income of about the same amount. Tenants who cultivate his other land pay rents amounting according to the Senior Subordinate Judge to Rs. 500 or Rs. 600. The Subordinate Judge's estimate is not shown to me to be incorrect. But as noticed by the Subordinate Judge the Sardar is not himself a tiller of the land. I have examined the khasra girdawari on which he relies. This shows that a considerable area of land is recorded as khudkasht but all of it is cultivated by tenants. An agriculturist is a professed cultivator of land, a farmer or husbandman (the definition in Murray's Dictionary), and while I can see no justification in the wording of S. 60, Civil P. C., for holding that for the purpose of that section the term excludes a large landowner or a person who does not depend solely or mainly on cultivation for his livelihood, I have no doubt that a person who does not himself till land and earn his living thereby wholly or partly is not an agriculturist within the meaning of the section. The Sardar has given evidence that he has been cultivating some of his land himself and this evidence is corroborated by that of his witnesses. But the khasra girdawari on which he relies does not support his statement. It certainly describes much of his land as khudkasht, but it also mentions that the land is cultivated by tenants at will. In his evidence the Sardar did not attempt to show that the khasra girdawari was wrong in mentioning the tenants. He declared he had cultivated the land of two wells but did not say what land that was, so that his statement could be verified by reference to the Khasra Girdawari. It is possible that the meaning of the entries is that the land was not let on long leases. Having given the matter careful consideration I do not find sufficient ground for differing from the lower Court's decision that the Sardar is not an agriculturist. This ends the matter and the question whether the Sardar's compromise with the decree-holder by which he disclaimed any right to object to the attachment of his land entitled the decree-holder to attach it in spite of the provisions of S. 60, Civil P. C., does not arise. On these findings I dismiss the appeal with costs.

V.B.B./R.K.

Appeal dismissed.

* A. I. R. 1936 Lahore 739

ADDISON AND ABDUL RASHID, JJ.

(Firm) Pars Ram-Brij Kishore — Appellant.

v.

Jagraon Trading Syndicate, Ltd., Jagraon—Respondents.

Letters Patent Appeal No. 112 of 1935, Decided on 26th March 1936, from order of Monroe, J., D/- 22nd June 1935, as reported in 1936 Lah 226.

* (a) Companies Act (1913), S. 156 (1) (iii) —Winding up—Existing members not called upon to contribute unpaid amounts of their share money — Past member is not liable to contribute till this is done : 1936 Lah 226=163 I C 126, Reversed.

In the case of winding up of a Company where existing members on list A are not called upon to contribute to the full extent of the unpaid amounts of their share money, a past member on list B cannot be liable to contribute till list A is exhausted : 1936 Lah 328=163 I C 126, Reversed. [P 740 C 2]

(b) Companies Act (1913), S. 156—Interest—Liability created by S. 156 is new and no interest can be awarded prior to payment order.

The liability created by S. 156 is a new liability and no provision is made for interest therein. It may be that when a Court makes a payment order under that section it could direct future interest on the amount fixed in the payment order until realization but it cannot include interest prior to that time.

[P 741 C 1]

Madan Gopal and Qabul Chand for Shamair Chand—for Appellant.

Nawal Kishore—for Respondents.

Addison, J.—The facts are as follows : On 28th June 1933, a petition was put in by the liquidator of the Jagraon Trading Syndicate, Ltd., under Sections 187, 156 and 225, Companies Act, for a payment order against Rai Sahib L. Pars Ram Brij Kishore as a contributory of the Company for Rs. 1,650 principal and Rs. 924 interest. Eleven shares stood in the name of the respondent firm. The value of each share was Rs. 500 and Rs 50 on each share were paid as application and allotment money. A call for Rs 150 per share was made by the Board of Directors on 16th May 1928, but the respondent did not pay it. The petition went on to state that the respondent's name had been duly placed on list B of contributories and that he was liable to pay the amount applied for. It was further claimed that as he had failed to pay the call money on 16th May 1928, the petitioner was entitled to charge interest at

the rate of 12 per cent per annum from 17th July 1928, the date fixed for payment. Finally it was said that the liquidator was entitled to obtain this payment order to adjust the rights of the contributories amongst themselves.

The petition is set out above, but the following facts are also necessary. The shares of the respondent were forfeited on 15th February 1930, and on 30th June 1930, a petition was filed in Court for the liquidation of the Company under the supervision of the Court. Such an order was passed on 11th November 1932. The District Judge, who was dealing with the liquidation, framed no issues, but on 10th January 1935, made a payment order against the respondent before him to the extent of Rs. 1,650 principal and Rs. 924 interest. He disallowed future interest. It was objected before him that as the shares had been forfeited the respondent was not liable. He repelled this contention by stating that the winding up took place within one year of the order of forfeiture and the respondent therefore could not escape liability under Section 156 (1) (i), Companies Act. He further stated that as the application was in respect of a call made by the Directors before the Company went into liquidation no question arose of the applicability of S. 156 (1) (iii). He then added, though this was not stated in the petition and there appears to have been no trial of the question, that, even if such a question arose, he was satisfied from the liquidator's books that the liabilities could not be met from the existing members.

Against this decision there was an appeal by Rai Sahib L. Pars Ram-Brij Kishore which was heard by a Single Judge of this Court. The contention raised by the appellant was that the claim sought to be enforced was for the payment of a debt in respect of calls before the Company went into liquidation which was barred by limitation. The learned Single Judge remarked that he thought that if the liquidator was forced to rely on the debt created by the original call on the shares in 1928 this argument would prevail. He then went on to state that the argument for the liquidator was that his claim was not on foot of the debt, but was for contribution under S. 156, which, it was well-settled, created a new liability. He held that the appellant came within the terms of S. 156, and

that the only question which might arise was whether existing members were unable to satisfy their contributions: see S. 156 (1) (iii). He then went on to say that the District Judge had gone into the accounts and had found that the liabilities could not be met from the existing members and that therefore, the appellants' appeal should fail. He also distinctly held that the only liability was that created by S. 156.

He however accepted the appeal on one point, namely, he disallowed interest on the ground that as the claim was under S. 156 and not on the footing of the original call the Articles of Association did not apply and interest was not allowed under the provisions of S. 156. He thus allowed the appeal to the extent of striking out the interest and dismissed it as regards the principal sum of Rs. 1,650. Against this decision both parties have appealed, the liquidator claiming interest and Rai Sahib Lala Pars Ram-Brij Kishore claiming that they were not liable to pay until it had been shown that the existing members, that is those on list A, were unable to satisfy the contributions required to be made by them in pursuance of the Companies Act, [S. 156 (1), (iii)].

It seems to us that S. 156 (1) (iii) does apply and indeed this was conceded by the learned Single Judge against whose decision these appeals have been preferred. He however held that there was a finding by the District Judge that he was satisfied from the liquidator's books that the liabilities could not be met from the existing members. This may or may not be so, but it is not disputed before us that no call has been made on the existing members apart from a call of Rs. 150 per share. It was never the case of the liquidator before the District Judge that he had exhausted list A and no opportunity was thus given to Rai Sahib L. Pars Ram-Brij Kishore to adduce evidence on the point. It is unnecessary to do so now as the facts are not disputed and it is not alleged that the existing members have been called upon to contribute to the full extent of the unpaid amounts of their share money. It may be the case that the existing members may not be able to satisfy the contributions required to be made by them in pursuance of the Act and then the other members on list B, such as the appellant before us, can be

called upon to contribute but not until list A has been exhausted.

The learned counsel appearing on behalf of the liquidator attempted to argue that he was claiming on the original call made in 1928, and that this was within limitation as his petition was filed before the District Judge within six years of that call. It is unnecessary to decide this point; for we cannot allow counsel to raise it because it is clearly stated in the order of the learned Single Judge that the argument of the liquidator was that his claim was not on foot of the debt but was for contribution under S. 156, which it was well settled, created a new liability. There is no doubt that this liability is newly created by S. 156, but contributories on list B cannot be called upon until those on list A are finished with. Admittedly this has not been done. The appeal of Rai Sahib L. Pars Ram-Brij Kishore must therefore succeed, the order against them set aside and the claim be ordered to be kept pending until it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Companies Act.

It necessarily follows that the appeal of the liquidator must also be dismissed. At the same time we desire to state that we agree with the decision of the learned Single Judge with respect to interest. The liability created by S. 156 is a new liability and no provision is made for interest therein. It may be that when a Court makes a payment order under that section it could direct future interest on the amount fixed in the payment order until realization, but we are clear that it cannot include interest prior to that time. Parties will bear their own costs throughout. The sum of Rs. 1,650 deposited in Court by Rai Sahib L. Pars Ram-Brij Kishore will be refunded to them.

D.S./R.K.

Order accordingly.

A. I. R. 1936 Lahore 741

AGHA HAIDAR, J.

Mt. Bhani and another—Defendants—Appellants.

v.

Ujagar Singh and others—Plaintiffs—Respondents.

Second Appeal No. 103 of 1936, Decided on 21st April 1936, from decree of Senior Sub-Judge, Amritsar, D/- 30th November 1935.

(a) **Adverse Possession—Question is one of mixed fact and law.**

The question of adverse possession is a mixed question of law and fact and the Court has to draw its inference from the proved facts in the case. [P 742 C 1]

(b) **Adverse Possession—Acquisition of title—Defendants entered as proprietors—Plaintiffs entered as tenants not paying rent to landlord—Mere non-payment of rent is not sufficient for adverse possession—Plaintiff should prove disclaimer of landlord's title.**

The defendants were entered as proprietors of a particular land. The plaintiffs were entered as tenants who did not pay any rent to the landlord. On the basis of this entry, and non-payment of rent for over 12 years, plaintiff claimed title by adverse possession:

Held: that the possession of a tenant was permissive and unless the tenant could prove that he had disclaimed the title of his landlord openly and to his knowledge more than twelve years before the institution of the suit, he could not claim adverse possession against his landlord and that mere non-payment of rent by the tenant could not be treated as adverse possession: 1922 P C 272; 40 Cal 173; 7 Bom 40 and 1919 P C 60, *Rel. on.* [P 742 C 1]

Ganesh Datta—for Appellants.

L. C. Mehra—for Respondents.

Judgment. — This is a defendants' appeal which arises out of a suit for possession of certain land measuring 7 kanals and 10 marlas, bearing khasra Nos. 321 and 324. The present suit was instituted as a result of certain proceedings for cancellation of a notice of ejectment served by the defendants on the plaintiffs. The plaintiffs came into Court on the allegation that they had acquired proprietary title by adverse possession inasmuch as they had been in possession since 1911-12. The trial Court dismissed the plaintiffs' suit; but, on appeal, the Senior Subordinate Judge has set aside the order of the trial Court and decreed the plaintiffs' claim, holding that they have acquired title by adverse possession. It appears that in the column of cultivation in the settlement records of 1912-13 the present plaintiffs were shown as in possession of the land. In the jamabandi papers of 1917-18 the name of Lal Singh, the predecessor of Sham Singh, the contesting defendant, appeared in the proprietary column. This entry appears to have been the result of certain partition proceedings and mutation No. 3.

The plaintiffs were shown as non-occupancy tenants in equal shares. The entries do not show any payment of rent on the part of the present plaintiffs. A

similar entry was repeated in the jama-bandi of 1921-22 and also in the jama-bandi of 1925-26. In the jamabandi of 1929-1930 in the column of cultivation one Kanhaya Singh was entered as a tenant cultivating through two of the plaintiffs, namely, Tilok Singh and Chuhar Singh, under the proprietors, namely, Sham Singh and Mt. Bhani. Under the provisions of S. 44, Punjab Land Revenue Act, these entries shall be presumed to be true until the contrary is proved. Thus the entries show that Sham Singh and his predecessor Lal Singh were the proprietors and the plaintiffs were entered as their tenants. The lower appellate Court has decreed the suit solely on the ground that, inasmuch as the plaintiffs had not paid any rent, at any rate, between the years 1917-18 and 3rd June 1934, their possession, which must be taken to be adverse, has matured into proprietary title.

In my judgment the question of adverse possession, as has been pointed out by their Lordships of the Privy Council in 42 All 152 (1), is a mixed question of law and fact and the Court has to draw its inference from the proved facts in the case. Now, acting on this principle, on the one side we have the entry of the defendants as proprietors and on the other the fact that the plaintiffs are entered as tenants who have not paid any rent to the landlords. Now the possession of a tenant is permissive and, unless the tenant can prove that he had disclaimed the title of his landlord openly and to his knowledge more than twelve years before the institution of the suit, he cannot claim adverse possession against his landlord. Mere non-payment of the rent by the tenant cannot be treated as adverse possession on the part of the tenant. Their Lordships of the Privy Council in 1922 P C 272 (2) had been pleased to observe that

mere non-payment of rent or discontinuance of payment of rent has not, by itself, been held in India to create adverse possession.

Their Lordships quoted with approval the observations of Mukerjee, J., in 40

Cal 173 (3). In fact, as long ago as 7 Bom 40 (4), Sargent, C.J., sitting in a Division Bench, held that mere non-payment of rent was not sufficient to constitute adverse possession against the landlord. I am, therefore, satisfied on the established facts and the authorities quoted above that the decision of the lower appellate Court is erroneous. I accordingly allow the appeal, set aside the decree of the lower appellate Court and dismiss the plaintiffs' suit with costs throughout.

R.W./R.K.

Appeal allowed.

3. Prasanna Kumar Mookerjee v. Srikantha Rout, (1912) 40 Cal 173=16 I C 365=17 C W N 137=16 C L J 202.

4. Tatla v. Sadashiv, (1883) 7 Bom 40.

A. I. R. 1936 Lahore 742

AGHA HAIDAR, J.

(Firm) Ladha Mal-Bishen Das—Plaintiffs—Appellants.

v.

Nadar—Defendant—Respondent.

Second Appeal No 17 of 1936, Decided on 3rd March 1936, from decree of Dist. Judge, Gujranwala, D/- 8th October 1935.

(a) Limitation—Plea under S. 5, Limitation Act—High Court will interfere in second appeal if discretion is not judicially exercised.

It is only when the lower appellate Court exercises a judicial discretion, that the High Court will not entertain a second appeal on a plea that the lower appellate Court was wrong in applying the provisions of S. 5; if the reasoning of the lower appellate Court is based wholly upon an erroneous view of law, or the Court rejects such a plea arbitrarily without exercising judicial discretion, the High Court will interfere in second appeal: 25 All 71; 26 All 327 and 14 I C 59, Ref. [P 743 C 1]

(b) Limitation Act (1908), Art. 152—No question of knowledge of party regarding date of judgment.

Under Art. 152 there is no question of knowledge of the party regarding the date of the decree or judgment. [P 743 C 2]

(c) Civil P. C. (1908), O. 20, R. 1—Court not bound to communicate decision to party.

A Court is not bound to communicate result of a case to the parties. [P 743 C 2]

Jhanda Singh—for Appellants.

Malik Mohammad Aslam—for Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit for the recovery of a sum of Rs. 1,200, principal and interest, the principal amount being Rs. 700. The interest was calculated at the rate of 25 per cent. per annum. The trial Court gave a decree only for Rs. 658-13-0 and

1. Satgur Prasad v. Raj Kishore Lal, 1919 P C 60=55 I C 486=42 All 152=46 I A 197 (P C).

2. Jagdeo Narain Singh v. Baldeo Singh, 1922 P C 272=71 I C 984=49 I A 399=2 Pat 38 (P C).

reduced the rate of interest to 18 per cent. The defendant went up in appeal to the District Judge. The appeal was undoubtedly filed much beyond the period of limitation; but, in the opinion of the learned District Judge, the appellant had been able to explain the delay. He accordingly held that the appeal was within time. On the merits he allowed the appeal and dismissed the plaintiff's suit. The plaintiff has come up to this Court in second appeal.

Sardar Jhanda Singh has argued strenuously that the appeal in the Court below was hopelessly time barred and ought to have been dismissed on that ground. Ordinarily, as I understand, the law is that, if the lower appellate Court has, on an application under S. 5, Limitation Act, held that an appeal was time barred or was within time, the High Court in second appeal would not go behind that finding and interfere. This view of law has been prevalent in the Allahabad High Court for a number of years and the authority for this view is to be found in 25 All 71 (1) and 26 All 327 (2). These two cases were subsequently followed by a Division Bench in 9 A L J 292 (3). It must, however, be observed that in all these cases the learned Judges, while holding that the High Court will not entertain a second appeal on a plea that the lower appellate Court was wrong in not applying the provisions of S. 5, Limitation Act, observed that the High Court would interfere if the Court rejected such a plea arbitrarily without exercising a judicial discretion. In the present case the reasoning of the lower appellate Court is based wholly upon an erroneous view of law and, therefore, it cannot be said that it exercised a judicial discretion. The evidence was recorded in the case on 12th March 1935, by the trial Court and the case was adjourned for delivery of judgment on 14th March 1935. There is evidence in the proceedings of the case, that the pleaders were present before the Court on 12th March, for we find that witnesses had been examined and cross-examined and arguments were heard. At the end of these proceedings taken on 12th March, 14th March 1935,

was fixed for delivery of judgment. Now O. 20, R. 1, Civil P. C., provides that the Court, after the case has been heard, shall pronounce judgment on some future day, of which due notice shall be given to the parties or their pleaders. In the present case there cannot be any manner of doubt after a perusal of the proceedings of the trial Court, that due notice was given to the pleaders of the parties of the day on which the judgment was to be pronounced. On 14th March 1935, when the judgment was announced and the plaintiff's suit was decreed, the defendant was not present either in person or by pleader.

Article 152, Limitation Act, is perfectly clear. It lays down that under the Code of Civil Procedure an appeal to the Court of the District Judge must be filed within 30 days computed from the date of the decree or order appealed from. There is no question here of the knowledge of the party who is desirous of filing an appeal. Counsel for the respondent asks me to transplant the concluding portion of Col. 3, Art. 164, Limitation Act, to Art. 152. This I cannot possibly do. The learned Judge has observed that there was no evidence on the file to show that the result of the case was intimated to the appellant. But the question is whether under the circumstances already narrated it was the duty of the trial Court to intimate the result of the case to the appellant. So far as I am aware there is no law or procedure in support of the opinion of the District Judge that the result of the case should be communicated to the parties. In my opinion the Court has decided the question of limitation on wholly erroneous grounds and its discretion cannot be said to have been exercised according to well recognized judicial principles and correct rules of procedure. The affidavit which has been filed by the appellant in the Court below has been read out to me. It is a typical document which unscrupulous litigants frequently file in Courts of justice on the advice of their equally unscrupulous friends and advisers. He had the audacity to depose that he had been informed by some one in the Court that the date for the pronouncement of the judgment shall be communicated to him later on by service post. I do not believe a word of this statement, and the fact that he is not prepared to mention the

1. *Tulsa Kunwar v. Gajraj Singh*, (1903) 25 All 71=1902 A W N 203.
2. *Hamid Ali v. Gaya Din*, (1904) 26 All 327.
3. *Bikram Singh v. Narain Singh*, (1912) 14 I O 59=9 A L J 292.

source of this alleged information goes to show that it is wholly baseless and the deponent was afraid to commit himself to any detail. In my opinion the appeal of the defendant in the Court below was barred by limitation and should have been dismissed on this ground. I, therefore, allow the appeal, set aside the judgment of the Court below and restore that of the trial Court. The appellant shall get his costs of this appeal.

V.B./R.K.

*Appeal allowed.***A. I. R. 1936 Lahore 744**

ADDISON AND DIN MOHAMMAD, JJ.

Mt. Hiro—Defendant—Appellant.

v.

Arjan Das and others—Plaintiffs—Respondents.

First Appeal No. 1336 of 1933, Decided on 31st May 1935, from decree of Senior Sub-Judge, Amritsar, D/- 10th July 1933.

Religious Endowment—Temple—Private or public—Building containing picture of some god and light eternally burning before it—This fact, by itself, will not be sufficient to convert building into public temple.

A religiously minded Hindu generally sets apart a small portion of his house for purely religious purposes and hence the mere fact that a building contains a picture of some god with a light eternally burning before it, will not by itself be sufficient to convert the building into a public temple, but is quite consistent with the idea of a private temple.

[P 742 C 2]

M. L. Puri, S. L. Puri and Qabul Chand Mittal—for Appellant.

D. R. Sawhney and Nihal Singh—for Respondents.

Din Mohammad, J.—Four residents of Katra Nihal Singh in the town of Amritsar, describing themselves as Shikarpuria Aroras, instituted a suit against Mt. Hiro, widow of Lal Das Thakar. They alleged that she was in possession of a temple, sacred to their caste, in the capacity of a Mahant and as she had diverted the building from its religious use and converted it into a secular building and had also lost her character, she was liable to be removed from the office she occupied and to be replaced by another suitable person as Mahant. Mt. Hiro resisted this suit on the ground that the building in suit was a residential house which was built by the ancestors of her deceased husband and was inherited by herself and her son as the heirs of her husband and

that the plaintiffs had consequently no cause of action and no locus standi to bring the suit. The Senior Subordinate Judge found against her and decreed the suit. She has appealed. We have heard counsel on both sides and have reached the conclusion that this appeal must succeed. The Senior Subordinate Judge has not properly appreciated the oral evidence on the record. He has further attached undue weight to certain pieces of documentary evidence produced by the plaintiffs and has thus been misled into attributing to the building a character which it can under no circumstances be said to possess.

We have been taken through the statements of the plaintiffs' witnesses and have no hesitation in agreeing with the counsel for the appellant that they are quite insufficient to prove the plaintiffs' case. Apart from the fact that these statements are indefinite and vague, almost all the witnesses examined by the plaintiffs strike us as interested and false. They have exaggerated matters and have paid scant respect to the sanctity of the oath they had taken. None of them has produced his book of accounts to support the verbal allegations made by them of having made donations to the temple in spite of the fact that every one of them has alleged that his book of accounts contains entries which would corroborate his statement. The worst offender in this respect is Arjan Das plaintiff who has deposed to the existence of an idol in the building, and, when cross-examined, has confessed his ignorance of the fact whether the idol is built of metal, clay or stone. In fact no idol of any sort was ever installed there. The only thing that was hanging on the wall was a picture of a Mohammedan Prophet, Khwaja Khizer, who is considered to be a 'denizen of waters' and has on this account been wrongly described by the plaintiffs' witnesses as 'Darya Shah' or 'King of rivers.' There is no doubt that some sort of light was kept eternally burning in the building which is generally done by all worshippers of Durga Devi, but that by itself will not be sufficient to convert the building into a public temple, and is quite consistent with the idea of a private temple. Bebari Lal, P. W. 4, has stated that he too burns 'Jot' in his own house and has further added that in the good old days certain Hindus used to

set apart a portion of their houses for the purposes of worship. Sunder Singh, one of the plaintiffs, has also admitted that he keeps a framed picture of 'Darya Shah' in his house for worship and burns Jot in honour of the goddess Durga every day.

Besides, there is not an iota of reliable evidence to show who provided funds for the building, when it was built, who dedicated it to the worship of 'Khwaja Khizer' or 'Joti Sarup,' and how it came to be possessed by Tej Bhan, father of Mt. Hiro's husband, Lal Das. Much stress has been laid on the fact that in the account books of the firm Budha Mal Harkishen Das, relating to Sambat 1936 corresponding to 1879 A. D., there is an entry of Rs. 101 having been paid to Thakar Tej Bhan on account of Mandar. This entry was produced by Madho Ram, P. W. 5, an alleged descendant of the owners of the said firm, but he has stated that these accounts closed in Sambat 1940 (1883 A. D.), and that no subsequent accounts are available. Moreover, it has not been proved that the entry in question relates to the building of this temple. Sardar Gurdit Singh, counsel for the plaintiff, had stated before issues that the temple had been in existence for about 100 years. If this be so, this entry cannot relate to the time when the temple was first built as alleged by Madho Ram, P. W. 5.

Another entry on which reliance has been placed dates back to the year 1919. It is found in the books of the firm Ramji Das Godhu Mal, ancestors of the plaintiff Arjan Das. Under date 19th August 1919, Rs. 200 appears to have been debited to Ramji Das Lila Ram of Peshawar, having been paid in cash to 'Thakar' at the instance of Mt. Sewan and Ganesh Das. This entry is said to have been signed by Lal Das. The entry itself is silent on the point as to why the money was being advanced and beyond the statement of the plaintiff himself, there is no proof that it bears the signature of Lal Das. Arjan Das has stated that this amount was paid 'towards building' without further elucidating his statement. Tirath Das, P. W. 3, a maternal uncle of the alleged donor Ganesh Das, has stated that the sum was paid towards the building of the temple. There being nothing on the record to show that the temple in suit underwent any change in 1919 and nothing in the entry itself to show that

this sum was paid for the purposes now alleged, the mere verbal allegation of these interested persons will not suffice to connect this item with the temple in suit.

Besides these entries there are a few other entries of paltry sums having been donated to some Thakar, but they are too vague to be discussed. Harnam Singh, P. W. 13, has stated that one Dariana Mal created the wakf, but the plaintiff Arjan Das himself has stated that there is another temple situated in Mochianwala Street which is known as Dariana Mal temple. This evidently establishes the falsehood of this witness. Harnam Singh has further produced printed rules and regulations governing the Shikarpuria Aroras which, among other things, prescribes the payment of Re. 1-4 0 to 'Thakar.' This again is an indefinite thing and quite insufficient to prove that the donation was intended for the temple in suit. Mere conjectures and surmises cannot take the place of positive proof and we cannot rely on such vague allegations as this in support of the plaintiffs' assertions. Stress was further laid on the two inspection notes recorded by Lala Guru Datt, Subordinate Judge, and his reader Hari Chand respectively in another suit, which was pending in the Court of the former, but these notes merely establish that one of the rooms in this building bore the look of a place of worship. As remarked above, there is nothing improbable in a religiously minded Hindu setting apart a small portion of his house for purely religious purposes.

As against this, Mt. Hiro has produced evidence, both oral and documentary, which satisfactorily establishes that the building had always been treated as a residential house. It is not disputed that the house has always descended from father to son. Moreover, Thakar Lal Das built a small projection in this house in 1914 in the capacity of an owner and this fact is supported by the Municipal records produced by the Municipal Record Keeper as D. W. 4. Gurdas Ram, D. W. 6, has produced two books of account belonging to Tej Bhan and Lal Das which show that they did some money-lending and commercial business on their own account. They also left considerable property at Shikarpur, their original home. Ishar Singh, D. W. 7, and Partap Singh, D. W. 8 have proved their own dealings respectively with Thakar Lal Das. We are

therefore satisfied that the building in dispute is the private property of Mt. Hiro and the plaintiffs have no locus standi to bring the suit. It may be interesting to note that this building was claimed by the Sikhs also as their Gurdwara, but, fortunately for the lady, the Gurdwaras Tribunal dismissed their claim in 1933. In the result, we accept this appeal, set aside the order of the Court below and dismiss the suit with costs throughout.

D.S./R.K.

*Appeal accepted.***A. I. R. 1936 Lahore 746**

JAI LAL, J.

Imam Din—Plaintiff—Petitioner.

v.

Bhag Singh — Defendant — Opposite Party.

Civil Revn. No. 90 of 1936, Decided on 6th April 1936, from decree of Senior Sub-Judge, Jhelum, D/- 30th November 1935.

(a) **Transfer of Property Act (1882), S. 55—Covenant guaranteeing non-existence of encumbrances necessarily implies condition of indemnity in case of its breach.**

The existence of a covenant in a sale-deed guaranteeing non-existence of encumbrances and its subsequent breach necessarily involves the party who has entered into the covenant to indemnify the other party to the contract. It is not legally necessary that there should be an express condition in the sale-deed on the part of the seller to indemnify the purchaser in case any defect in his title is subsequently discovered. [P 746 C 2]

(b) **Civil P. C. (1908), S. 115—Failure to apply obvious law—Revision lies.**

Where the Judge omits to apply an obvious principle of law he acts illegally in the exercise of his jurisdiction and therefore revision lies. [P 747 C 1]

*Mohsin Shah—for Petitioner.**Amar Nath Chona—for Opposite Party.*

Order.—Abdullah was the original owner of a house. He mortgaged it by means of an unregistered mortgage deed to Bhag Singh and subsequently he mortgaged it for Rs. 300 by means of a registered mortgage deed in favour of one Haveli Ram. Bhag Singh then instituted a suit on his mortgage and obtained a decree for the sale of the mortgaged house. He did not implead Haveli Ram as a defendant. In execution of the decree he himself purchased the house and subsequently sold it to the petitioner Imam Din. In the sale deed it is recited that the house is free from encumbrance. Subse-

quent to the sale of the house to Imam Din, Haveli Ram instituted a suit on his own mortgage making Abdulla, Bhag Singh and Imam Din as defendants in the case. This suit was decreed. Thus under the decree obtained by Haveli Ram the house was declared to be subject to a mortgage for Rs. 300 in his favour and salable to satisfy that mortgage even in the hands of Imam Din who was a party to the suit. Imam Din then instituted a suit for recovery of Rs. 300 from Bhag Singh. This suit was decreed by the trial Judge, but on appeal to the Senior Subordinate Judge it has been dismissed on the ground that Bhag Singh did not himself know that there was a mortgage in favour of Haveli Ram and that there was no indemnity clause in the sale deed by him in favour of Imam Din.

The conclusion of the learned Senior Subordinate Judge in my opinion is erroneous on both these points. The question in this case is not whether Bhag Singh had knowledge of a pre-existing mortgage on the property sold by him, because in that case his conduct in selling the property would be fraudulent, but the present suit is based on a covenant contained in the sale deed executed by Bhag Singh in favour of Imam Din that the house is free from encumbrance, and on the discovery of the existence of an encumbrance it is clear that there has been a breach of that covenant. The existence of such a covenant and its subsequent breach necessarily involves the party who has entered into the covenant to indemnify the other party to the contract. It is not legally necessary that there should be an express condition in the sale deed on the part of the seller to indemnify the purchaser in case any defect in his title is subsequently discovered. A covenant guaranteeing the non-existence of encumbrances necessarily implies such a condition of indemnity. It is next contended for the respondent that the suit is premature. In the first instance this objection was not taken in the trial Court, and secondly in a suit instituted by Haveli Ram for recovery of the money due to him under the mortgage a decree has been granted and to that suit Bhag Singh, Abdulla and Imam Din were parties. It is therefore clear that Imam Din has been damnified and is entitled to be compensated for his loss by his seller who guaranteed a title to him free from encumbrances. It is not a case where

without guaranteeing title the seller merely transfers his right, title and interest in the property sold, in which case there is no guarantee of title and no implied agreement to indemnify.

The last objection² by the respondent's counsel is that no revision lies in this case. I overrule this objection also because in my opinion the Senior Subordinate Judge has omitted to apply an obvious principle of law and has acted illegally in the exercise of his jurisdiction. I accept this petition with costs throughout, set aside the decree of the Senior Subordinate Judge and restore that of the trial Judge.

D.S./R.K.

Petition accepted.

A. I. R. 1936 Lahore 747

JAI LAL, J.

(Bakhshi) Jiwan Singh — Defendant—Appellant.

v.

(Dewan) Radha Kishan—Plaintiff and another—Defendant—Respondents.

Second Appeal No. 1944 of 1935, Decided on 5th March 1936, from decree of Dist. Judge, Jhelum, D/- 25th July 1935.

Limitation Act (1908), Arts. 61, 96 and 120—R and N borrowing Rs. 5,000 on promissory note from J and M — J alone realizing amount by draft on R and N — Suit by J and M against R and N for recovery of Rs. 7,700 on basis on promissory note—Payment by draft alleged to have been made on another account—Court holding payment to have been made on account of promissory note, but decreeing suit in favour of M only for half the amount on ground that J had no authority to receive payment on behalf of M—Decree passed on 10th April 1926 and appeal finally dismissed on 29th January 1931 — M executing his decree and recovering Rs. 1,200 from R and N in 1932 — Suit by R and N in April 1933 against J for recovery of Rs. 1,200 — Suit held to be governed by either Art. 61 or Art. 96 or Art. 120—Suit held to be within time whichever article applied.

In February 1919, R and N borrowed a sum of Rs. 5,000 on a promissory note from J and M. A few months later J realized the amount due from R and N by means of a draft on them. In 1925 J and M instituted a suit for recovery of Rs. 7,700 alleged to be due from R and N on basis of the promissory note, contending that the payment on account of the draft in 1919 was on another account. The Court held that the payment had been made on account of the promissory note, but holding that J had no authority to receive payment on behalf of M dismissed the suit to the extent of half of the claim. The suit was decreed in favour of M for half the amount in suit. The decree by the trial Court was on 10th April 1926 and on ap-

peal by R and N against the decree, this appeal was finally dismissed after a remand on 29th January 1931. The decree obtained by M was executed by him and Rs. 1,200 were recovered from R and N in February, June, July, and October 1932. R and N then instituted a suit on 11th April 1933 against J for recovery of Rs. 1,200 on the ground that the payment of the share of M due under the promissory note to J had been found to be illegal by the Courts and the plaintiff had been made to pay Rupees 1,200 twice over and were therefore entitled to a decree for that amount against J :

Held : that the suit was governed either by Art. 61 or Art. 96 or Art. 120 ; and whichever article applied, the time began to run either from the payment of Rs. 1,200 or from the date of the decree of the High Court, passed on 29th February 1931 ; and the period of limitation in each case being three years, the suit was within time : 1934 *Mad* 12 ; 1925 *Oudh* 719 ; 1921 *Bom* 184 and 13 *Cal* 155, *Ref.* ; 1919 *Mad* 31, *Disting.* [P 749 C 1]

Achhru Ram—for Appellant.

Mehr Chand Mahajan and *Jiwan Lal Kapur*—for Respondent (Plaintiff).

Judgment.—This second appeal raises a difficult question of limitation. The facts are these : In February 1919 Radha Kishan and Narain Kishan borrowed Rs. 5,000 on a promissory note from Jiwan Singh and Milkhi Chand. A few months later Jiwan Singh realized Rs. 5,000 on account of this promissory note from Radha Kishan and Narain Kishan by means of a draft on them. In 1925 Jiwan Singh and Milkhi Chand instituted a suit for recovery of Rs. 7,700 alleged to be due from Radha Kishan and Narain Kishan on the basis of the promissory note. The defence of the defendants was that the promissory note had been discharged by the payment in 1919. The case of Jiwan Singh and Milkhi Chand was that the payment on account of the draft in 1919 was on another account. This however was found by the Court to be false and it was held that the payment had been made on account of the promissory note.

It was also held that Jiwan Singh had no authority to receive payment on behalf of Milkhi Chand. Consequently the suit by Jiwan Singh was dismissed to the extent of half the claim. It was decreed in favour of Milkhi Chand for half the amount in suit. The decree by the trial Court was on 10th April 1926. An appeal was preferred against this decree to this Court by Radha Kishan and Narain Kishan, and on 11th December 1928 this Court remanded an issue to the trial

Court whether Jiwan Singh had authority to receive the money on behalf of Milkhi Chand. This question was answered in the negative and finally the High Court dismissed the appeal on 29th January 1931. In consequence of the dismissal of the appeal, the decree which had been awarded against Radha Kishen and Narain Kishen for half the amount due under the promissory note was executed by the decree holder Milkhi Chand and Rs. 1,200 was recovered by him in February, June, July and October 1932. The suit out of which this appeal has arisen was then instituted by Radha Kishen and Narain Kishen for recovery of Rs. 1,200 from Jiwan Singh on the ground that the payment of the share of Milkhi Chand due under the promissory note to Jiwan Singh had been found to be illegal by the Courts and the plaintiffs had been made to pay Rs. 1,200 twice over and were therefore entitled to a decree against him for that amount.

The Courts below have decreed the suit and the only question raised on this appeal is that the suit when instituted was barred by time. The suit was instituted on 11th April 1933. The learned District Judge has held that the article applicable to the suit is Art. 61, Lim. Act, which governs suits for money payable to the plaintiff for money paid for the defendant, the period of limitation being three years from the date when the money is paid. On behalf of the appellant at one time it was claimed that Art. 62 covered the case; it was then contended that Art. 115 applied; but the Courts below repelled these contentions. Before me the learned counsel contends that it is Art. 96 that governs the suit. Art. 96 applies to suits for relief on the ground of mistake, the period of limitation being three years from the date when the mistake becomes known to the plaintiff. The appellant's counsel contends that the three years time should begin to run from the date of the decree of the trial Court and not from the date of the decree of the High Court. The respondents' counsel on the other hand contends that Art. 96 does not apply to the case, but that if it does, then time should begin to run from the date of the decree of the High Court and as the suit when instituted was filed within three years of the date of the decree of the High Court it is

within time. It is also contended on behalf of the respondents that really it is Art. 120, Lim. Act, which governs the case because no other article applies to it, and if any article comes nearest to the case it is Art. 61 and limitation should begin to run from the date of the payment.

No judgment exactly applicable to the facts of the present case has been cited on either side. On behalf of the appellant 57 Mad 347 (1) is cited, which related to a suit by a partner to recover the share of the defendant in a partnership debt paid by the plaintiff to a creditor of the firm, the defendant also being a partner in the firm. It was held that Art. 61, Lim. Act, did not apply to the case, but an opinion was expressed that Art. 120 applied. This judgment, if at all applicable, helps the appellant only in his argument that Art. 61 does not apply, but if the facts are analogous to the facts of the present case, as seems to be the contention of the appellant's counsel, then Art. 120 would apply in the present case as well. Similarly in 52 I C 468 (2), a judgment of the Madras High Court, cited by the appellant, it was held that Art. 61 did not apply to the facts of that case. In that case the landlord attempted to recover from his tenant dues paid by him to the Government. It was held that Art. 61 did not apply because as between the Government and the landlord the tenant had no liability to pay the amount, but that it was the landlord alone who was liable to the Government. The facts of that case are, therefore, distinguishable from the facts of the present case. In 87 I C 1017 (3), an Oudh case, Art. 96 was applied to a suit by a mortgagor who had paid the mortgage money to one mortgagee whereas there were three mortgagees and the other two had succeeded in recovering their shares from the mortgagor. This case seems to come very near to the present case.

It was held that the date from which limitation should begin to run is the date of the decree. The last case cited on behalf of the appellant is 45 Bom 582 (4).

1. Seenoyya v. Ramalingayya, 1934 Mad 12=146 I C 204=57 Mad 347=65 M L J 789.
2. Muthuramalinga v. Mahalinga Raju, 1919 Mad 31=52 I C 468.
3. Ganesh Parshad v. Jodh Singh, 1925 Oudh 719=87 I C 1017.
4. Martand v. Moreshwar, 1921 Bom 184=61 I C 34=45 Bom 582=23 Bom L R 69.

In that case also Art. 96 was held to be applicable. The suit was by a person to whose share land had fallen on partition which land was subject to a mortgage. The suit was for recovery of the amount of the mortgage debt which the plaintiff alleged that he had paid by mistake. It was held that limitation began from the date of the decree of the first Court and not from that of the appellate Court.

In my opinion, if Art. 96 applies to the facts of this case, then the date from which limitation should begin to run is the date of the decree of the High Court which was passed on 29th January 1931, in the peculiar circumstances of this case. In the first instance, I am not prepared to accept the proposition that in every case of a decree of the appellate Court confirming the decree of the first Court, time should run from the date of the decree of the first Court. It depends on the nature of the suit and the nature of the proceedings to which limitation has to be applied. In the present case, the respondents-plaintiffs were contesting their liability to pay anything to Milkhi Chand on the promissory note, and their liability was finally determined when the decree of the High Court was given. Moreover, the High Court did not merely confirm the decree of the trial Judge; it gave an independent finding by having an inquiry made on a fresh issue framed by it. If Art. 96 does not apply to the case, then probably it is Art. 120 that would apply. I am doubtful if the case is covered by Art. 61; but for the purposes of this case I refrain from deciding which of the three articles applies, i. e. Art. 61, or Art. 96 or Art. 120. In either case time would begin to run either from the payment of Rs. 1,200 or from the date of the decree of this Court, which was passed on 29th January 1931, and under neither of the articles relied upon by the parties is the period of limitation less than three years.

A somewhat similar case was decided in 13 Cal 155 (5), and it was held that time began to run from the date of the payment and not from the date of the decree of the original Court. I hold, therefore, that the suit in the present case was not barred by time and dismiss this appeal with costs.

R.M./R.K.

Appeal dismissed.

5. Tarab Ali Khan v. Nil Ruttun Lal, (1886) 13 Cal 155.

A. I. R. 1936 Lahore 749

AGHA HAIDAR, J.

Bhagat Ram and others—Plaintiffs—Appellants.

v.

Ali Bakhsh and others—Defendants—Respondents.

Second Appeal No. 1689 of 1935, Decided on 28th February 1936, from decree of Senior Sub-Judge, Sialkot, D/- 24th May 1933.

Civil P. C. (1908), O. 21, R. 35 (2)—Decree for joint possession—Joint possession must be delivered in particular manner prescribed by O. 21, R. 35 (2)—Possession given in any other way is of no legal effect—It is not effective for purposes of limitation and does not provide first starting point for limitation.

In giving joint possession to a party, in execution of a decree, the procedure prescribed by O. 21, R. 35 (2) must be strictly followed. Joint possession under a decree granting joint possession, can only be delivered in the particular manner prescribed by the legislature in O. 21, R. 35 (2). It is not within the competence of anybody to attempt to give joint possession in any other manner, and if the patwari or any other person takes upon himself to deliver such joint possession in a manner contrary to the express language of the legislature, their action would not have any legal effect. Such possession is not effective for purposes of limitation and does not provide a fresh starting point for limitation: 1933 Lah 427, Rel. on; 1928 Lah 910, Disting. [P 750 O 1]

Mukand Lal Puri—for Appellants.

Dwarka Das Kapur—for Respondents.

Judgment.—This appeal arises out of a suit for possession of a half a share out of 44 kanals 18 marlas of land described in detail in the plaint. Both the Courts below have dismissed the plaintiffs' suit and the plaintiffs have come up to this Court in second appeal.

On 9th July 1896, Ali Bakhsh, defendant 1, executed a mortgage with possession in favour of the predecessor of the plaintiffs. The area covered by this mortgage was 71 kanals 12 marlas of land. In pursuance of this mortgage, the mortgaged land was mutated in the name of the mortgagee. On 9th April 1919, Haveli Ram, father of the present plaintiffs, brought a suit for possession of half of the land which was the subject of the mortgage. The trial Court, on 18th July 1919, decreed the suit. On appeal the learned District Judge, on 29th January 1920, modified the decree of the trial Court and granted a decree for possession of half of 44 kanals 18 marlas only, on the ground that it was in the mortgagee's possession in

1909 and 1910, that is to say, within a period of 12 years prior to the suit. The decree was for joint possession. Possession was ordered to be delivered under the provisions of O. 21, R. 35 (2), Civil P. C. The document evidencing delivery of possession is before us as Ex. P 1. In this document there is a report of the Patwari that possession had been given of the land through Ali Bakhsh chaprassi in the presence of Bahawal Bakhsh lambar-dar and the decree-holder Haveli Ram. This report bears date 27th June 1921. The Patwari, who made the report, has also given evidence in the present case. There is also a document, dated 28th June 1921, containing the formal receipt of possession by the decree-holder. It merely says that possession had been obtained in the presence of the patwari and other witnesses, and it is also stated that this possession has been obtained by means of ploughing the land (kulba-rani). On 26th June 1933 the plaintiffs brought the present suit for possession of half of 44 kanals 18 marlas on the allegation that they had been dispossessed within the last five or six years. In order to bring their suit within limitation the plaintiffs relied upon the dakhnama, dated 27th June 1921.

There cannot be any manner of doubt that the final decree, dated 29th January 1920, was for joint possession and such a possession could only be delivered in the particular manner prescribed by the legislature in O. 21, R. 35 (2), Civil P. C. It is not within the competence of anybody to attempt to give joint possession in any other manner, and if the patwari or any other person took it upon himself to deliver such joint possession in a manner contrary to the express language of the legislature, their action would not have any legal effect. There is a Division Bench judgment of this Court, in 1933 Lah 427 (1), in support of this view. In that case also some kind of actual possession was given in the place of symbolical possession and the learned Judges pointed out that symbolical possession cannot be said to have been given as required by law and that limitation, therefore, did not run from the date on which the decree for joint possession was executed by the plaintiff's predecessor-in-

interest in this defective manner. This was a Letters Patent appeal and the judgment of the learned Single Judge was upheld. The result, therefore, is that we have the opinion of three learned Judges of this Court, which is directly in point and goes against the contention of the appellants.

Mr. Mukand Lal Puri for the appellants invited my attention to 1928 Lah 910 (2). In that case the only evidence before the Court was that there was a symbolical delivery of possession and the learned Judge acted on the presumption, which was perfectly open to him, that possession must be deemed to have been delivered according to law, and that, if this was not done, the aggrieved party ought to have challenged the proceedings of the executing Court which had ordered delivery of symbolical possession by filing an appeal or revision. That presumption does not arise in the present case because, as already pointed out, we have the dakhnama itself on the record which is further supported by the evidence of the patwari who had written out the dakhnama. There are other authorities of this Court which lay down that the procedure prescribed by O. 21, R. 35 (2), must be strictly followed, vide 1923 Lah 693 (3), 20 P R 1917 (4) and 55 I C 19 (5). There is, therefore, a substantial body of judicial opinion which is all one way and is opposed to the contention of the appellants. I, therefore, affirm the decree of the Court below and dismiss the plaintiffs' appeal with costs.

R.M./R.K.

Appeal dismissed.

2. Piara Ram v. Sohawa, 1928 Lah 910=109 I C 561.
3. Nidhi Ram v. Parsa Ram, 1928 Lah 693=74 I C 1=5 L L J 507.
4. Khub Ram v. Surat, 1917 Lah 364=39 I C 753=20 P R 1917.
5. Jauhri Lal v. Peman, 1920 Lah 473=55 I C 19=2 L L J 202.

A. I. R. 1936 Lahore 750

ADDISON AND ABDUL RASHID, JJ.

Vir Bhan-Bansi Lal—Assessees—Petitioners.

v.

Commissioner of Income-tax, Lahore—Opposite Party.

Civil Ref. No. 71 of 1935, Decided on 24th January 1936, from Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces, Lahore, D/- 13th November 1935.

1. Harnam Singh v. Ganda Singh, 1933 Lah 427=145 I C 345=34 P L R 839.

(a) Income-tax Act (1922), Ss. 22 (4), 23 (4) and 34—Income-tax Officer, having received certain information, serving assessee not assessed for the year with notice under S. 34—Return submitted by assessee found to be incorrect—Account books found to be full of omissions and discrepancies—Assessee served with notice under S. 22 (4) calling upon him to produce all account books and documents—Assessee denying their existence and not producing them in spite of two more notices under S. 22 (4)—Assessee assessed under S. 23 (4)—S. 34 held applicable to circumstances of the case—Notice under S. 34 held to be legal—Assessment held to have been rightly made under S. 23 (4).

The Income-tax Officer, by reason of having received certain information, served the assessee who were not assessed for the year, with a notice under S. 34. The assessee put in a return, but as it was found that it was incorrect and there were serious omissions and discrepancies in the account and certain account books and documents were not produced, a fresh notice under S. 22 (4) was served upon them calling upon them to produce the necessary books and documents. The assessee denied the existence of the account books and documents and put in a revised return which was also found to be incorrect and another notice under S. 22 (4) was served to produce all account books and documents. As it was not complied with final notice under S. 22 (4) was served, and on the assessee still denying the existence of the account books and documents, and refusing to comply with the notice, the Income-tax Officer held them to be liable to assessment under S. 23 (4) and so assessed them:

Held: that S. 34 was applicable to the circumstances of the case. The notice under S. 34 issued by the Income-tax Officer was a legal notice within the meaning of S. 34. Under the circumstances of the case the assessment was rightly made under S. 23 (4): 1935 *Lah* 742, *Foll.* [P 751 C 2; P 752 C 1]

(b) Income-tax Act (1922), S. 34—Notice under S. 34 issued—Another notice under S. 22 (2) is not necessary.

Section 34 itself mentions that notice under S. 34 may contain all or any of the requirements which may be included in notice under S. 22 (2). So when a notice under S. 34 is issued another notice under S. 22 (2) is not necessary. [P 752 C 1]

(c) Income-tax Act (1922), Ss. 22 (4) and 23 (4)—Books of accounts and other documents not produced in accordance with notice under S. 22 (4)—Income-tax Officer is entitled to make assessment to best of his judgment under S. 23 (4).

Where the Income-tax Officer comes to the conclusion that the assessee has been withholding books of account which are not produced in accordance with a notice under S. 22 (4), he is entitled to make an assessment to the best of his judgment under S. 23 (4). More so when other documents have been withheld by the assessee and there has been deliberate misrepresentation on his part to the Income-tax Authorities: 5 *I T C* 389, *Rel. on.* [P 752 C 1]

Kripa Ram Bajaj—for Petitioners.
J. N. Aggarwal—for Opposite Party.

Addison, J.—Under S. 66, Income-tax Act, the following three questions have been referred to this Court by the Commissioner of Income-tax, Punjab, namely, (1) Whether S. 34, Income-tax Act, was applicable to the case or not. (2) Whether the notice under S. 34 issued by the Income-tax Officer was a legal notice within the meaning of S. 34. (3) Whether, in the circumstances of the case, the assessment was rightly made under S. 23 (4). The assessee is a Hindu undivided family consisting of two brothers, Vir Bhan and Bansi Lal. They were assessed to various sums on their income up to the year 1930-31, but in 1931-32 they were not assessed to income-tax on the claim that their business had been running at a loss. In January 1932, the Income-tax Officer received certain information which led him to serve a notice upon the assessee under S. 34 of the Act for the year 1931-32. This was served within time. The assessee put in a return of income on 16th May 1933, showing a loss of Rs. 5,407. The accounts were carefully gone into, serious omissions and discrepancies were discovered, and it was found that there were certain other books besides the cashbook and ledger produced by the assessee which had not been produced for examination. A fresh notice under S. 22 (4) was therefore served on the assessee calling for certain *bahis*, etc. On 12th June 1933, Vir Bhan appeared and stated that no *lekha bahis* were kept for the money-lending business, that is, he denied the existence of such *bahis*. Thereafter he put in a revised return showing a profit of Rs. 5,856 3 6 instead of a loss of Rs. 5,407. This return was also found to be incorrect and not to be in accordance with those books which were produced, certain omissions being discovered and other defects noted. Another notice was therefore issued under S. 22 (4) to produce certain other account books, promissory notes, *hundis*, bonds, mortgage-deeds and sale deeds, etc. On the facts which came to his notice the Income-tax Officer held that the *lekha bahis* specified in the notice were being withheld, while the bonds, promissory notes and mortgage-deeds were also not produced. A final notice under S. 22 (4) was issued to produce the necessary accounts and documents on 8th June 1934 when Vir Bhan appeared and denied the existence of these books and declined to

comply with the notice. The Income-tax Officer therefore held the assessee to be liable to assessment under the provisions of S. 23 (4) and he proceeded so to assess them.

The contention raised in the first question was not seriously pressed before us and is decided by the Special Bench case, 16 Lah 937 (1). There is no doubt that S. 34 of the Act is applicable in the circumstances mentioned and our reply to this question is in the affirmative. The reply to question 2 is contained in S. 34 itself. What was contended on behalf of the assessee was that, besides notice under S. 34, there should also be a regular notice as provided by S. 22 (2) of the Act, but S. 34 itself mentions that the notice under it may contain all or any of the requirements which may be included in the notice under S. 22 (2), and this means obviously that another notice under S. 22 (2) is not necessary. Our reply to the second question is therefore also in the affirmative. As regards the third question the answer must also be in the affirmative. On the facts found there was a default. It was held by a Division Bench of the Patna High Court in 5 I T C 389 (2) that where the Income-tax Officer came to the conclusion that the assessee had in fact books of account, which were not produced in accordance with a notice under S. 22 (4) of the Act, he was entitled to make an assessment to the best of his judgment under S. 23 (4). Apart from that it is obvious that in the present case other documents have been withheld. This is a case where there has been deliberate misrepresentation on the part of the assessee to the Income-tax Authorities. We further direct that the assessee pay the costs of the Income-tax Commissioner.

R.M./R.K. *Answers accordingly.*

1. Madan Mohan Lal v. Commissioner of Income-tax, 1935 Lah 742=158 I C 718=16 Lah 937=38 P L R 52 (F B).
2. Raghu Karson v. Commissioner of Income-tax, (1931) 5 I T C 389.

A. I. R. 1936 Lahore 752

BHIDE, J.

Mt. Bano and another — Appellants.

v.

Ghulam Mustafa Khan—Respondent.

Second Appeal No. 2258 of 1935, Decided on 3rd March 1936, from decree of Dist. Judge, Mianwali, D/- 18-10-1935.

Husband and Wife — Restitution of conjugal rights—Suit for—Relief is discretionary—Question should be decided according to personal law and principles of equity—Relief should be refused, if there is long delay in bringing suit and delay is not explained.

The relief in a suit for restitution of conjugal rights is discretionary. The question has to be decided according to the personal law and the principles of justice, equity and good conscience so far as they are not inconsistent with it. Where there is long delay in instituting the suit, relief is generally refused by the Court.

Where the parties to the suit are Mahomedans and the marriage is found to have been contracted during the minority of the wife, and was never consummated, and there was a long delay in bringing the suit, for which no explanation is given, it is a case in which relief cannot be granted: 11 M I A 551 (P C); 6 P R 1885; 1916 Lah 365 and 1924 Lah 188, *Rel. on*, 5 L L J 95, *Disting.* [P 753 O 1]

*V. N. Sethi—*for Appellants.

J. R. Agnihotri for Bishen Narain—*for Respondent.*

Judgment.—This was a suit for restitution of conjugal rights. It has been decreed by the Courts below and the defendants have preferred a second appeal. The learned District Judge's finding that the marriage was duly proved is final and the only question pressed in this appeal is that the Courts below have not acted in accordance with recognized judicial principles in granting relief to the plaintiff in the circumstances of the case. This contention appears to me to have force. The marriage in the present case is said to have been performed in the year 1923 when the plaintiff as well as the defendant Mt. Bano were minors, their ages according to the "Nikah" register entries being 10 and 12 respectively. The marriage was performed by Mt. Bano's father as her guardian, but it appears from the evidence that Mt. Bano's mother had been divorced by the father and he had remarried and that Mt. Bano as well as her brother were brought up by their aunt (see D. W. 1, D. W. 2 and D. W. 3). The circumstances in which the marriage was performed are not altogether free from suspicion. It appears that soon after the marriage, Mt. Bano filed a suit for cancellation of the marriage, though it was apparently taken off the file as it was instituted without a proper guardian. The age of Mt. Bano according to her statement at the time was 16. D. Ws. 1 to 3 (Mt. Bano's brother, cousin and aunt respectively) support her allegation that she was duly married to Hayat defendant 2,

that she has been living for years with him as his wife and she has also a son aged 7 or 8 years by him. The plaintiff alleged that Mt. Bano had lived with him for some time, but this allegation has been disbelieved. It is alleged that Mt. Bano was abducted by Hayat, and their whereabouts could not be traced. But it is significant that no attempt was made to prosecute Hayat and bring back the defendant. It is true that the plaintiff was a minor, but his father, who had arranged the marriage, might have been expected to take action.

It is alleged that a report was made at the police station and efforts were made to trace the defendant and Hayat but without success. No copy of the report has been however produced, and there is no evidence on the record to show what efforts if any were made by or on behalf of the plaintiff to trace the defendants and prosecute Hayat. So far as one can judge from the evidence, no action was taken till 1933, i.e., 10 years after the alleged marriage, when a complaint under S. 498, I. P. C., was lodged, but the complaint was then dismissed and the plaintiff was referred to a civil Court. The learned District Judge has remarked that the plaintiff has sufficiently explained the delay, but I am unable to find any evidence worth the name in support of this remark. The relief in suits of this kind is discretionary and principles governing it were laid down in 11 M I A 551 (1). The question has to be decided according to personal law and the principles of justice, equity and good conscience so far as they are not inconsistent with it. Where there is long delay in instituting the suit the relief is generally refused by Courts: cf. 6 P R 1885 (2), 46 P R 1916 (3) and 1924 Lah 188 (4). In view of all the facts stated above, this does not appear to me a fit case for granting the relief prayed for. In 5 L L J 95 (5), relied on by the defendant, the delay was found to be sufficiently explained. In view of the fact that the marriage was contracted during the minority of the de-

fendant and was never consummated, and also taking into consideration the long delay in taking action, of which no reasonable explanation is given, or is at any rate supported by evidence. I accept the appeal and dismiss the suit; but, in view of all the circumstances, leave the parties to bear their costs throughout.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 753

BHIDE AND CURRIE, JJ.

Sher Mohammad Khan and others—
Defendants—Appellants.

v.

Chuhr Shah—Plaintiff and another—
Defendant—Respondents.

First Appeal No. 1851 of 1934, Decided on 21st November 1935, from preliminary decree of Senior Sub-Judge, Shahpur, D/- 22nd June 1934.

(a) Custom (Punjab)—Alienation—Sale of reversionary right in widow's estate is void—Principle of S. 6, T. P. Act, is applicable.

The sale of reversionary rights in a widow's estate is opposed to the principles of customary or tribal law, and according to the principle of S. 6, T. P. Act, which can be taken as a guide, though the Act is not in force in this province, such a transfer is void: 66 P R 1897 (F B); 1925 Lah 341 and 1929 Lah 295, *Foll.*

[P 755 C 1]

(b) Custom (Punjab)—Reversioner—Title is derived from common ancestor and not from father—Ineffective alienation by father of his reversionary right—Father never inheriting property—Alienation cannot be enforced against son.

A reversioner derives his right to succeed to ancestral property from the common ancestor and not from his father, and an ineffective alienation of prospective reversionary rights made by the father cannot be specifically enforced against the son, when the father never inherited the property.

[P 755 C 2]

Badri Das and Vishnu Datta— for Appellants.

Achhru Ram, V. R. Sawhney for S. R. Sawhney and *Bhagwat Dyal—* for Respondent (Plaintiff).

Bhide, J. — Civil Appeals Nos. 1851 and 2238 of 1934 are cross-appeals arising out of a suit for redemption of a mortgage by one Chuhr Shah. The family of Chuhr Shah owned one-fourth share in a village named Tatri in Tahsil Bhalwal in the Shahpur district, which has been referred to as X for brevity in the judgment of the learned Senior Subordinate Judge under appeal. The plaintiff Chuhr Shah claimed to be entitled to redeem one-fourth share in X on payment of proportionate mortgage money. The learned

1. Buzlur Rahim v. Shumshunnissa Begam, (1866) 11 M I A 551 (P O).

2. Budh Singh v. Asa Singh, (1885) 6 P R 1885.

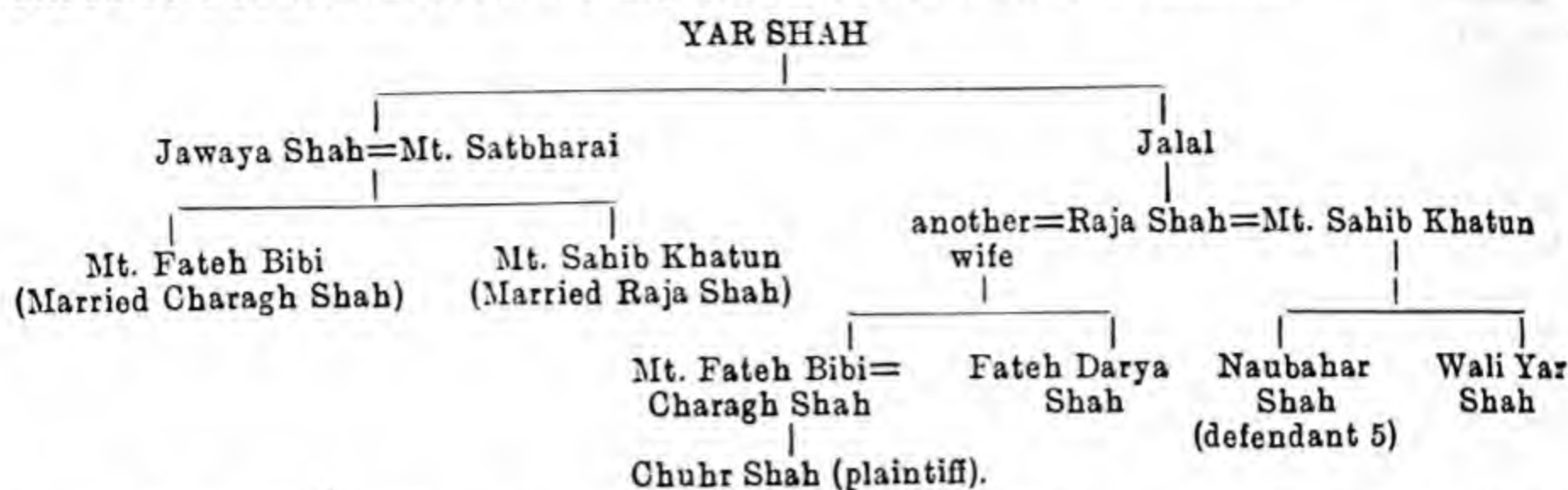
3. Zlada v. Jowai, 1916 Lah 365=34 I O 538=46 P R 1916=149 P L R 1916.

4. Nawab Bibi v. Allah Ditta, 1924 Lah 188=73 I O 896=5 L L J 505.

5. Daulan v. Abdul Haq, (1923) 5 L L J 95=79 I O 286=10 P L R 1923.

1936 L/95 & 96

The pedigree-table of the family of Chuhar Shah is as follows:



her estate as against Fateh Darya Shah. Naubahar Shah also claimed to have a preferential right to succeed to the estate of Wali Yar Shah as his full brother. This dispute led to a good deal of litigation, but it is unnecessary to go into its details. Suffice it to say that it was eventually settled by a compromise by virtue of which Fateh Darya Shah gave up his claim to a share in the estate of Wali Yar Shah and accepted one-fourth share in the estate left by Mt. Sat Bharai. This compromise was challenged in a suit by Ghulam Hussain, son of Fateh Daraya Shah, but was eventually upheld by this Court (vide Ex. P/10). As a result of this compromise Chuhr Shah and Naubahar Shah got Wali Yar Shah's estate in equal shares (i. e. $\frac{1}{2}$ of $X/8$ i. e. $X/16$ each); Fateh Darya Shah got one-fourth share in Mt. Sat Bharai's estate (i. e. $\frac{1}{4}$ of $X/2 = X/8$), while Naubahar Shah and Chuhr Shah got the remaining three-fourths of Mt. Sat Bharai's estate in equal shares (i. e. $\frac{1}{2}$ of $\frac{3}{4}$ of $X/2 = 3/16 X$) each. It will thus appear that the present plaintiff got $1/16 X$ from Wali Yar Shah's estate and $3/16 X$ from Mt. Sat Bharai's estate, i. e. $4/16 X$ or $1/4 X$, and this is the share that plaintiff seeks to redeem in the present suit. Plaintiff inherited no share in X from his father Charagh Shah as the latter had already sold his equity of redemption therein. Charagh Shah had also sold his reversionary rights in Mt. Sat Bharai's estate, but plaintiff's contention was that this sale was void, firstly because (i) Charagh Shah had no such reversionary interest at all as he was not entitled according to custom to succeed to Mt. Sat Bharai's estate in the presence of her daughters and their sons, i. e. in the presence of Naubahar Shah and Chuhr Shah,

On 13th October 1908 Wali Yar Shah died, leaving no widow or issue. On 14th November 1908 Mt. Sat Bharai died. A dispute then arose as regards succession to the estates of Wali Yar Shah and Mt. Sat Bharai, amongst Fateh Darya Shah, Naubahar Shah and Chuhr Shah. It will appear from the pedigree table that Naubahar Shah and Chuhr Shah are sons of the daughters of Mt. Sat Bharai and as such they claimed a preferential right according to custom to succeed to

and (ii) even if he was held to be entitled to succeed, the sale of the reversionary interests being merely a sale of 'expectancy' was void according to the principle of S. 6, T. P. Act. The learned Senior Subordinate Judge found against the plaintiff on the former point, but in his favour on the latter. The respondents-mortgagees had pleaded that the suit was barred by limitation, as they had been in adverse possession since 1896 or at any rate since the death of Mt. Sat Bharai. But this point was also decided in plaintiff's favour and the suit was held to be within limitation. Eventually the learned Senior Subordinate Judge held that the plaintiff was entitled to one-third share of Mt. Sat Bharai's estate, i. e. $\frac{1}{3}$ of $\frac{1}{2} X = \frac{1}{6} X$ and granted him a decree for redemption of this share on payment of proportionate mortgage-money. In coming to this decision as regards the share which plaintiff was entitled to redeem, the learned Senior Subordinate Judge seems to have ignored the compromise by virtue of which the plaintiff had become entitled to one-fourth share in X as shown above.

The defendants' appeal was taken up first and the two points urged on their behalf were: (i) that the learned Senior Subordinate Judge was wrong in holding that the sale by Chiragh Shah and Fateh Darya Shah of their reversionary rights in Mt. Sat Bharai's estate was void, and (ii) that the suit was in any case barred by limitation.

As to the first point there seems to be no force in the learned counsel's contentions that the reversionary rights in property held on a life-estate by a widow constitute a vested interest and not a mere expectancy and that there is any distinction in this respect between reversionary rights under Hindu law and custom. These points appear to be well settled by authority in this Province. It was held in 66 P R 1897 (1) by a Full Bench of the Punjab Chief Court that the sale of reversionary rights in a widow's estate was opposed to the principles of customary or tribal law and that according to the principle of S. 6, T. P. Act—which can be taken as a guide, though the Act is not in force in this Province—such a transfer was void. In 6 Lah 87 (2) also

it was held that the right of succession on the death of a widow under Customary law, as in the case of Hindu law, is a mere *spes successionis* and that the reversioner has no right or interest in the estate *in praesenti*. In 10 Lah 613 (3), 66 P R 1897 (1) was followed and it was held that a reversioner entitled to succeed to the property on the death of a widow cannot, during her life-time, make any valid transfer of his rights to succeed. It was further held that the principle contained in S. 6, T. P. Act, embodied in this respect the spirit of the custom prevailing in this province.

There are no doubt certain authorities which lay down that as the Transfer of Property Act is not in force in this province, a transfer of reversionary rights can be equitably given effect to in a suit for specific performance against the transferor when the succession actually opens out: see e. g. 13 P R 1899 (4); 1926 Lah 39 (5); 1930 Lah 928 (6). In the present instance, however, this situation did not arise at all as Chiragh Shah died before the succession to Mt. Sat Bharai's estate opened out. The learned counsel for the defendants did not urge that the transfer could be specifically enforced against the plaintiff, who is a son of Chiragh Shah, and it seems to me that such a position would not be tenable in view of the fact that a reversioner derives his right to succeed to ancestral property from the common ancestor and not from his father, and there seems to be no good reason why an ineffective alienation of prospective reversionary rights made by the father should be specifically enforced against the son, when the father never inherited the property.

The next point urged on behalf of the defendants was that of limitation. The contention that the suit was time-barred was based on the ground that the mortgagee's possession had become adverse since the sale of the equity of redemption. It was urged that although the sale itself was void, it could be taken into consideration for determining the nature

1. Tola v. Abdulla Khan, (1897) 66 P R 1897.
2. Gurbhaji v. Lachhman, 1925 Lah 341=88 I O 550=6 Lah 87=26 P L R 217=7 L L J 189.

3. Thakar Singh v. Uttam Kaur, 1929 Lah 295=118 I O 449=10 Lah 613=30 P L R 928.
4. Malik Allah Baksh v. Ghulam, (1899) 13 P R 1899.
5. Padmun v. Achhar, 1926 Lah 39=89 I O 792.
6. Naranjan Singh v. Dharam Singh, 1930 Lah 928=129 I O 29=31 P L R 909.

of mortgagee's possession. The learned counsel referred to a number of authorities, but these were clearly distinguishable as the mortgagee's possession was either adverse from its inception: see, e. g., 4 Lah 249 (7) or had been converted into that of an owner under a decree or with the consent of the mortgagors: see 2 Lah 53 (8), 1930 Lah 71 (9), 37 Mad 545 (10) and 39 All 423 (11). The learned counsel conceded that the mortgagees could not convert their possession into that of owners by any unilateral act, but urged that the mortgagor Chiragh Shah had himself in this case sold the equity of redemption. But what Chiragh Shah sold was a mere 'expectancy' and not any rights in praesenti. It is obvious that possession of the mortgagees could not, in any case, become adverse till the death of Mt. Sat Bharai. On the death of Mt. Sat Bharai, the possession might have been held to be adverse to the plaintiff if it was shown that the plaintiff Chubh Shah had consented expressly or by implication to their holding his share in Mt. Sat Bharai's estate as owner. But there is no such evidence on the record. The learned counsel laid stress on the mutation as regards the estate of Mt. Sat Bharai effected in 1915; but the plaintiff was not present at the time and the learned counsel was unable to point out any evidence to show that he ever consented to it. The mortgage was not redeemable till 1928, as already mentioned, and the present suit instituted in 1933 was, therefore, clearly within time. On the above findings the defendants' appeal fails and must be dismissed with costs.

In the plaintiff's appeal, the only point urged was that the decree was wrong in so far as it allowed plaintiff to redeem only 1/6th of X. It has been pointed out above that as a result of the compromise with Fateh Darya Shah, plaintiff had become entitled to 1/4th share in X. The learned counsel for the defendants con-

ceded this, but urged that Naubahar Shah had, in fact, already redeemed the whole of Wali Yar Shah's share in X, though according to the compromise he, (Naubahar Shah) was entitled to redeem only 1/2 of Wali Yar Shah's share, and that, therefore, the plaintiff could not include any share inherited from Wali Yar Shah in the present suit. The learned counsel referred in this connexion to the judgment in the suit instituted by Naubahar Shah, printed at p. 105 of the record, but this does not specify the share of Naubahar Shah. A reference to the plaint in that case, however, showed that Naubahar redeemed only what he was entitled to and not the whole of the share in X left by Wali Yar Shah, as contended by the learned counsel.

I would accordingly accept plaintiff's appeal and grant him a decree for possession of 1/4 share instead of 1/6 share in X as ordered by the learned Senior Subordinate Judge on payment of proportionate mortgage money (i. e., Rs. 5,625), together with Rs. 41-10-8 on account of improvements. The decree should be prepared in conformity with O. 34, Civil P. C. The plaintiff should deposit the mortgage-money or such amount as may be necessary to make up the above sum in addition to any sum he may have already deposited within three months of this date. The plaintiff will get his costs throughout.

Currie, J.—I agree.

B.D./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 756

JAI LAL, J.

Mahbub—Plaintiff—Appellant.

v.

Kale Khan and others — Defendants—Respondents.

Second Appeal No. 2067 of 1935, Decided on 28th February 1936, from decree of Dist Judge, Delhi, D/- 28th May 1935.

Transfer of Property Act (1882), S. 54 — Vendee already in possession — Formal delivery of possession is sufficient.

Where tangible immovable property sold is already in possession of the vendee, and the sale can take place only by delivery thereof, then it is not necessary that the vendee should leave the property and re-enter it under the title; a formal delivery of possession under such circumstances is sufficient: 1933 Cal 411; 1916 Cal 934; 1915 Mad 573 and 1934 Pat 301, [P 557 C 2] Foll.

Dev Raj Sawhney—for Appellant.

Bishan Narain—for Respondents.

7. Kadar Baksh v. Mangha Mal, 1923 Lah 495 = 73 I C 889 = 4 Lah 249 = 5 L L J 555.

8. Karori Mal v. Ramji Lal, 1921 Lah 9 = 59 I C 812 = 2 Lah 53 = 46 P L R 1921 = 3 L L J 68 (F B).

9. Prem Das v. Sarbaland, 1930 Lah 71 = 120 I C 481.

10. Usman Khan v. Nagalla Dasanna, 1914 Mad 578 = 16 I C 694 = 37 Mad 545 = 23 M L J 360.

11. Khedu Rai v. Sheoparsan Rai, 1917 All 212 = 40 I C 121 = 39 All 423 = 15 A L J 366.

Judgment. — It has been found, and this finding must be taken to be conclusive for the purposes of this second appeal, that the property in dispute belonged to Samand Khan. Samand Khan really owned the site under the property in dispute and the appellant Mahbub built a house on it. Subsequently, by means of a sale deed unregistered, Samand Khan sold the site of the house to Mahbub for Rs. 98 and recited in the sale deed that proprietary possession had been given to the purchaser. The respondent Kale Khan had a decree against Chahat Khan, a brother of Samand Khan, and in execution of that decree he got sold the property in dispute and purchased it himself. Samand Khan raised an objection to the attachment and the sale of the property, but that objection was dismissed. Consequently his vendee Mahbub instituted a suit, after having raised an unsuccessful objection, for possession of the property. This suit was decreed by the trial Judge, but the District Judge on appeal dismissed it holding that the provisions of S. 54, T. P. Act, which admittedly applied to the property in suit, had not been complied with inasmuch as, in his opinion, the sale was not of tangible immoveable property but of a reversion.

The sale, as I have already stated, was by an unregistered deed and was for Rs. 98. S. 54 provides that a transfer of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. It also provides that in the case of tangible immoveable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Two questions therefore arise for decision in this appeal: (1) whether it was a case of a transfer of a reversion; (2) and if it was the case of transfer of tangible immoveable property of a value of less than one hundred rupees, whether there was delivery of the property. I have already stated that the property sold in this case was of a peculiar nature. The materials of the house admittedly belonged to the appellant Mahbub. In my opinion, in any case, on the basis of his title, Mahbub was entitled to succeed so far as the materials of the house were concerned, because they had never been

transferred and indeed could not be transferred by Samand Khan to him as they belonged to Mahbub. The only dispute which could be raised by Kale Khan, the purchaser decree-holder, therefore could relate to the site.

I have already stated that according to the sale deed it was not a reversion that was sold, but it was the site that was sold, which was tangible immoveable property. I am unable therefore to agree with the conclusion of the learned District Judge that it was the case of sale of reversion. The next question is whether delivery of the property took place. Now, it is true that the property sold was already in the possession of the vendee Mahbub, and in the nature of things actual physical delivery could not be given to him. It has however been held in 38 Mad 1158 (1), 20 C W N 195 (2), 60 Cal 384 (3) and 151 I C 55 (4), a case decided by the Patna High Court, that where tangible immoveable property sold is already in possession of the vendee and the sale can take place only by delivery thereof, then it is not necessary that the vendee should leave the property and re-enter it under the new title; that a formal delivery of possession under such circumstances is sufficient.

In the present case, the nature of possession was changed by the factum of sale and I am also of opinion that the unregistered sale deed can, under the circumstances, be looked at to ascertain the nature of the possession of Mahbub. A contrary view seems to have been taken in 40 Bom 313 (5), 50 All 986 (6), 34 Cal 207 (7) and 1933 Cal 544 (8). Correctness of the view expressed in 34 Cal 207 (7) was expressly doubted in 60 Cal 384 (3). Moreover, it must be remem-

1. Muthukaruppan Samban v. Muthu Samban, 1915 Mad 573=25 I C 772=38 Mad 1158=27 M L J 497.
2. Sonai Chutia v. Sonaram Chutia, 1916 Cal 934=34 I C 692=20 C W N 195.
3. Kula Chandra v. Jogesh Chandra, 1933 Cal 411=144 I C 155=60 Cal 384.
4. Santokhi Missir v. Siro Jha, 1934 Pat 301=151 I C 55.
5. Bhaskar Gopal v. Padman Hira, 1916 Bom 223=33 I C 267=40 Bom 313=18 Bom L R 8.
6. Sohan Lal v. Mohan Lal, 1928 All 726=118 I C 177=50 All 986=26 A L J 1084 (F B).
7. Sibendrapada Banerji v. Secy. of State, (1907) 34 Cal 207=5 C L J 890.
8. Kaliram v. Dulal Ram, 1933 Cal 544=142 I C 582.

bered that in the present case Kale Khan professes to derive his title from Chahat Khan, who, according to the conclusion of the trial Judge, which conclusion was not attacked before the District Judge, must be deemed to have no title to the property. It is not therefore a case of a bona fide transferee from the same transferor without knowledge of a previous transfer by him by an unregistered deed; and this fact distinguishes some of the cases cited by the learned Counsel for the respondent.

There is no doubt a conflict of opinion on the question involved, but, in my opinion, in the present case, the fact that Kale Khan derives his title from Chahat Khan, who in his turn has no title to the property, materially weighs against the claim of the respondent, and my own personal inclination is to follow the view taken in 60 Cal 384 (3) and the other cases cited by the appellant's counsel. I therefore accept this appeal and set aside the decree of the District Judge and restore that of the trial Judge with costs throughout.

D.S./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 758

CURRIE, J.

Sundar Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 337 of 1936, Decided on 29th April 1936, from order of Sess. Judge, Ludhiana, D/- 17th February 1936.

Criminal Trial—Possession of incriminating article—Possession should be actual and conscious.

To constitute criminal liability, possession of incriminating article must be actual and not constructive. Possession of incriminating articles of which a man is not conscious, cannot constitute an offence. [P758 C 2; P 759 C 1]

Anant Ram Khosla for Govt. Advocate—*for the Crown.*

Facts.—Three men, Sundar Singh, Ganga Singh and Dalip Singh, were challaned under the Excise Act for possession of two bottles of illicit liquor, which were recovered from a house jointly owned by them. The Magistrate has convicted Sundar Singh alone, because he is the eldest member of the family. Sundar Singh, who has been awarded a non-appealable sentence applies for revision of the Magistrate's order and after going

through the record I consider the case to be a fit one for reference to the High Court.

Grounds of Reference—Sundar Singh and Ganga Singh are real brothers and Dalip Singh is their nephew. According to the prosecution story, the accused live together and own two houses one of which is used by them for residence and the other for tying cattle and storing fodder, etc. The residential house was searched first and two bottles of illicit liquor were recovered from there. The raiding party then proceeded to the cattle-house which was locked. Dalip Singh produced the key of the house and two bottles containing illicit liquor were found buried in fodder. The defence was that the accused had a partner in cultivation, named Bachna, who lived in the cattle-house and possessed a duplicate key. He had a quarrel with the accused about his share of the produce, and in order to take revenge he had planted the bottles in the cattle-house without the accused's knowledge.

The learned trial Magistrate has, I think, rightly rejected the defence version; but he has in my opinion convicted the wrong man. Ishar Singh (P. W. 2) states that Sundar Singh was not present at the time of the recovery. The evidence of Imam Din (P. W. 3) is also to the same effect as he says that two accused were present and the third came after the recovery. Ishar Singh has further stated that Ganga Singh and Dalip Singh drink, but Sundar Singh does not drink. In these circumstances, when the recovery was made in Sundar Singh's absence and the key of the house was produced by Dalip Singh, Sundar Singh cannot be convicted for possession of the bottles merely because he happens to be the eldest member of the family. At the time of the recovery, possession clearly was with Dalip Singh because he produced the key of the house, and I am of the opinion that the other co-owners of the house are legally not liable, especially Sundar Singh who was admittedly not present at the time of the recovery. He may be said to be in possession of the house constructively as a co-owner, but to constitute criminal liability, possession must be actual and not constructive. In any case, the house is not shown to be in possession of Sundar Singh exclusively. There are three joint owners and the pos-

sibility that the bottles were placed in the house by one of the other two owners without the knowledge of Sundar Singh, cannot be excluded. Possession of incriminating articles, of which a man is not conscious, cannot constitute an offence. I therefore report the case to the High Court under S. 438, Criminal P. C., with the recommendation that the conviction of Sundar Singh be set aside and that the fine imposed on him, which has been paid, be refunded.

Order.—This case has been referred by the learned Sessions Judge with the recommendation that the conviction of Sundar Singh under the Excise Act be set aside. The facts are given in the order of reference. Mr. Khosla, who appears for the Crown, urges that Sundar Singh admitted recovery of the articles. There is no doubt that he did admit the recovery, but at the same time he urged that the illicit liquor found in the cattle-shed outside the village was not kept there by him or his relatives, but had been planted by his cultivating partner Bachna who had had a quarrel with him and wanted to get his revenge. Of the three witnesses produced by the prosecution two are definite that Sundar Singh was not present himself at the time of the recovery but arrived later. Undoubtedly the key of the cattle-shed, where the illicit liquor was found was produced by his nephew Dalip Singh. The Excise Sub-Inspector did not go into the witness box at all, but left it to a lambardar, a sufedposh and a police constable to give evidence. In these circumstances, for the reasons given by the learned Sessions Judge, I accept his recommendation, set aside the conviction and acquit the petitioner. The fine, if realised, to be refunded.

B.D./R.K.

Conviction set aside.

A. I. R. 1936 Lahore 759

TEK CHAND, J.

Dhanpat Rai—Plaintiff—Petitioner.

v.

Badri Dass and another—Defendants—Opposite Parties.

Civil Revn. No. 160 of 1936, Decided on 27th April 1936, from order of Sub-Judge, First Class, Amritsar, D/- 28th November 1935.

Civil P. C. (1908), S. 151 and O. 9, R. 8—Dismissal of suit in default owing to mistake of Court—Court has inherent power to restore it.

A Court has inherent jurisdiction to restore a suit, which has been dismissed in default owing to a mistake of the Court itself.

[P 760 C 1]

Where the lower Court dismissed a suit in default on the plaintiff's absence on that date, which had been fixed merely for filing objections against the report of the commissioner appointed in pursuance of the preliminary decree :

Held : that the suit should be restored : 1928 Lah 534 and 6 I C 203, *Applied*. [P 760 C 1]

Krishna Swarup for *S. L. Puri* and *S. L. Puri*—for Petitioner.

Kishori Lal—for Opposite Parties.

Order.—The plaintiff-petitioner instituted a suit against the defendants-respondents for rendition of accounts. On 21st October 1932 a preliminary decree was passed against the defendants and a Commissioner appointed to go through the accounts and report as to the amount due by each defendant. The Commissioner duly submitted his report, and the Court fixed 14th March 1933 for filing objections by the parties. On that date the plaintiff and one of the defendants were absent while the other defendant was present. The Court thereupon passed an order dismissing the suit under O. 9, R. 8, Civil P. C., read with O. 17, R. 2 against defendant 2 who was present and under O. 9, R. 3 read with O. 17, R. 2 against defendant 1 who was absent.

On 16th June 1933 the plaintiff filed an application for restoration under O. 9, R. 9 stating that his absence on 14th March was not intentional, but was due to a mistake, he being under the impression that the date fixed was 16th March and not the 14th, and that this was so noted in his diary. The learned Subordinate Judge ordered notices to issue to the respondents. Inquiry into this application continued till 11th April 1934, when the plaintiff made another application stating that he had been advised that O. 9, R. 9 did not govern the case. He, therefore, asked for permission to withdraw his application of 16th March 1933 and to file another application. His application was accordingly allowed to be withdrawn by order of the Court dated 11th April 1934.

On 2nd May 1934, the present application was presented under S. 151 for setting aside the order dismissing the suit in default on 14th March 1933. This application was dismissed by the Subordinate Judge by his order dated 28th November 1935. The learned Judge held that the

order of his predecessor dismissing the suit in default on 14th March 1933 was erroneous, but that the application for setting aside that order made under S. 151 was incompetent. From this order the plaintiff has preferred this revision and the sole question for consideration is whether the learned Subordinate Judge should or should not have set aside the order of 14th March 1933 on application under S. 151. The learned counsel for the defendants-respondents does not contest the view of the learned Subordinate Judge, as indeed he could not possibly do, that the order of 14th March 1933 dismissing the suit in default on the plaintiff's absence on that date which had been fixed merely for filing objections against the report of the Commissioner appointed in pursuance of the preliminary decree, was erroneous. He however urges that the proper remedy was by way of an application under O. 9, R. 9 or of an appeal to the District Judge. It might have been open to the petitioner to file an application for restoration under O. 9, R. 9 or lodge a regular appeal to the District Judge, but I do not see why an application under S. 151 was not competent. It has been held in 1928 Lah 534 (1), and 6 I C 208 (2) that a Court has inherent jurisdiction to restore a suit which had been dismissed in default owing to a mistake of the Court itself. These authorities are clearly applicable to the present case and I do not see why the learned Subordinate Judge should not have set aside the order dismissing the suit in default as soon as he became apprised of its incorrectness.

I accept this petition for revision, set aside the orders of the Court below dated 14th March 1933 and 28th November 1935, and direct that the suit be restored to its original number and be proceeded with from the stage at which it was on 14th March 1933. Having regard to all the circumstances I leave the parties to bear their own costs in this Court. Both counsel have been directed to cause their respective clients to appear in the Court of the Senior Subordinate Judge on 18th May 1936 when the learned Senior Subordinate Judge will decide whether the case is to be tried by him or by another

Subordinate Judge at Amritsar, and fix a date for filing objections by the parties to the report of the Commissioner.

V.B.B./R.K.

Petition accepted.

A. I. R. 1936 Lahore 760

ADDISON AND ABDUL RASHID, JJ.

Sarab Krishan and others—Appellants.

v.

Firm Shadi Ram-Badri Das and others—Respondents.

Letters Patent Appeal No. 84 of 1935, Decided on 11th February 1936, against judgment of Bhide, J., D/- 9th May 1935.

Insolvency—Sole proprietor of firm bona fide selling assets and liabilities of his firm to new firm—He becomes creditor of new firm and no notice of sale transaction is necessary to old creditors—On insolvency of new firm transfer of business from old to new firm cannot also be fictitious transaction.

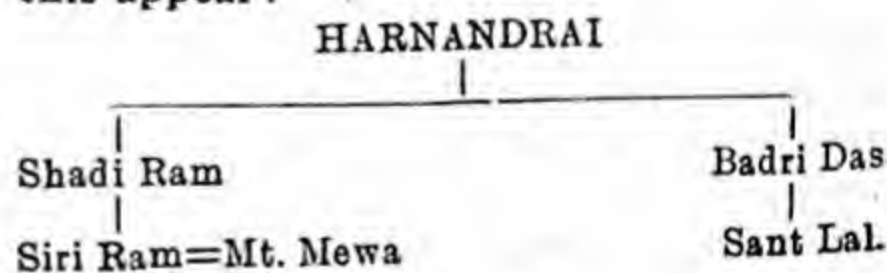
Where the sole proprietor of a firm sells bona fide the business of the old firm including its assets and liabilities to the new firm, he becomes the creditor of the new firm (to the extent of those assets and liabilities) and no general or special notice of the transaction of sale is necessary to the old creditors. On insolvency of the new firm, the transfer of the business to the new firm cannot be a fictitious transaction to defraud the creditors.

[P 761 C 1]

J. N. Aggarwal, Mela Ram and D. N. Aggarwal—for Appellants.

Lala Badri Das—for Respondents.

Judgment.—The following pedigree-table is necessary in order to understand this appeal :



Shadi Ram was separate from his brother Badri Das. There was a firm styled Shadi Ram-Jagannath, the partners of which were Shadi Ram and a stranger Jagannath. Shadi Ram died in 1920 and Mt. Mewa, his daughter-in-law, inherited his share in the partnership. Jagannath died in 1923 and Mt. Mewa purchased his share of the partnership from his sons on 13th January 1924, and thus became the sole proprietor and owner of the business. Jagannath's heirs were paid Rs. 50,000 by her. A new firm, styled Shadi Ram-Badri Das, appears to have been started by Badri Das, and his son Sant Lal on 10th February 1924.

1. Kaluram v. Ghasitaram, 1928 Lah 534=108 I C 603.

2. Adwaitanand Tirthaswami v. Basudeo, (1910) 6 I C 208.

This firm took over the business of the old firm Shadi Ram-Jagannath, including its debts and credits. On 20th July 1924 entries were made in the books to the effect that Mt. Mewa, had become a creditor of the firm to the extent of a sum of Rs. 50,000, consisting of value of the goods, namely Rs. 19,000 odd, and the value of the debts, Rs. 30,000. This was made still more clear on 14th January 1925, when Mt. Mewa executed another document in favour of Badri Das, transferring the business in question, of which undoubtedly at the time she was the sole proprietor. Certain creditors of the firm in 1930 petitioned to have the firm Shadi Ram-Badri Das adjudged insolvent. Mt. Mewa claimed to be a creditor of the firm, but the petitioning creditors disputed this fact, contending that she was really the proprietor of the firm, the old and new firms being virtually identical, and the so-called transfer in 1924-25 being a fictitious transaction intended to defraud the creditors. The Insolvency Court decided this matter in favour of Mt. Mewa, and the creditors appealed to this Court, their appeal being dismissed by a Single Judge. Against this decision this Letters Patent appeal has been preferred.

On the documents which have already been referred to it is clear that in 1924-25 she was the sole proprietor and that she sold the business to the new firm Shadi Ram-Badri Das. She thus became a creditor of the firm. It was contended before us, however, that as the other creditors were creditors before she sold the firm, they were not bound by the transaction as they received no general or special notice that it had taken place. This question, however, does not arise, as it is clear that she was the sole proprietor and sold the firm bona fide. She is thus a creditor and the decisions of the Insolvency Court and the Single Judge are correct. No other question arises for decision in this matter and we dismiss this appeal with costs.

R.W./R.K. *Appeal dismissed.*

A. I. R. 1936 Lahore 761

AGHA HAIDAR, J.

Secy. of State—Petitioner.

v.

Ishar Das—Decree-holder and another—Judgment-debtor—Opposite Parties.

Civil Revn. No. 470 of 1935, Decided on 20th April 1936, from Sub-Judge, 3rd Class, Lahore, D/- 6th March 1935.

(a) Execution — Notice for attachment of salary of Government servant — Objection raised by Secretary of State—Court holding salary to be attachable—No appeal filed by Secretary of State — Revision is not competent.

Notice under O. 21, R. 48, Civil P. C., was issued to the Secretary of State for attachment of salary of a Government servant. The Secretary of State objected to it, but the Court ordered that it was attachable. No appeal was filed by the Secretary of State from this order :

Held : that as the Secretary of State raised the objection that the salary was not attachable, the procedure came within the purview of O. 21, R. 58, Civil P. C., and unless it was challenged by a regular suit under O. 21, R. 63, the order of the executing Court was conclusive and the revision application must fail.

[P 762 C 1, 2]

Held further : that the order passed under O. 21, R. 48 was an order passed in execution of the decree under S. 47, Civil P. C., and as such was subject to an appeal and hence revision was incompetent : 1933 Bom 185, *Rel. on.*

[P 762 C 2]

(b) Provincial Insolvency Act (1920), S. 28 (4)—Adjudication of Government servant annulled—Receiver not availing of S. 28 (4)—Creditor can proceed against salary acquired subsequent to annulment.

Where subsequent to adjudication, the insolvent, a Government servant, incurs debts and creditor obtains a decree, and subsequently the adjudication is annulled but the official receiver has not availed himself of S. 28 (4), the decree-holder can proceed against salary obtained by him after the order of annulment. [P 762 C 2]

Mohammad Monir for Govt. Advocate—*for* Petitioner.

J. G. Sethi and M. L. Sethi—*for* Opposite Party (Decree-holder).

Order.—This is an application in revision against the order of the Subordinate Judge, Third Class, Lahore, ordering the attachment of half the salary of the judgment-debtor Grant in the hands of the Secretary of State for India. Grant was adjudicated insolvent on 29th October 1926 at Agra. At the time of his adjudication Grant was drawing a salary of Rs. 250 per mensem in the Telegraph Office. After his adjudication Grant incurred fresh debts and on the basis of those debts Ishar Das of Lahore obtained a decree against him for Rs. 682-7-0 with costs on 14th April 1931. On 8th May 1931 Ishar Das made an application to the Subordinate Judge, Lahore, for attachment of Grant's salary and a warrant of attachment was issued on 11th May 1931, ordering the attachment of half the salary which Grant was drawing. This warrant was in the ordinary course received by the Chief Superintendent, Telegraphs, Agra, who raised the object

tion that Grant's salary was not attachable. He forwarded the warrant to the Judge of the Small Cause Court, Agra, in whose Court the insolvency proceedings against Grant were pending. The Small Cause Court Judge, Agra, wrote back to the Chief Superintendent, Telegraphs, that since Grant was an undischarged insolvent his salary could not be attached by the Subordinate Judge, Lahore, in view of the provisions of S. 28, Provincial Insolvency Act. On 26th June 1931 the Chief Superintendent, Telegraphs, sent a copy of the order of the Judge, Small Cause Court, Agra, to the Subordinate Judge, third Class, Lahore, who issued a notice to the Secretary of State (in this case the Collector, Agra) under O. 21, R. 48, Civil P. C. The Government Pleader appeared before the Subordinate Judge and pleaded that the Secretary of State was not liable under the provisions of O. 21, R. 48, Civil P. C. The Subordinate Judge by his order, dated 6th March 1935, held that Grant's salary was attachable and the Secretary of State was liable for the amount under O. 21, R. 48. It is against this order that the present application for revision has been filed by the Secretary of State.

A preliminary objection was taken by Mr. Jai Gopal Sethi on behalf of the respondent-decree-holder, that the order of the Court below was an order under O. 21, R. 58, Civil P. C., and that no revision lies against it. He further argued that it may be treated as an order under O. 21, R. 63-A (Lahore) and the appeal consequently lay to the District Judge, and as the applicant did not seek this statutory remedy he cannot attain his object by coming to this Court in revision. He further developed his argument by pointing out that the Secretary of State had appeared before the Subordinate Judge through the Government Pleader and raised the objection that Grant's salary was not attachable. This procedure comes within the purview of O. 21, R. 58, Civil P. C., and, unless it is challenged by means of a regular suit under O. 21, R. 63, Civil P. C., the order of the executing Court is conclusive, and it would be highly inconvenient and contrary to the spirit of the enactment to try to get round it through the channel of a revision. This objection, in my opinion, is well founded and the application for revision must fail on this ground.

Furthermore, the order passed by the Court, under O. 21, R. 48, Civil P. C., was an order passed in execution of the decree under S. 47, Civil P. C., and as such was subject to an appeal: vide 144 I C 897 (1). The applicant, therefore, could challenge the order of the Court below by filing a regular appeal to the District Judge. This he did not do and, in my opinion, a revision is barred on this ground also.

There is another aspect of looking at the matter. The adjudication of Grant as insolvent was annulled by an order dated 26th October 1932 and he retired from service on 18th July 1933. It has been stated by the counsel for the opposite party that in the present case the Receiver has not availed himself of the provisions of S. 28, Cl. (4), Insolvency Act, and has not realized the salary due to Grant after the order of annulment. This being so, I fail to see why the decree-holder should not be entitled at any rate to proceed against the salary for the period between the order of annulment and the date of his retirement. The application is dismissed with costs.

R.W./R.K. *Application dismissed.*

1. Charles S. Brown v. Albert Donough Han-
son, 1933 Bom 185=144 I C 897=35 Bom
L R 360.

* * A. I. R. 1936 Lahore 762
FULL BENCH

YOUNG, C. J., COLDSTREAM, MONROE,
SKEMP, BHIDE, CURRIE AND ABDUL
RASHID, JJ.

Lalla Mal-Sangham Lal—Assessee—
Petitioners.

v.

Commissioner of Income-tax, Lahore—
Opposite Party.

Civil Ref. No. 72 of 1935, Decided on
30th April 1936, from order by Addison
and Abdul Rashid, JJ., D/- 10th Feb-
ruary 1936.

* * Income-tax Act (1922), S. 9 (2) — An-
nual value—Annual value includes amount
paid by tenant on account of Municipal
house tax: 5 I T C 36=32 P L R 517=1931
Lah 320=131 I C 193 (F B), Overruled.

Annual value in S. 9 (2) does not mean only
annual money benefit derivable from property
but the sum for which the property might
reasonably be expected to let from year to year.
In estimating the sum for which the property
might reasonably be expected to let from year
to year the amount paid by the tenant on ac-
count of the Municipal house tax should be

included, that is, should be treated as part of the rent payable by the tenant to the landlord: 1932 Cal 886 (S B), *Rel. on*; 5 I T C 36=32 P L R 517=1931 Lah 320=131 I C 193 (F B), *Overruled*. [P 764 C 2; P 765 C 1]

Nawal Kishore—for Petitioners.

J. N. Aggarwal—for Opposite Party.

Order of Reference.

Addison, J.—Under S. 66 (2), Income-tax Act the Commissioner of Income-tax, Punjab, has referred the following two questions of law to this Court, namely :

(1) Whether the enhancement of income from the property from Rs. 50,038 to Rs. 51,802 by the Assistant Commissioner is legal (2) Whether the house-tax paid by the tenants of the petitioner on account of Delhi Municipal house-tax is to be included to arrive at "the annual value."

As the two questions are interdependent and as the Commissioner has asked that the second question should be referred to a Full Bench in view of conflict of authority we have come to the conclusion that this case should be referred to a Full Bench with the permission of the Hon'ble Chief Justice. The second question has already been before a Full Bench of this Court: see 5 I T C 316 (1). I was a member of that Bench. I was inclined to hold that the question was one more or less of fact but, if it was to be considered a question of law, it should be answered in the affirmative. Three Judges, namely Tek Chand, Jai Lal and Agha Haidar, were of the view that it should be answered in the negative, while Dalip Singh, J., was of opinion that the question was one of fact. The question was, therefore, answered in the negative on the view taken by the majority of three Judges to two. The same question came before a Full Bench of three Judges, including the Hon'ble Chief Justice, of the Calcutta High Court, shortly afterwards: see 6 I T C 293 (2). This Bench dissented from the decision of this Court, the principal portion of the judgment being set out in the order of the Commissioner stating this case. It is on account of this divergence of opinion that the Commissioner has asked that it should be referred again to a Full Bench of this Court. I still hold the same view as

I took in the former Full Bench of this Court, namely that the answer to the second question should be in the affirmative. My learned brother agrees that this is a fit case again to be referred to a Full Bench. For these reasons we would refer the two questions to a Full Bench if the Hon'ble Chief Justice agrees.

Opinion.

Young, C. J.—This is a reference by the Commissioner of Income-tax under S. 66 (2), Income-tax Act. The reference came before a Bench of this High Court, but in view of a conflict of authorities it was referred by the Bench to the Chief Justice for formation of a Full Bench. As the questions referred to had already been decided by a Full Bench of five Judges this Bench has been formed consisting of seven Judges none of whom have expressed an opinion upon the point. The assessee is the owner of certain houses in Delhi for which house tax is payable under S. 61, Punjab Municipal Act. By a written agreement between the assessee and a tenant the tenant agreed in addition to the sum reserved as "rent" to pay the amount of tax which under the provisions of the Municipal Act is a tax payable by the owner, that is, in this case, the assessee. The Income-tax Officer has assessed the property of the landlord under S. 9, Income-tax Act. The material portion of S. 9 (1) runs as follows :

9 (1). The tax shall be payable by an assessee under the head 'property' in respect of the bona fide annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner

Section 9 (2) is as follows :

9 (2). For the purposes of this section, the expression 'annual value' shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year; Provided that, where the property is in the occupation of the owner for the purposes of his own residence, such sum shall, for the purposes of this Section, be deemed not to exceed ten per cent of the total income of the owner.

The Assistant Commissioner for income-tax included both amounts, that is the amount reserved as rent and the Municipal tax paid by the tenant on behalf of the landlord for the purpose of ascertaining the annual value of the premises. The assessee objected to this procedure on the authority of the Full Bench decision of this Court reported in 131 I C 193 and in 5 I T C 316 (1). Two questions were referred to this

1. *Ohunna Mal-Salig Ram v. Commissioner of Income-tax*, 1931 Lah 320=131 I C 193=32 P L R 517=5 I T C 316 (F B).

2. *Krishna Lal Seal v. Commissioner of Income-tax*, 1932 Cal 886=140 I C 1=60 Cal 857=86 C W N 1144=6 I T C 293 (F B).

Court. The first question was submitted at the request of the assessee and Rai Bahadur Badri Das on his behalf now does not press this point and withdraws the reference with regard to it. The second question on which we are invited to express an opinion is as follows:

Whether the house tax paid by the tenants of petitioner on account of Delhi Municipal house tax is to be included to arrive at "the annual value."

In our opinion the question to be answered is a simple one. We have merely to construe S. 9 (2) of the Act. "Annual value" in the sub-section is clearly defined as "the sum for which the property might reasonably be expected to let from year to year," that is, the sum for which the landlord could let the premises having regard to local conditions and the demand for houses in that particular district. The strongest evidence of the sum for which the property might reasonably be expected to let is clearly, in our opinion, the sum which a tenant would be prepared to pay. It would make no difference what the amount paid to the landlord, or to his use, by the tenant for the right to use the premises was termed. No tenant would in ordinary circumstances pay more than the actual letting value of the premises. If for example there were two houses situated in the same district on the same kind of land and built in the same way, for one the landlord might demand Rs. 110 rent per month; for the other the landlord might demand Rs. 100 rent and insert a condition in the lease that the tenant should pay Rs. 10 per month, the amount due by the landlord to the Municipality. It appears to us that there can be no distinction between the two cases. In both Rs. 110 a month would be the sum for which the property might reasonably be expected to let.

It is argued in this case that the amount specified to be paid on account of the Municipal tax cannot be included in the sum for which the property might reasonably be expected to let as it was a tax payable by the landlord and that the "annual value" would be the net profit which the landlord actually kept in his own pocket. The basis of the argument is taken from the judgment of Tek Chand, J. in the Full Bench case already referred to where he quoted the words used by

Wilson, J. in 11 Cal 275 (3), that the "annual value of a house" must mean the "annual money benefit derivable from it by the owner." In our opinion, this definition of "annual value" can have no relation to the question before us. "Annual value" in S. 9, Income-tax Act, is clearly defined. It is not said there that the "annual value" means the "annual money benefit derivable from the property." On the contrary it says that it is the sum for which the property might reasonably be expected to let from year to year. If we may respectfully say so, it appears to us that the decision of the majority of the previous Full Bench of this Court was arrived at by considering other Acts or expressions of judicial opinion which had nothing to do with the construction of this sub-section of the Income-tax Act.

If the argument of counsel is correct that the amount payable to the Municipality on behalf of the landlord by the tenant cannot be included for the purpose of arriving at the annual value, there would be nothing to prevent the landlord making an arrangement for the tenant to pay other liabilities of his and so further to reduce the "annual value." There does not appear to us to be any distinction between the tax payable to the Municipality and the land revenue payable in respect of the property. The land revenue is by S. 9 (v) an authorized deduction. It is clear that if the legislature had meant to authorize any other deduction of the same kind, it would expressly have been included in the "allowances." We have been referred to a case where the same point arose in a reference to the Calcutta High Court and which is reported in 60 Cal 357 and in 6 I T C 293 (2) which supports our opinion on this question. The reasoning of the learned Chief Justice of the Calcutta High Court in that case appears to us to be unassailable. The same view was expressed by Addison, J. in the dissenting judgment of our own Full Bench referred to above.

We therefore answer the reference submitted to us as follows: That in estimating the sum for which the property might reasonably be expected to let from year to year, the amount paid by the tenant of the petitioner on account of the

3. Nundo Lal Bose v. Corporation for the town of Calcutta, (1885) 11 Cal 275.

Delhi Municipal house tax should be included, that is, should be treated as part of the rent payable by the tenant to the landlord. It must, however, be understood that the amount of rent payable by the tenant to the landlord is only *prima facie* evidence of "annual value," and a consideration of the rents paid for similar and similarly situated properties in the locality may show the "annual value" in any particular instance to be less or more than the rent actually paid.

D.S./R.K. *Reference answered.*

A. I. R. 1936 Lahore 765

JAI LAL, J.

(Firm) Duni Chand. Gokal Chand—
Decree-holder—Appellants.

v.

(Firm) Brij Lal & Sons—Judgment-debtor and another—Surety—Respondents.

Misc. Second Appeal No. 1914 of 1933, Decided on 7th April 1936, from order of Senior Sub-Judge, Rawalpindi, D/- 31st August 1933.

Execution — Validity of — Decree-holder desirous of executing decree at another place, obtaining certificate of non-satisfaction from Court passing decree—Certificate wrongly addressed to Senior Sub-Judge and not to District Judge—Defect in certificate is formal and is cured by its presentation to District Judge and subsequent transfer of case by him to subordinate Judge—Objection cannot be raised unless taken at earliest opportunity.

Where a decree-holder, desirous of executing his decree at another place, obtains a certificate of non-satisfaction from the Court passing it and the certificate is wrongly addressed to the Senior Subordinate Judge and not to the District Judge but the decree-holder, having obtained the certificate personally presents it to the District Judge and obtains an order from him transferring the same for execution to a Court subordinate to it, the defect in the certificate of non-satisfaction is a formal defect and is cured by its production before the District Judge and by the transfer of the case by him for execution to the Judge, subordinate to it. Moreover, objection on ground of defect cannot be raised unless taken at the earliest opportunity.

[P 765 C 1, 2]

Ram Lal Anand I—for Appellants.

Judgment.—The respondent is neither present nor is he represented before me. I have therefore heard the appeal *ex parte* against him. The appellant having obtained a money decree against Jagat Ram in the Court of a Subordinate Judge at Amritsar desired to execute it in Rawalpindi. He accordingly obtained a certificate of non-satisfaction, but the

certificate was addressed to the Senior Subordinate Judge of Rawalpindi and not to the District Judge of Rawalpindi as should have been done. The certificate of non-satisfaction was apparently handed over personally to the decree-holder who took it to the District Judge of Rawalpindi and obtained an order from him transferring the same for execution of the decree to a Subordinate Judge at Rawalpindi. This Subordinate Judge, on receipt of an application for execution, issued a warrant for the arrest of Jagat Ram, judgment-debtor, and had him arrested. The judgment debtor was then released on Gur Saran Das standing surety for his appearance in Court. On the date fixed Jagat Ram did not appear, and an application was made by Gur Saran Das and also on behalf of the judgment-debtor that the latter was too ill to attend the Court. An objection was also taken to the jurisdiction of the Subordinate Judge to execute the decree on the ground that the certificate of non-satisfaction had been addressed by the Amritsar Court to a wrong Court in Rawalpindi and therefore all the proceedings in the Court of the Subordinate Judge, Rawalpindi, were illegal. This objection having been overruled by the Subordinate Judge, an appeal was preferred to the Senior Subordinate Judge who held the objection to be well-founded, the proceedings in execution taken before the Subordinate Judge at Rawalpindi being in his opinion illegal and *ultra vires*. He set aside the order appealed against. The decree-holder has appealed to this Court.

It is contended on his behalf that the defect in the certificate of non-satisfaction was a formal defect and was cured by its production before the District Judge of Rawalpindi and by the transfer of the case by him for execution to the Court of the Subordinate Judge at Rawalpindi. This contention, in my opinion, is well-founded. It is true that legally the certificate of non satisfaction should have been addressed to the District Judge of Rawalpindi, but it was actually presented to him and was sent by him to the Subordinate Judge. The mistake in the certificate, therefore was an accidental one. Moreover, no objection was taken at the earliest opportunity by the judgment-debtor and it is doubtful whether the surety can raise such an objection after having given security in the Court of the Subordinate Judge. I accept this appeal and set aside

the order of the Senior Subordinate Judge and send the case back to the Subordinate Judge in whose Court the execution proceedings were pending in Rawalpindi with direction to proceed with the execution of the decree in accordance with law. The respondent shall pay the costs of the appellant in this Court and in the Court of the Senior Subordinate Judge.

R.M./R.K.

*Appeal allowed.***A. I. R. 1936 Lahore 766**

JAI LAL, J.

Committee of Management for Gurdwaras, Amritsar—Appellant.

v.

Central Bank of India, Ltd., Amritsar—Respondent and others—Pro forma Respondents.

Misc. First Appeal No. 2198 of 1935, Decided on 5th May 1936, from order of Senior Sub-Judge, Amritsar, D/- 11th July 1935.

Execution—Decree binding.

A decree, though passed without jurisdiction, unless it is set aside by proper remedies, is binding on the executing Court. [P 767 C 1]

Bhagat Singh—for Appellant.

H. J. Rustomji—for Respondent 1.

Judgment.—The Central Bank of India, Ltd., had a decree for sale of mortgaged property against S. S. Charaya & Co. They attempted to execute the decree by sale of the mortgaged property, but in the meantime a claim to the property was preferred under the Sikh Gurdwaras Act before the Tribunal by the Committee of Management for Gurdwaras at Amritsar and another body. The claim was compromised before the tribunal and the property was declared to be vested in the Committee of Management for Gurdwaras at Amritsar. The result was that this property was declared not to be the property of the judgment-debtor. The Central Bank of India, Ltd., however, instituted a suit in the Court of Lala Kishan Chand, Subordinate Judge at Amritsar, for a declaration that the decree of the tribunal was a nullity having been obtained by fraud and collusion between the plaintiff and the defendants in that case. The Committee of Management for Gurdwaras at Amritsar was impleaded a defendant in that case. The committee did appear and pleaded to the plaint and raised the question of the jurisdiction of the Court to entertain the suit owing to

the existence of Ss. 36 and 37, Sikh Gurdwaras Act. After raising this objection however the committee remained absent and allowed proceedings to go ex parte against it. Subsequently the suit was decreed; the effect of the decree was that the decree of the tribunal was declared to be invalid. The Central Bank of India, Ltd., then attempted to execute their decree against the judgment-debtor by selling the mortgaged property and an objection was raised by the Committee of Management for Gurdwaras at Amritsar to the sale of the property on the ground that the same had been declared to be their property by the tribunal. The committee further pleaded that the decree of Lala Kishan Chand was a nullity as the same had been passed without jurisdiction. S. 36, Sikh Gurdwaras Act, says:

No suit shall lie in any Court to question anything purporting to be done by the Local Government, or by a tribunal in exercise of any powers vested in it by or under this Act.

Section 37 provides:

Except as provided in this Act no Court shall pass any order or grant any decree or execute wholly or partly, any order or decree, if the effect of such order, decree or execution would be inconsistent with any decision of a tribunal, or any order passed on appeal therefrom, under the provisions of this Part.

It is clear therefore that in the face of the decree of the tribunal the Central Bank of India, Ltd., is not entitled to execute its decree by sale of the property in dispute, but the difficulty is that by a subsequent decree of a Subordinate Judge, which decree has not been set aside and all attempts to set it aside at the instance of the Committee of Management for Gurdwaras at Amritsar have failed, the decree of the tribunal has been declared to be invalid on the ground of having been obtained by collusion and fraud, and this judgment of the Subordinate Judge is binding on the Committee of Management for Gurdwaras at Amritsar as the committee was a party to the suit and had an opportunity to defend it by raising the plea as to the jurisdiction of the Subordinate Judge. They could have appealed from the decree if they failed to have the ex parte decree set aside and finally they could have the decree revised relying upon Ss. 36 and 37, Sikh Gurdwaras Act.

The result is that a decree which is binding on the appellants is still existing, and that decree prevents the executing Court from taking any notice of the decree.

of the tribunal. The matter is not free from difficulty and there is an obvious conflict between the two decisions, the second of which seems to be without jurisdiction but is binding on the appellants. I mean the decision of Lala Kishen Chand, Subordinate Judge. Still it is not open to the executing Court in these proceedings to hold that that decision was without jurisdiction because it was given

in a case in which the appellants had been impleaded. I hold therefore that the better view is that the decision of the Subordinate Judge at Amritsar prevents the appellants from raising the bar created by the decision of the tribunal. I dismiss this appeal but leave the parties to bear their own costs.

B.D./R.K.

*Appeal dismissed.***A. I. R. 1936 Lahore 767**

ADDISON AND DIN MOHAMMAD, JJ.
Bahadur Shah and another—Plaintiffs
—Appellants.

v.

Zulfiqar Shah and others—Defendants
—Respondents.

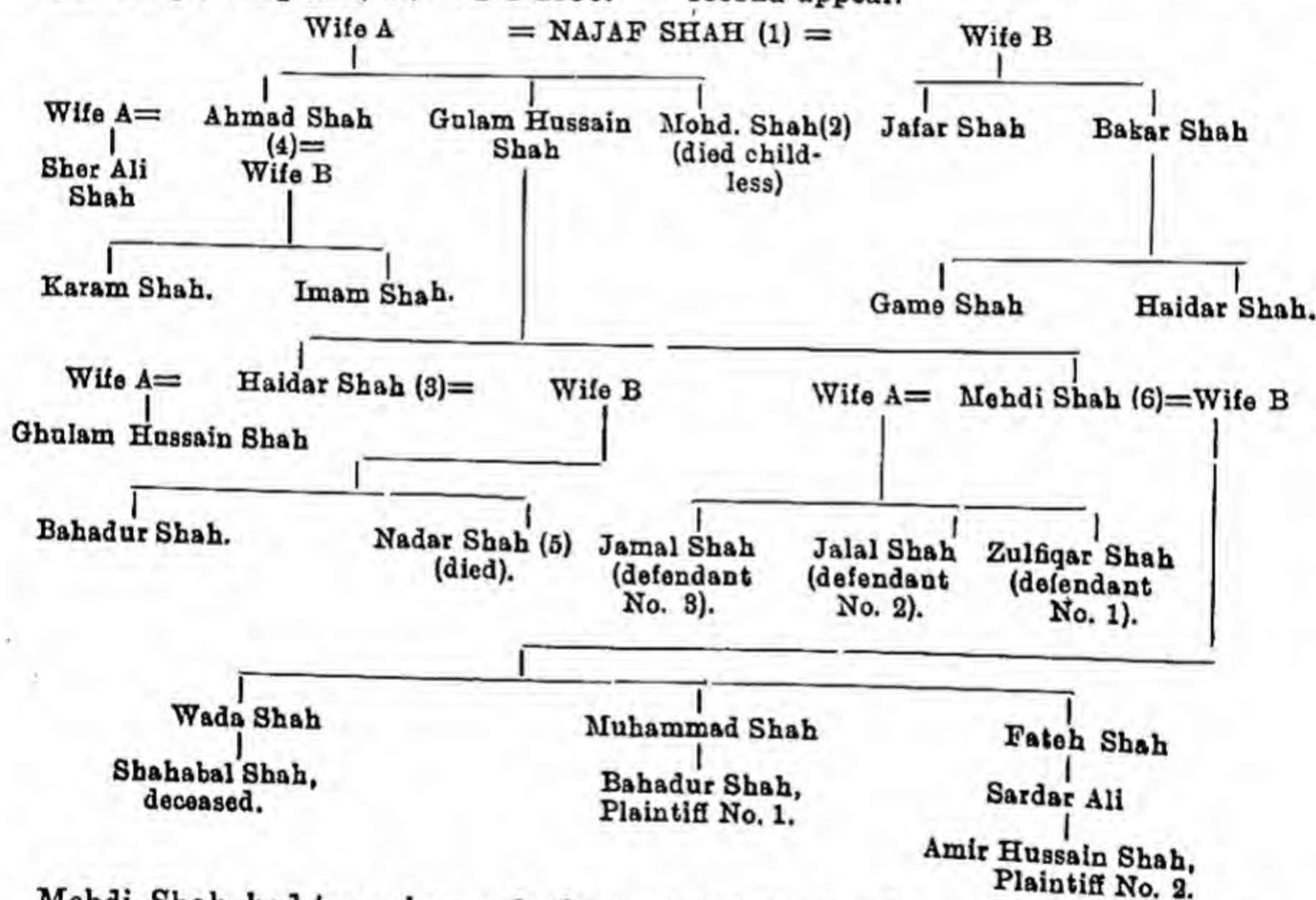
Second Appeal No. 1967 of 1930, Decided on 8th March 1935, from decree of Dist. Judge, Sargodha, D/- 11-8-1930.

Custom (Punjab)—Succession — Sayads of villages Kotla Sayyadin near Shahpur—Pagwand rule prevails.

Among Sayads of village Kotla Sayyadin near Shahpur, pagwand rule is followed and not chundawand. [P 769 C 2]

Ghulam Mohi-ud-Din — for Applts.
M. C. Sud for S. L. Puri—for Respdts.

Judgment. — The following pedigree table is necessary for the purposes of this second appeal:



Mehdi Shah had two wives and three sons by each wife. On his death his property was mutated in favour of the six sons in equal shares. Later, the descendants of one wife separated from the descendants of the other and there was a partition. Shahabul Shah, grandson of Mehdi Shah, has now died. The plaintiffs are his two cousins and are descended from the same wife as the deceased Shahabul Shah. Shahabul Shah's land has been mutated in equal shares

between the descendants of both wives according to the pagwand rule. The plaintiffs claim that as the chundawand rule is followed in their family they, being relatives of the whole blood, are entitled to succeed to Shahabul Shah's estate to the exclusion of the descendants of the other wife. They also added that they were entitled to succeed to him on the further ground that they had been associated with him in cultivation after the partition between the descendants of

the two wives had been effected. The trial Court decreed the claim. The learned District Judge reversed his decision and dismissed the suit. The plaintiffs applied to him for a certificate under S. 41 (3), Punjab Courts Act, and the District Judge granted them a certificate for the purpose of a second appeal to this Court on the question whether the rule of succession prevailing amongst the parties who are Sayads by caste is pagwand or chundawand. On this certificate the plaintiffs instituted the appeal which is before us.

The parties are Sayads of village Kotla Sayyadan near Shahpur and are admittedly governed by custom. The entry in the *riwaj-i-am* of the District, Ex. D-5, is to the effect that when property devolves on brothers after their father's death all of them succeed in equal shares according to the pagwand rule. If the property is subsequently partitioned among all the brothers and one of them dies sonless, his share devolves on all the brothers according to the pagwand rule and not on the uterine brothers. If he was associated with a brother of the half-blood, still his share shall devolve upon all the brothers. No regard shall be paid to association. This was the reply of all Musalmans. Appended to the reply is a note that two persons Najaf Shah and Sher Ali Shah, residents of Shahpur, and one person Alam Shah, resident of Sodhi, dissented and said that in their family the custom was that a uterine brother of the whole blood got the share of the deceased and that the pagwand rule was not followed. This note does not affect the parties who belong to another place and who apparently adopted the answer given by all Musalmans. Below the entry two instances are given. The first is to the effect that at village Kotla Sayyadan, Ahmad Shah, Ghulam Shah and Mohammad Shah, were three brothers from one mother, and Baqar Shah and Ghulam Mohammad from the other, and on Mohammad Shah's death his share devolved on Ahmad Shah and Ghulam Hussain Shah and not on Baqar Shah. The second instance is to the effect that at Shahpur, Mehdi Shah and Haidar Shah were from one mother and Amir Shah and Shah Kabir from the other, and on Mehdi Shah's death his share was divided between the surviving brothers. This second instance relates to Shahpur where Najaf Shah and Sher Ali Shah re-

ferred to above also resided. It will be apparent that the statement of custom recorded in the revenue papers is against the plaintiffs' case with the possible exception of the first instance which will be referred to later.

The plaintiffs rely on Exception 2 to para. 7 of Rattigan's Digest where it is stated that Sayads, Qureshis and Pathans of Shahpur District follow the chundawand rule. The authority given is para. 19 of a minute by the Lieutenant-Governor on some settlement report. This minute has not been traced by any one. As this statement in Rattigan's Digest of Customary Law is not supported by any authority and is against the recorded statement of custom, it must be neglected. The plaintiffs further rely on the following instances within the family itself:

The first case is that of Najaf Shah; see pedigree table. At the time of the first settlement in 1857 he was dead. The revenue papers of that year record that his descendants by one wife, namely, Jafar Shah, Game Shah and Haidar Shah held 49½ ghumaons of land, while the descendants of the other wife, namely, Ahmad Shah, Mehdi Shah and Haidar Shah held 1630½ ghumaons. This merely proves an unequal division among the progeny of the two wives and is at variance with both the chundawand and pagwand rules of succession. There is nothing to show whether this unequal division was made during the lifetime of Najaf Shah or after his death. It is admitted that the father has full power to divide his property in his lifetime as he wishes. This instance, therefore, does not help the plaintiffs. The second instance relied upon by the plaintiffs is that of Mohammad Shah, son of Najaf Shah. It is said on the authority of the first instance given below the record of custom already referred to that on the death of this Mohammad Shah his real brothers, Ahmad Shah and Ghulam Hussain Shah, succeeded to his share of the estate to the exclusion of his half-brothers, Jafar Shah and Baqar Shah. This is not supported by the revenue papers as Mohammad Shah was dead before the first settlement of 1857. Whatever took place, therefore, had taken place before the Revenue Records commenced to be kept in this District. There is no mention of Mohammad Shah's name in these papers as being the owner of any land. The first instance recorded

under the statement of custom was mentioned to the Settlement Officer in 1895 long after Mohammad Shah was dead. It is in fact not known whether Mohammad Shah died before or after his father's death. Apart from the statement to the Settlement Officer in 1895 there is no evidence worth considering about the succession to the estate of Mohammad Shah. This instance is, therefore, most unsatisfactory and must be rejected.

The third instance relied upon by the plaintiffs is that of Haidar Shah. But it is proved by Ex. P-13 that he made a division of his property in his lifetime. The division in its result is chundawand, but as he possessed plenary powers of disposing of his property in his lifetime it cannot be said that this is a case of succession according to the chundawand rule. As a matter of fact the defendants produced a copy of a mutation, Ex. D-7, which shows that this Haidar Shah left some land in another village, Shahpur, at the time of his death in 1903 and mutation was effected of this land, which was not disposed of by him, in favour of all the sons equally in accordance with the pagwand rule. This instance, therefore, also does not help the plaintiffs' case. The fourth instance relied upon is that of Ahmad Shah. Here again, Ex. P-13 shows that there was an unequal division amongst the sons made by the father himself in his lifetime. This also, therefore does not help the plaintiffs' case. The fifth instance is that of Nadir Shah. He died without issue. Bahadur Shah, his brother of the whole blood, sued Ghulam Hussain Shah, brother of the half blood for his whole estate. But the claim was really compromised as Bahadur Shah agreed to give Ghulam Hussain Shah a considerable area of land which he was in possession of but which was claimed by Ghulam Hussain Shah as his property. This is the most favourable case on the plaintiffs' side but even it is not of much importance in the circumstances described.

The sixth instance relied upon is that of Mehdi Shah, but the mutation is clearly to the effect that the six sons succeeded in equal shares. There were three sons by each wife and it cannot be said that this division was chundawand. Further the defendants have proved five instances amongst Sayads of neighbouring villages where the pagwand rule was followed,

1936 L/97 & 98

and there is no instance proved by the plaintiffs as to the chundawand rule being followed. It is, clear therefore, that the rule established in the present case is that of pagwand. We dismiss this appeal but make no order as to costs here as a certificate was granted under S. 41 (3) of the Punjab Courts Act.

R.W./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 769

AGHA HAIDAR, J.

Indar Singh—Defendant—Appellant.

v.

Nasiba and another — Plaintiffs and others—Defendants—Respondents.

Second Appeal No. 189 of 1936, Decided on 30th April 1936, from decree of Dist. Judge, Ambala, D/- 13th November 1935.

(a) Custom (Punjab)—Alienation — Necessity—Transferee before advancing money must make reasonable enquiry as to its necessity—He need not look to its application—Mere recital as to existence of necessity in deed is feeble evidence.

If a transferee makes reasonable enquiry as to the existence of the necessity, and on being satisfied that the necessity existed he advances the money, it is no part of his duty to see to the application of the loan to the necessity. The burden in these cases is always on the transferee. The mere recital as to the existence of the necessity in the deed of transfer is very feeble evidence and Courts of justice ordinarily do not attach much weight to it.

[P 770 C 1, 2]

(b) Custom (Punjab) — Alienation—Necessity—Only small portion of consideration not applied for purposes of legal necessity—Alienation should not be set aside—Alienee is not liable to pay such portion of consideration to person challenging alienation.

Where a sale or a mortgage by a mortgagee is established for legal necessity, the fact that the vendee or the mortgagee is unable to prove that a small portion of the consideration was applied for purposes of legal necessity, is no ground for setting aside the alienation, nor can the vendee or the mortgagee be held liable to pay to those challenging the alienation that portion of the consideration for which legal necessity is not positively established: 1927 P C 37, *Foll.*

[P 770 C 2]

Tek Chand—for Appellant.

Judgment.—This is a defendant-mortgagee's appeal which arises out of the following circumstances: Three brothers, Shaman, Samanda and Naranjan Singh, executed a mortgage dated 10th September 1928 in favour of Rodhal Mal for a sum of Rs. 1,270. On 1st August 1930 the same mortgagors executed another mortgage in favour of Indar Singh, defendant 1, for a sum of Rs. 1,500. The mortgaged

property consisted of some land and a house. Two of the sons of Naranjan Singh instituted the present suit for a declaration that the mortgages mentioned above were without consideration and necessity and that the property being ancestral, they were not binding upon the plaintiffs. We are concerned with the mortgage in favour of Indar Singh alone in the present appeal. Indar Singh pleaded that the property was not ancestral and that the mortgage was for consideration and necessity. The trial Court held that the property and the house were ancestral and that out of the mortgage in favour of Indar Singh a sum of Rs. 1,250 was paid towards previous debts and Rs. 200, which was paid in cash before the Sub-Registrar, was borrowed for the purpose of purchasing bullocks.

The small item of Rs. 50 was intended to cover the registration charges and was allowed. On these findings the trial Court dismissed the plaintiffs' suit. The plaintiffs went up in appeal. The learned District Judge has affirmed the finding of the trial Court as regards the item of Rs. 1,300 and has allowed the same. As to the item of Rs. 200 he has held that necessity for this amount has not been proved. He accordingly allowed the appeal to this extent: that he disallowed the item of Rs. 200. Indar Singh has come up to this Court in second appeal and has challenged the finding of the learned District Judge disallowing the item of Rs. 200. There is no doubt that in the mortgage-deed in favour of Indar Singh there is a recital that the money was required for the purchase of bullocks for agriculture, but there is no finding that there was any enquiry and that it was after that enquiry that the money had been advanced by the mortgagee. The law on the subject is well settled. If a transferee makes reasonable enquiry as to the existence of the necessity and on being satisfied that the necessity existed, he can advance the money, and it is no part of his duty to see to the application of the loan to the necessity. The burden in these cases is always on the transferee. In the present case Indar Singh has failed to prove that he made reasonable enquiry and that when he satisfied himself that the necessity had existed he advanced the money. The mere recital as to the existence of the necessity in the deed of transfer is very feeble evidence and

Courts of justice ordinarily do not attach much weight to it. This argument of the learned counsel therefore fails.

A point was, however, taken by counsel for the appellant, at my suggestion, inasmuch as Indar Singh has been able to prove necessity to the extent of Rs. 1,300, the mere fact that he has failed to prove legal necessity for the small item of Rs. 200 was no ground for holding that the mortgage was binding upon the plaintiffs only to the extent of Rs. 1,300. In my opinion this contention is well founded. It has been laid down by their Lordships of the Privy Council in a recent decision in 49 All 149 (1) that where a sale or mortgage by a Hindu widow or a Hindu father or manager of a joint Hindu family is established for legal necessity, the fact that the vendee or the mortgagee is unable to prove that a small portion of the consideration was applied for purposes of legal necessity, is no ground for setting aside the alienation, nor can the vendee or the mortgagee be held liable to pay to those challenging the alienation that portion of the consideration for which legal necessity is not positively established. This principle, in my judgment, fully applies to the present case although it is governed by the Customary law of the Punjab. The law is fully discussed at p. 156 and the following pages of the report, and no distinction is made between the transfer by a sale or mortgage. The sole question in all these cases is whether there was necessity for the loan. In my opinion, having regard to the fact that necessity has been proved for the very substantial sum of Rs. 1,300, it may be taken that there was necessity for the loan of Rs. 1,500, even if strict proof is lacking as regards necessity for the small item of Rs. 200. In my opinion, on the principle laid down in the case quoted above, the mortgagee-appellant must be taken to have proved consideration and necessity for the amount of his mortgage. I, therefore, allow the appeal, modify the decree of the lower appellate Court and dismiss the plaintiff's suit with costs throughout.

R.W./R.K.

Appeal allowed.

1. Sri Krishan Das v. Nathu Ram, 1927 P O 87 = 100 I O 130 = 54 I A 79 = 49 All 149 (P O).

* * A. I. R. 1936 Lahore 771

FULL BENCH

MONROE, BHIDE AND CURRIE, JJ.

Kishore Chand—Plaintiff—Appellant.
v.

Bahadur and others — Defendants — Respondents.

First Appeal No. 1166 of 1934, Decided on 24th April 1936, from decree of Senior Sub-Judge, Ferozepore, D/- 24th March 1934.

(a) Limitation Act (1908), S. 12—Copying agent is not private agent of applicant.

A "copying agent" in dealing with an application presented in accordance with the rules, does not act as a private agent of the applicant but as an official of the copying department which is entrusted with the duty of preparing and certifying copies: 9 I C 381; 1928 Lah 16 and 1935 Lah 682, Ref. [P 777 C 2]

* * (b) Limitation Act (1908), S. 12 — What is valid application stated: 1935 Lah 625=160 I C 788 and 1935 Lah 889=160 I C 897, Overruled.

An application for a copy, whether made in person or by post, which bears the necessary court-fee stamp and is addressed to the proper officer is a valid application, even if it is not accompanied by the full cost of preparing and certifying the copy: 1934 Lah 474, Foll.; 1935 Lah 625=160 I C 788 and 1935 Lah 889=160 I C 897, Overruled. [P 777 C 2]

* * (c) Limitation Act (1908), S. 12 — Period between date of presentation of application and date on which full costs deposited can be excluded if deposit is made with reasonable diligence as and when required by copying department: 1935 Lah 625=160 I C 788 and 1935 Lah 889=160 I C 897, Overruled.

Under the rules for the supply of copies, the time necessary for ascertaining the costs of preparing a copy is time "requisite" for obtaining the copy within the meaning of S. 12, and an applicant is entitled to exclude from the prescribed period of limitation the period between the date of presentation of the application and the date on or by which the full costs of preparing the required copy is deposited, provided he deposits with reasonable diligence the aforesaid amount as and when required by the copying department, and provided further that in the case of an application made by post he remits five rupees with the application: 1934 Lah 474, Foll.; 1935 Lah 625=160 I C 788 and 1935 Lah 889=160 I C 897, Overruled. [P 777 C 2; P 778 C 1]

Mehr Chand Mahajan and *Nawal Kishore*—for Appellant.

Amolak Ram and *Harbhajan Das*—for Respondents.

Order of Reference.

Bhide, J. — A preliminary objection has been raised in this case that the appeal is barred by time. The decision

of this point turns on the question of the period which can be allowed under S. 12, Lim. Act, as time "requisite" for obtaining copies of the judgment and decree of the trial Court accompanying the memorandum of appeal. It appears that the application for copies was made to the Copying Department on 7th April 1934, but the full amount of copying fees was not deposited till 16th April 1934. The copies were ready the same day. The learned counsel for the respondent contended that according to the rules the application for copies should have been accompanied by a sufficient amount to cover the copying-fees and as this amount was not paid till 16th April 1934, the appellant is entitled to deduct one day only for the copies. If this contention is correct the appeal would be clearly time-barred. The appellant's explanation is that when he put in the application he was not informed by the copying agent of the necessary fees and that he deposited the fees as soon as he was informed. The endorsement on the copies is not quite correct in so far as it states that the fees were not deposited till 16th April. From the affidavits filed it appears that the appellant first deposited Rs. 13-8-0 on 12th April as he was asked to do, and then paid up the balance of Rs. 4-2-0 on 16th April when called upon to do so. The respondents' contention is that the "copying agent" is merely an agent of the applicant, and the time taken by him in ascertaining the amount of copying fees and informing the appellant cannot be deducted.

It will appear from the above that the two main propositions on which the objection of the respondents is based are:

(i) that the copying agent is a private agent of the applicant for copies; and

(ii) that an application for a copy cannot be held to be a proper application unless and until the applicant deposits an amount sufficient to cover the copying fees.

A number of rulings bearing on the above points has been cited by the learned counsel for the parties. As regards the first point, the first ruling in which this proposition is to be found appears to be 9 I C 381 (1) a Division Bench ruling of the Punjab Chief Court. But the facts of that case were peculiar

1. *Ashiq Husain v. Ali Bux*, (1911) 9 I C 381.

It appears that a copy was required of the judgment and decree of the Divisional Court, but the application for a copy instead of being made to the clerk of that Court as required by the rules, was addressed to the copying agent, Delhi District, who then had to obtain the copy from the clerk of Court to the Divisional Judge. In these circumstances it was held that the "copying agent" acted merely as a private agent of the applicant and this view is easily intelligible on the facts of that case. This ruling was followed in 1928 Lah 16 (2). The facts of that case are not very clear from that judgment, but the learned Judge who decided that case had occasion to re-consider it in 1935 Lah 682 (3) and he has explained therein that that case was governed by the old copying rules and that the copying agent to whom the application was made had to apply to the Court and obtain a copy. If so the case would stand on a footing similar to 9 I C 381 (1). The learned Judge distinguished the case from those cases where the application is made to the Court in accordance with the rules and expressed the opinion that it was difficult to hold the copying agent to be an agent of the applicant in the latter class of cases.

The third ruling cited was 35 P L R 713 (4), in which the above two rulings were followed. In this case the application for a copy of the decree was made by post and was accompanied by a money order for Rs. 10. The application was apparently held to have been made to the proper person, but the interval which elapsed between the date of the application and the date of deposit of the full copying fees was not allowed to be deducted under S. 12, Lim. Act. According to the rules an application for copies made by post has only to be accompanied by a deposit of Rs. 5 and it is then for the copying department to calculate the requisite fees and require the applicant to put in the balance, if any, (vide R. 5 High Court Rules and Orders, Vol. 4, Ch. 17-C). In 35 P L R 713 (4), these rules were apparently complied with, but the learned Judge held on the authority

of the above two rulings that the copying agent was merely a private agent of the applicant and hence the time taken by him in calculating the fees and informing the applicant of the requisite fee could not be allowed. The learned Judge has also referred to the instructions in the High Court Rules and Orders (Vol. 1 Ch. 14-B) but these appear to be of a general character and the question must be decided on the basis of the relevant copying rules and not of these instructions.

The above ruling was cited with approval in 1935 Lah 625 (5) and 1935 Lah 889 (6). In the former case, it was held, following the above ruling, that a copying agent is an agent of the applicant and not of the Court. In the latter case, the application for copies was made in person, but the applicant did not make any deposit with the application. He waited till the copying department calculated and informed him of the amount of copying fees and then deposited the same. It was held that according to the rules it was necessary for the applicant to deposit with his application an amount sufficient to cover the cost of preparing and certifying copies, and therefore there being no proper application until that amount was deposited the intervening period could not be deducted as time "requisite" for obtaining the copies under S. 12, Lim. Act. There is no direct reference in this ruling to the question whether a copying agent is to be treated as a private agent of the applicant in all circumstances and stress seems to have been laid chiefly on the fact that the necessary deposit was not made with the application. 2 Luck 447 (7) has been referred to in 1935 Lah 889 (6), but the copying rules in that province are perhaps somewhat different, and a system of readily ascertainable fixed copying fees is probably in force there.

In 37 P L R 510 (8), the facts appear to have been similar to those in the present case. The learned Judge, who decided the case, found it difficult to under-

2. Abdul Rahim v. Chet Ram, 1928 Lah 16=104 I C 586=28 P L R 605.

3. Mathela v. Sher Mahomed, 1935 Lah 682=161 I C 72.

4. Mehr Ali Beg v. Sarwan, (1934) 35 P L R 713.

5. Naul Mal v. Reru Mal, 1935 Lah 625=160 I C 788.

6. Jiwan v. Punjab National Bank, 1935 Lah 889=160 I C 897.

7. Gudar Pal v. Nageshar Bakhsh, 1927 Oudh 129=101 I C 186=2 Luck 447=4 O W N 220 (F B).

8. Labhu Ram v. Bansidhar, 1936 Lah 120=158 I C 786=37 P L R 510.

stand how the copying department, which is controlled by the Government, can be treated as the agent of the applicant, when the latter complies with the rules in force and when the copying agent is not asked to make any "further application on the applicant's behalf." He also held that the time taken by the Copying Department in computing the copying fees and informing the applicant was time "requisite" in the circumstances. It would thus appear that this ruling is in conflict with the above rulings. Another recent ruling 37 P L R 235 (9) was also cited, but the facts of that case are distinguishable as no copy of the decree was prepared in that case for a long time and I do not think the ruling throws light on the points arising in the present case.

It would appear from the above that there is a conflict of authorities as to the precise position of an applicant, who makes an application for copies to the proper person, but does not deposit with it the full amount of fees required to cover the copying fees. The rules relating to the supply of copies of judgment of the different Courts differ in certain respects, some being governed by those in Financial Commissioner's Standing Order No. 5, and others by the rules in Ch. 17-A, Vol. 4 Rules and Orders of the High Court : (vide Ch. 17-A, Vol. 4, R. 9 referred to above). But so far as the points raised in the present case are concerned there seems to be no material difference. The relevant rules in the Financial Commissioner's Standing Order No. 5, (now incorporated in the District Office Manual) which govern the present case appear to be the following :

18-A, 10. (i) Every application for a copy of a record, other than an application made by post, shall be accompanied by a deposit in cash of a sum which shall not be less than the cost of preparing and certifying such copy. Each such deposit shall be acknowledged on a receipt in form O. D.-8 appended to these rules (foil and counter-foil). The foil shall be handed over to the person paying the money and the counter-foil retained for audit purposes.

Note.—If, for any reason, the cost of the copy cannot be quickly ascertained, the rules laid down in Ols. (4) and (5) below should be followed :

(ii) If the application is not accompanied by the cash deposit it should be returned to the person presenting it with an endorsement stating the amount of the deposit required ; such

endorsement shall be dated and signed by the officer returning the application and a note of the date of return shall be made in the register.

The relevant rules relating to applications by post are the following :

(iv) Every application for a copy of a record made by post shall be accompanied by a fixed deposit of rupees five which shall be acknowledged on a receipt as in Cl. (1) ; if it is not accompanied by such deposit it shall be dealt with as in Cl. (2) above. The amount received by money order need not however be acknowledged in form C. D.-8. In such cases the money order coupon signed by the officer-in-charge, as required by para. 11, will serve the purpose of a receipt.

(v) On receipt of an application by post with the prescribed deposit, an estimate of the cost of preparing and sending the copy, including court-fee, if any, shall be prepared, and if the estimated total exceeds the amount of the deposit the applicant shall be called upon to remit the balance, and no action shall be taken on the application until such balance has been remitted. The applicant shall be warned that if the balance is not remitted the copy will not be prepared and the deposit shall be forfeited. (Vide Ch. 17-O, Vol. 4, Rules and Orders of the High Court and Ch. 18 of the District Court Manual p. 4).

It is unnecessary to reproduce the rules relating to the person to whom the applications should be addressed. It is not disputed that an application for a copy cannot be considered to be a proper application unless it is addressed to the proper authority. In the present case it was so addressed and the only dispute is as regards the effect of non-deposit of the requisite copying fees with the application. From the rules cited above it will appear that an application made in person must be accompanied by a deposit in cash of a sum not less than the cost of preparing and certifying the copy and in the case of applications by post an initial deposit of Rs. 5 is required. Further, in the former case when the cost of the copy cannot be quickly ascertained the applicant is required to deposit Rs. 5 only at the outset and then called upon to deposit the balance after the copying department has ascertained the requisite fees. So far as applications by post are concerned, the position seems to be clear enough. The applicant has only to make an initial deposit of Rs. 5 and then deposit the balance when called upon to do so by the copying department.

In the latter class of cases, there seems to be no good reason for disallowing the period taken in computing the copying fees and informing the applicant, unless

the copying department is to be treated as a mere private agent of the applicant. I am however unable to see why the copying department should be treated as a private agent of the applicant in such circumstances. I have already pointed out that the facts in 9 I C 381 (1), were distinguishable. There are some general remarks in that case as regards the status of a copying agent, but the case is an old one, and it is not clear what rules were then in force when the appeal was filed (1908). The expression 'copying agent' is perhaps misleading. As the rules stand at present, the copying department is certainly maintained and controlled by the Government and a litigant can only obtain copies by making an application to the copying department in accordance with rules framed by Government: (see *inter alia* Rr. 13-A-1, 13-A-38, 13-A-42 and 13-A-46 in Ch. 3, District Office Manual). It is difficult to understand why the 'copying agency' should be treated as a private agent of the applicant in such a case.

As regards applications made in person, the position is not perhaps so clear. The rules require that the application should be accompanied by a deposit sufficient to cover the cost of preparing and certifying the copies. But how is the applicant to find this amount beforehand? Is it intended that the applicant should first inspect the record, count the number of words in the documents of which he requires copies, calculate the fees and then deposit the amount? I doubt if this could be the intention. Again it would not be even possible for the applicant to ascertain the fees when he requires copies of documents such as field maps, etc. The wording of the rules is not so clear, but it seems to me that the intention probably is (and I believe this is the practice) that the copying department should ascertain the fees and inform the applicant and then he must deposit the required fees. If he does not, the application must be returned to him according to sub-cl. 2 of the above rule. Otherwise if the copying department was not concerned with the ascertainment of the requisite fee the rule should have required the application to be returned at once when no deposit is paid at all. This interpretation also received support from the note to Cl. (1) of the rule quoted above which says that 'if for any

reason the cost of the copy cannot be quickly ascertained, the rules laid down in Cls (iv) and (v) below (i. e., those relating to applications by post) may be followed.' This probably refers to calculations to be made by the copying department. The word 'quickly' indicates that ordinarily the copying department would be able to ascertain the cost quickly and inform the applicant, but in cases where this is not possible, the applicant should be required to deposit Rs. 5. If this interpretation is correct, there is, of course, no reason why the time taken by the copying department in computing the fees and informing the applicant should not be allowed.

Again even if it were held that an applicant must first ascertain the cost of the copies and deposit the same, I do not see why the time spent by him in ascertaining the cost should not be held to be time 'requisite' for the purpose of obtaining the copies. As laid down by their Lordships of the Privy Council, in 1928 P C 103 (10), all time that is properly required for the purpose of obtaining copies can be excluded under S. 12, Lim. Act. Now if it is held that an application for a copy cannot be made at all without first ascertaining and depositing the cost thereof, I do not see why the time spent in ascertaining the cost should not be held to be time properly 'required' for the purpose. Whether the cost is ascertained by personal inspection or through the copying department would not be so material, though the litigants generally prefer the latter as the more convenient and safer course. But it is obvious that the applicant must require some time to ascertain the cost and provided he takes proper steps for the purpose and deposits the amount ascertained promptly, I see no good reason why this time should not be allowed under S. 12, as time 'requisite' for the purpose of obtaining the copy. The questions discussed above are of frequent occurrence and in view of the wording of the rules and conflict of authorities, seem to require elucidation and authoritative pronouncement so that all concerned may know the precise position. I would, therefore, refer the following points to a Full Bench for decision:

10. *Jijibhoy N. Surty v. T. S. Chettiar Firm*, 1928 P C 103 = 109 I C 1 = 55 I A 161 = 6 Rang 302 (P C).

(1) Does the Copying Agent act merely as a private agent of the applicant when an application for a copy is made to him in person or by post in accordance with the rules quoted above?

(2) Cannot an application for a copy, whether made in person or by post according to the aforesaid rules be treated as a valid application, until the full amount necessary to cover the cost of preparing and certifying it is deposited, even when the applicant deposits the cost as and when ordered by the Copying Department?

(3) In any case, should not the time taken in ascertaining the cost of preparing and certifying the copies, (whether the cost is ascertained by the applicant through the Copying Department or otherwise) be allowed as time 'requisite' for obtaining the copies under S. 12, Lim. Act, when the applicant acts with reasonable diligence in the matter?

Currie, J.—I agree.

Opinion of Full Bench

In this appeal a preliminary objection was raised that the appeal was barred by time because the application for copies made on 7th April 1934 was not accompanied by a deposit, and as the deposit was not made until 16th April, there was therefore no proper application until that date. In view of the fact that this question has frequently arisen and that there is a conflict of authorities of this Court, the learned Judges hearing the appeal referred the following points to a Full Bench for decision:

1. Does the Copying Agent act merely as a private agent of the applicant when an application for a copy is made to him in person or by post in accordance with the rules quoted above?

2. Cannot an application for a copy, whether made in person or by post, according to the aforesaid rules, be treated as a valid application, until the full amount necessary to cover the cost of preparing and certifying it is deposited, even when the applicant deposits the cost as and when ordered by the Copying Department?

3. In any case, should not the time taken in ascertaining the cost of preparing and certifying the copies, (whether the cost is ascertained by the applicant through the Copying Department or otherwise) be allowed as time "requisite" for obtaining the copies under S. 12, Lim. Act, when the applicant acts with reasonable diligence in the matter?

These questions arise because of the provisions of S. 12, Lim. Act. Sub-s. (2) of that section requires that

in computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed shall be excluded.

It becomes necessary therefore in each case in which copies have to be filed, and where the period limited for appealing

elapsed before the appeal was filed, to determine what time was requisite for obtaining the necessary copies, and in order to understand the questions involved, it is necessary to examine the system under which copies are obtained. O. 20, R. 20, Civil P. C., requires that

certified copies of the judgment and decree shall be furnished to the parties on application to the Court and at their expense.

In practice the records are not actually retained in the Court and to meet this difficulty rules have been made by the High Court for the supply of copies of records of civil and criminal cases. These rules will be found in Vol. 4 of the Rules and Orders, Ch. 17.A. The place where such copies are to be obtained is shown in R. 2 which requires that provision shall be made for the supply of copies of the records of every Court at the headquarters of the District in which such Court is situated and in certain cases which it is unnecessary to define, at the place of sitting of every Court which is situated at a distance of more than 10 miles from such headquarters. There is a special provision for the copies of the records of the Court of the District and Sessions Judge which are to be supplied at the ordinary place of sitting of such Court. R. 4 requires that certain matters should be stated in the application and R. 5 requires that in accordance with law each application must have a two anna Court-fee stamp affixed to it. R. 6 shows by what officer in the case of each particular Court the applications are to be received; the officer in the case of the records of a civil Court not specially dealt with is an officer appointed in that behalf by the Deputy Commissioner. The rules applicable for the preparation and delivery of copies are stated in R. 9, and are, in the case of agencies under the control of the Financial Commissioners, the rules contained in Financial Commissioner's Standing Order No. 5; and in the case of other Agencies the rules contained in Part C of Ch. 17 of the Rules and Orders. In the present case, the case in which the records are deposited at the headquarters of a district, the rules applicable are those contained in the Financial Commissioner's Standing Order No. 5; but in fact, so far as the present questions are concerned, there is very little difference between these rules and those contained in Ch. 17.C. The rules permit that an

application for a copy of a record may be made in person or by post and R. 13-A-10 of the Financial Commissioner's Rules, which is under the head "advance deposits," deals separately with applications by post and otherwise than by post. The first part of sub-cl. (1) is as follows:

Every application for a copy of a record other than an application made by post shall be accompanied by a deposit in cash of a sum which shall not be less than the cost of preparing and certifying such copy.

There is a note to this rule and a similar note in Ch. 17-C, which states that if for any reason the cost of the copy cannot be quickly ascertained, the rules laid down in Cls. (4) and (5) below should be followed. Cls. (4) and (5) are the clauses which deal with applications made by post. It appears that this note was added sometime after the rules were made, and it may be presumed that a difficulty arose in carrying out the requirements of Cl. (1), that clause requiring payment of a sum which at the time of the application might not be immediately ascertainable. Cl. (2) requires that if the application is not accompanied by the cash deposit, it shall be returned to the person presenting it with an endorsement stating the amount of the deposit required. Cl. (4) requires that every application for a copy of a record made by post shall be accompanied by a fixed deposit of Rs. 5. Cl. (5) directs that on the receipt of an application by post with a deposit, an estimate of the cost of preparing and sending the copy shall be prepared, and if the estimated total exceeds the deposit, the applicant shall be called on to remit the balance. It further directs that no action shall be taken on the application until such balance has been remitted. These rules indicate clearly that a person who requires copies has to make an application in accordance with them, but once his application has been made, all further duties except that of paying for the copies, are cast upon the Copying Agent. The Copying Agent is in no sense the agent of the applicant. He is an official of the Government and the applicant has no control of any kind over him. The rules provide for three modes of presenting an application, the first, an application with a deposit of the full amount payable for the copy.

The note recognises that this is not always possible. It does not require that the alternative procedure laid down

in Cls. (4) and (5) must be followed. It indicates that that procedure ought to be followed and in our opinion the obligation of adopting that procedure lies on the Copying Agent and not on the applicant. The second method, the alternative to that indicated by Cl. (1) and the method to be followed where the application is made by post, requires a deposit of five rupees, and it is of the essence of this method that there should be a notification of the cost of the copy to the applicant and the payment by him of the balance of such cost before the copy is prepared. The third course of action open to the Copying Agent is to be taken when there is no deposit; he is required in such a case to endorse the cost of the copy on the application and return it to the applicant so that he may, if he wishes, pay the cost of having the copy made. The rules seem to place all three methods of applying for copies on the same footing and they do not expressly attach any penalty where the application is not accompanied by the cash deposit. We proceed to consider the points referred to us.

As to the first question, we think a perusal of the rules is sufficient to show that the Copying Agent is in no sense the agent of the applicant. The argument that the Copying Agent is a private agent is based on a decision reported in 9 I C 381 (1). The copies there required were of the judgment and decree of the Divisional Court. The application should have been made to the Clerk of the Court but was instead sent to the Copying Agent for the Delhi District. He then obtained a copy from the Clerk of Court to the Divisional Judge. It was held that the Copying Agent (who obviously was not the Copying Agent for the purpose of the copies required) acted as the private agent of the applicant. This case is far from establishing that where an application is made to the Copying Agent, the Copying Agent being the proper authority for supplying the copy, he is in preparing the copy acting as the private agent of the applicant. This case was followed in 1928 Lah 16 (2) but was explained by the learned Judge who decided that case in 1935 Lah 682 (3), and from the explanation it appears that the principle laid down in 1928 Lah 16 (2) did not go beyond that of the decision in 9 I C 381 (1). There is no case in which it has been clearly held that the Copying Agent, the agent to whom the application

for copies ought to be made, is the private agent of the person applying for copies. In our opinion the Copying Agent and his staff are officials of the Government. In the cases cited later this view has invariably been taken when this question has been discussed. We have no doubt that the answer to the first question ought to be in the negative. The second question presents greater difficulty. It has been discussed in several recent cases in this Court and there is a serious conflict of judicial opinion, each of the conflicting opinions being held by a number of Judges.

Decisions have been quoted to us from which it appears that Addison, J. and Din Muhammad, J. hold the view that no valid application for copies exists, until the cost has been deposited the contrary view being held by Coldstream, J., Dalip Singh, J., Agha Haidar, J. and Beckett, J. The conflicting views are shown in the following quotations: In 1935 Lah 889 (6) Addison, J. in a judgment in which Din Muhammad, J. concurred said:

It follows from this rule (i. e., R. 10 of the Financial Commissioner's Standing Order No. 5) that it was the duty of the applicant to put in with his application a deposit sufficient to cover the cost of preparing and certifying the copies. He did not take the trouble to do so, but waited to see what the Copying Department would report. They did not make any report till the 29th May and the amount was not deposited till 31st May 1933. According to the rule therefore there was no proper application until the 31st May.

In 1935 Lah 625 (5), Din Muhammad, J. took what may be called the extreme view; in that case the applicant applied by post sending a deposit of Rs. 10, thereby complying with the rule. Din Muhammad, J. said:

In the first place he allowed about two and a half months to elapse after submitting his application by post before he attended the Copying Department to enquire about the copies he applied for * * *. In spite of this, after putting in a personal appearance and making the necessary deposit on the 12th and 14th of November, he again absented himself and although the necessary copies were ready for delivery on the 15th, they had to be sent to him by post which took 11 days.

We think that the negligence shown here was on the part of the Copying Department. When they received an application with a proper deposit, their duty was to inform the applicant of the cost when they had ascertained it: after receiving such information and not till when the applicant would be responsible

for delay: again, surely, the applicant having made his deposit was not to be expected to remain waiting while the copying was actually performed; he was entitled to depart and to receive his copy by post, having made his application by post. In 37 P L R 510 (8), Coldstream, J. said:

The application was not rejected but entertained although no fee was paid at the time of the application. No direction was given as to the time when the fee was to be paid, nor was the applicant told when to appear to take the copies:

and referring to two decisions of the Privy Council he said :

They do not however lay down the proposition that where there has been no mistake of counsel, no negligence nor inaction nor want of bonafides imputable to the applicant, but the delay in giving a copy is due to the slipshod and negligent procedure of the Copying Department, the time which the department itself notes as having elapsed between the application and the completion of the copy is not to be regarded as 'time requisite'.

In our opinion Coldstream J.'s view offers the more reasonable interpretation of the rules. The application is complete when it has been presented to the proper authority duly stamped, and if the applicant complies with all reasonable diligence with the requirements of the Copying Department, he is entitled to the benefit of S. 12, Limitation Act, with respect to the whole period which elapses between the time of presentation of his application and the time of receipt of the copies: if delay is occasioned by his conduct between these two points of time, he cannot obtain any benefit in respect of the period of delay. We think that the second question ought to be answered in the affirmative. It follows from what we have said that the answer to the third question is also in the affirmative.

For the sake of convenience we set out our answers to the questions: (1) a 'copying agent' in dealing with an application presented in accordance with the rules, does not act as a private agent of the applicant, but as an official of the Copying Department, which is entrusted with the duty of preparing and certifying copies. (2) An application for a copy, whether made in person or by post, which bears the necessary court-fees stamp and is addressed to the proper officer is a valid application, even if it is not accompanied by the full cost of preparing and certifying the copy. (3) Under the rules for the supply of copies referred to above, the time necessary for

ascertaining the cost of preparing a copy is time 'requisite' for obtaining the copy within the meaning of S. 12, Limitation Act, and an applicant is entitled to exclude from the prescribed period of limitation the period between the date of presentation of the application and the date on or by which the full cost of preparing the required copy is deposited, provided he deposits with reasonable diligence the aforesaid amount as and when required by the Copying Department and provided further that in the case of an application made by post, he remits Rs. 5 with the application.

V.B./R.K.

Reference answered.

A. I. R. 1936 Lahore 778

ADDISON AND ABDUL RASHID, JJ.

Nura and another—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1390 of 1935, Decided on 24th February 1936, from order of Sess. Judge, Ludhiana, D/- 4th December 1935.

Criminal Trial—Murder—Rest of evidence rejected — Solitary statement of one witness implicating accused — Accused should be given benefit of doubt.

In a murder case, where the rest of the evidence has to be rejected, the accused should not be convicted on the solitary statement of one witness only but should be given the benefit of doubt. [P 779 C 1]

Abdul Haye and Nazar Mohammad—for Appellants.

V. N. Shethi—for the Crown.

Addison, J.—Nura Gujjar of Ghalib Kalan and Nura Teli of Gura have been sentenced to death, subject to confirmation by this Court, under the provisions of S. 302, I. P. C., for the murder of Ata Mohammad Teli of Gura, on 10th August 1935, in the early morning. Alia, the father of Nura Teli, was killed in a fight some four years ago. The deceased Ata Mohammad and certain others were sentenced to various terms of imprisonment under the provisions of S. 304, I. P. C., for this offence, but were acquitted on appeal. Nura Teli was later convicted in a case under the Arms Act and was imprisoned. He however had come out of jail about a month before the date of this murder. Nura Gujjar is alleged to be a friend of Nura Teli, though he lives in another village. The case for the prose-

cution is that Ata Mohammad was going to village Birak that morning to sell some oil when he was attacked by the two appellants and one Jiwana, brother of Nura Teli. He died in hospital that night or rather in the very early morning of 11th August. There is no doubt that the offence was murder, the injuries on the deceased indicating that the assailants must have meant to kill him. Jiwana was acquitted by the Sessions Judge and the question is whether there is sufficient evidence to maintain the convictions against the two appellants.

The injured man was taken to the hospital at Jagraon and the Assistant Surgeon there attended to him. He told the Assistant Surgeon that he had been beaten by the two appellants and Jiwana. The Assistant Surgeon sent for the Naib Tehsildar, who was a Magistrate, Third Class, to record his statement, as he was in danger of death. Before the Magistrate the injured man named the same three persons as his assailants. According to the prosecution witnesses, Ata Mohammad did not name Jiwana in the first instance, while the two eyewitnesses have also stated that there were only two men. It must therefore be held that the dying declaration of Ata Mohammad is not a true statement, so that little value can be attached to it. Certain witnesses have stated that the injured man told them shortly after the occurrence that he had been attacked by the two Nuras, namely Nura of Ghalib and Nura of Gura. The evidence of these witnesses however is not very consistent. Bachan Singh lambardar (P. W. 6) stated that the injured man told him at the village gate, when he was being carried to the hospital, that he had been beaten by Nura of Ghalib and Nura of Gura. Similarly, Mt. Akki, the mother of the deceased, (P. W. 8), has stated that these two persons were named by her son. Alia, father of the deceased, (P. W. 11), has given similar evidence, but his statement must certainly be rejected as it has been established that before the committing Magistrate he admitted that his son was unconscious when he reached the spot. Dharm Singh lambardar (P. W. 9) only heard the deceased say that the two Nuras had beaten him. Ralia (P. W. 7), chowkidar, made a statement similar to that of Dharm Singh. This is not very definite and is not sufficient to identify the two appellants.

Lastly, Wali Mohammad (P. W. 12) stated that he heard the deceased say that Nura of Ghalib and Nura of Gura had beaten him, but he is discredited as he stated before the committing Magistrate that the injured man had no talk with him. Such being the evidence as regards the statement of the deceased immediately after the occurrence, it must be held to be unreliable and for this reason must be rejected.

There are two persons alleged to have been eyewitnesses, namely Ralla Singh and Dewa Singh (P. Ws. 3 and 4). Dewa Singh was nearest to the deceased at the time he was attacked. His evidence is that he saw two men assaulting him, but he could not identify who they were as their backs were towards him. There are clear indications that this witness has been won over. At the same time, he did not implicate the two appellants. Ralla Singh was undoubtedly there as this is admitted by the other witness Dewa Singh, but he was farther off than Dewa Singh. His evidence is that Nura of Gura and Nura of Ghalib were the persons who killed the deceased. This is, in fact, the solitary statement implicating them, and the question is whether it is sufficient on which to base the convictions of the appellants. In a case like this, where the rest of the evidence has to be rejected, it would be the more prudent course to give the appellants the benefit of the doubt. For the reasons given, we accept the appeal and set aside the convictions and sentences of the appellants.

R.W./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 779

COLDSTREAM AND BHIDE, JJ.

Chhutta and others—Plaintiffs—Appellants.

v.

Mohammad Yar—Defendant—Respondent.

Second Appeal No. 612 of 1935, Decided on 3rd February 1936, from decree of Dist. Judge, Mianwali, D/- 27th October 1934.

Wajib-ul-arz—Bhakar Tahsil, Mianwali District—Agreement by village proprietor to abstain from claiming proprietor's right in land broken up during time agreement in force—Agreement held to be not conditional upon actual surrender of shamilat to Government.

An agreement recorded in the wajib-ul-arz of the second settlement, and made by each

village proprietor of Bhakar Tahsil of Mianwali District, was to abstain from claiming proprietary rights in land broken up by him during the time the agreement remained in force in consideration of each other proprietor giving a similar undertaking. The words describing it in the wajib-ul-arz clearly meant that it was not intended to be acted upon only when the actual surrender of the shamilat to the Government took place, but was made in view of the possibility of the shamilat having to be surrendered at some time in future, and it came into operation when it was recorded. The agreement was again recorded in wajib-ul-arz of the third Settlement although no land had been occupied by the Government:

Held: that the agreement was not dependent on the actual surrender of the shamilat land to the Government nor was it conditional, and that the Government was not a party to it.

[P 779 C 2; P 780 C 1]

Nawal Kishore and Faqir Ullah—for Appellants.

Abdul Aziz for Ghulam Mohy-ud-Din and Ghulam Mohy-ud-Din—for Respondent.

Coldstream, J.—The judgment will dispose of the twenty-one second appeals Nos. 612, 614, 616, 617, 620 to 626, 628, 630 to 632, 634, 636 to 639 and 462 of 1935, the point for decision being admittedly the same in them all.

The appellants are *ala maliks* or *adna maliks* or non proprietors in villages in Bhakar Tahsil of Mianwali district. In each case they had sued for a declaration that they were entitled to acquire *adna malkiyat* rights in certain lands which they had re claimed from the village shamilat. The suits were all dismissed by the trying Court and the lower appellate Court. The circumstances are the same as those in the case decided by the judgments of this Court in Civil Appeal No. 657 of 1934, and First Appeal No 674 of 1932, but counsel contends that in those cases the attention of the Court had not been drawn to the proviso to S. 5, Sindh Sagar Doab Colonization Act, 1902, upon which he bases an argument that as no land was ever surrendered to Government the agreement between the Government and the proprietors was never operative and, therefore, the consequent agreement between the village proprietors embodied in the wajib-ul-arz of 1902, that until the agreement with the Government was cancelled the previous conditions relating to the acquisition of proprietary rights would remain in abeyance also never became effective.

This was not the case set out by the appellants in their suits, the plea there

being that as the Sindh Sagar Act had been repealed the provision incorporated in the wajib-ul arz of the Second Settlement (1902), regarding the abeyance of right to acquire proprietary rights, had been cancelled. The proposition that the agreement recorded in the wajib-ul-arz was dependent on the actual surrender of the shamilat land to Government is not consistent with the words in the wajib-ul-arz. The agreement there recorded was not conditional nor was the Government a party to it. It was one made by each village proprietor to abstain from claiming proprietary rights in land broken up by him during the time the agreement remained in force in consideration of each other proprietor giving a similar undertaking. The words describing it in the wajib-ul-arz clearly mean that it was not intended to be acted upon only when the actual surrender of the shamilat to Government took place, but was made in view of the possibility of the shamilat having to be surrendered at some time in future and it came into operation when it was recorded. It is significant that the agreement was again recorded in the wajib-ul-arz of the third Settlement in 1923-24 although no land had been occupied by Government. Finding no force in the argument now advanced, I would dismiss the appeals with costs.

Bhide, J.—I agree.

V.B./R K. *Appeal dismissed.*

A. I. R. 1936 Lahore 780

ADDISON AND ABDUL RASHID, JJ.

Ujagar Singh and another—Defendants Appellants.

v.

Bhagwana—Plaintiff and *others*—Defendants—Respondents.

Second Appeal No. 1263 of 1935, Decided on 17th February 1936, from decree of Dist. Judge, Ambala, D/- 11th May 1935.

Punjab Tenancy Act (16 of 1887), S. 59—Suit for possession of water-mill and garden by heir of last holder—Water-mill is not governed by Tenancy Act, hence heir entitled to succeed—Suit for garden is suit for land; hence heir of tenant at will is not entitled to possession.

Where the collateral of a last holder of water-mill and garden claimed their possession and the last holder was recorded only as a tenant at will in respect of the garden:

Held: that the site of a water-mill was not governed by the Tenancy Act, and therefore

the collateral was entitled to succeed to the rights of the last holder in it: 77 P R 1904 and 13 I C 348, *Rel. on.* [P 780 C 2]

Held also: that it was different however with respect to the garden. A suit for land occupied as a fruit garden was a suit for land within the meaning of the Punjab Courts Act; therefore the heir of the last holder was not entitled to possession, but he could remove the trees: 111 P R 1890, *Rel. on.* [P 780 C 2; P 781 C 1]

(*Sardar*) *Narotam Singh*—for Appellants.

A. G. Maurice—for Respondents.

Judgment.—The plaintiff sued for possession of a water-mill and a garden on the allegation that he was the collateral of one Bishna, the last holder thereof. The defendants, who are the landlords, contended that the plaintiff was not Bishna's collateral nor was the property ancestral qua him and that therefore the suit should be dismissed. The trial Judge found that the plaintiff was a collateral. As regards the garden he held that it came within the definition of land and that thus the plaintiff could not claim to succeed the former tenant Bishna. With respect to the water-mill, he held that the Punjab Tenancy Act did not apply to it and that therefore he was entitled to a decree with respect to it as Bishna could have alienated his rights in it.

Against this decision there were two appeals to the District Judge. He accepted the plaintiff's appeal and decreed the plaintiff's suit to the extent of one-half, as there was another reversioner, Munshi, living, apparently on the ground that Bishna must be held to have been given a grant of the shamilat land for the purpose of planting a garden. He also accepted the defendant's appeal to the extent of decreeing the suit only with respect to half the rights in the water-mill. Against this decision the defendants, who are landlords have appealed to this Court.

It was held in 77 P R 1904 (1) and 39 P L R 1912 (2), that the site of a water-mill is not governed by the Tenancy Act. It may therefore be taken that a person who is the heir of the last owner of a water-mill is entitled to succeed to the rights of the last holder in it. It is different however with respect to the garden. It was held in 111 P R 1890 (3), that a suit for land occupied as

1. *Farman Ali v. Imam Din*, (1904) 77 P R 1904.
2. *Devta Jamlu v. Hari Das*, (1912) 13 I C 348=39 P L R 1912.
3. *Jhanda Khan v. Fateh Din*, (1890) 111 P R 1890.

a fruit garden is a suit for land within the meaning of the Punjab Courts Act. The defendants are entered as landlords. Bishna was entered as tenant-at-will, and on his death it must be held that the tenancy has come to an end. The plaintiff is therefore not entitled to a decree for possession of the garden; but as heir of Bishna, he is certainly entitled to remove the trees. We accordingly accept the appeal to the extent of dismissing the plaintiff's suit for possession of the garden, but at the same time we give him permission to remove the trees to the extent of one-half within four months. Parties will bear their own costs in this Court.

V.B.B./R.K. *Appeal partly accepted.*

A. I. R. 1936 Lahore 781

CURRIE, J.

H. A. M. Newbould—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1152 of 1935, Decided on 24th April 1936, from order of Magistrate, 1st Class, Rawalpindi, D/- 8th October 1935.

Criminal P. C. (1898), S. 197—Sanction to prosecute—Authority to appoint or remove public servants delegated to lower authority—Still sanction to prosecute such public servant must be from local Government or still superior authorities.

Where an authority delegates the power to remove a public servant to a subordinate authority, the public servant for the purposes of S. 197, Criminal P. C., nevertheless continues to be removable by the original authority and sanction to prosecute such public servant must be obtained from the local Government or other superior authority and the delegatee of powers cannot by itself sanction prosecution: 1934 Rang 238 and 1917 Mad 344, Foll. [P 783 C 1, 2]

Charles Ross Alston, M. Sleem and Jan—for Appellant.

Ram Lal and Vir Sen Sawney for Govt. Advocate—for the Crown.

Judgment.—The appellants H. A. M. Newbould and Jamna Das have been convicted under S. 409 or S. 409 read with S. 109, I. P. C., on each of three counts. Newbould was sentenced to one and a half years' rigorous imprisonment and a fine of Rs. 500 on each count, the sentences to run consecutively. Jamna Das was sentenced to one year on each count, the sentences to run consecutively. Newbould was the Postmaster at Rawalpindi

drawing a salary of Rs. 590 per mensem while Jamna Das was the Post Office Treasurer employed by the Post Office Treasury Contractors, Messrs. Dina Nath and Shiv Parshad. Briefly stated, the prosecution case was that Newbould at first agreed to release V. P. P. articles, in the present case cinema films, received by Sant Singh Seble, a cinema proprietor in Rawalpindi, on receipt of cheques, though this was against the rules. Subsequently, he actually, through Jamna Das advanced sums of money to Sant Singh Seble from the Post Office balance, charging one rupee per cent per mensem interest. Cheques were taken for these advances which in some cases were ultimately passed through the Post Office accounts and sent to the Imperial Bank for presentation to Sant Singh's bank. Actually all the cheques were honoured. It may be noted that in the case of V. P. P. articles, the cheque was not presented to the V. P. P. clerk but was cashed by Jamna Das who made over the money to Sant Singh Seble or his agent who paid the cash to V. P. P. clerk. According to the prosecution, this procedure had been going on for some time.

The Post Office balances are verified from time to time and eventually Mr. Brij Bashi, Inspector of Post Offices, when verifying the accounts on 29th June, became suspicious in view of the large number of cheques included in the balance. He states that he signed the Head Office summary on 29th June and that the summary then prepared contained a large number of cheques. The first of July was a Sunday and on 2nd July he again went to the Post Office and another summary was shown to him, which he was asked to sign on the allegation that he had omitted to sign it on the 29th. He thought that the summary now put up was a substitution for the original and did not sign. He made some inquiries and on 4th July proceeded to Kohala on duty and eventually on 5th July he made a report to the effect that he had suspected foul play and suggested that the Assistant Postmaster General should come and investigate. That officer came in July and held a departmental inquiry and eventually on 6th December 1934 the Postmaster-General, made the case over to the police for investigation. The first information report was accordingly registered on 1st January 1935 and

in a letter, dated 5th March 1935, the Senior Deputy Director-General Posts and Telegraphs, communicated to the Postmaster-General, Punjab the sanction of the Director-General, under S. 197, Criminal P. C., to the prosecution of Mr. Newbould, Postmaster, Grade A, under Ss. 409 and 477-A, I. P. C. I heard lengthy arguments on the facts of the case and also on the law points involved.

The first point raised on behalf of the appellant Newbould is that the sanction under S. 197, Criminal P. C., is illegal. On behalf of Jamna Das it is urged that if the trial as regards Newbould is illegal for want of proper sanction, the whole trial is vitiated, and this much is conceded by the learned Government Advocate. As regards the validity of the sanction, it was argued that under the terms of S. 197, Criminal P. C., the sanction of the Local Government was required. In the trial Court the Magistrate held that, in view of certain rules contained in the Posts and Telegraphs Manual, the Director-General, Posts and Telegraphs, could be considered to be a local Government. This argument was repeated by the learned Government Advocate who also urged that no sanction at all was necessary, on the ground that the appellant could not be said to be acting or purporting to act as a public servant when committing the breach of trust. This argument appears to me to have no force in view of the fact that in the charges framed under S. 409, Penal Code, he was distinctly charged with having committed the breach of trust being a public servant and in such capacity having dominion over property, i. e., Post Office Treasury. Further it appears to me that certainly as regards the second charge which relates to the advance of money against a cheque for the purpose of releasing V. P. P. articles, the Postmaster was acting in his capacity as a public servant. I am therefore definitely of opinion that sanction to his prosecution was necessary. As regards the validity of the sanction given in the present case, S. 197 provides:

When any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government.

Thus, the question is whether Newbould, who was undoubtedly a public servant, comes within the purview of this Section. Admittedly the Local Government, i. e., the Government of the Punjab could not remove him as he belonged to an All-India Department viz. the Posts and Telegraphs Department. The question therefore is whether he was removable by some higher authority, that is to say, whether he was removable by the Government of India. The public services in India are classified under the Civil Services (Classification, Control and Appeal) Rules, under various heads in R. 14. He apparently belongs to what is classified in R. 14 (3) as the Central Services, Class 2. Under R. 34 all first appointments to the Central Services, Class 2, shall be made by the Governor-General in Council or by an authority empowered by the Governor-General in Council in this behalf. In Government of India Home Department Notification (Establishments), No. F. 9/2/33, dated 9th January 1934, the Governor-General in Council empowered the authorities specified in Col. 2 of the annexed schedule to make first appointments to the services and posts specified in Col. 1 thereof; and accordingly we find that in the case of Postmasters' Service (Class 2) the Director General of Posts and Telegraphs is empowered to make the appointments. In the same notification powers of punishment specified in Col. 4 of the schedule were delegated to the authority specified in Col. 3, and we find that in respect of Postmasters' Service (Class 2) all such powers delegated to the Director-General of Posts and Telegraphs.

On behalf of the appellant it is urged that despite the delegation of powers to the Director-General, such officers are still to be considered as public servants removable by the Governor-General in Council and therefore the sanction of the Local Government would be required for their prosecution under S. 197, Criminal P. C. In support of this contention two rulings have been cited. In a case decided by a Single Judge of the Rangoon High Court, reported in 36 Cr L J 77 (1), it was held that a Sub-Inspector of Excise was a public servant not removable save by or with the sanction of the Local Govern-

1. Kyaw Htin v. Ah You, 1934 Rang 238=1934 Cr C 1039=152 I C 866=36 Cr L J 77=12 Rang 590.

ment, though the Local Government had delegated the power to appoint to Commissioners of Divisions. This ruling followed the view expressed in 17 Cr L J 168 (2) by the Madras High Court—a case concerning the Chairman of a Union Panchayat formed under the Local Boards Act. It was held that such a person did not cease to be a public servant not removable from office without the sanction of the Local Government by the mere fact that the Government had delegated their powers of appointment to Presidents of Taluk Boards. The learned Judge who decided that case, remarked:

In my opinion, the delegation by the Local Government of its power to a special officer only means that the Local Government performs that act itself through the medium of a particular officer as the channel through which it is done; and it is an ordinary case of *qui facit per alium facit per se*. It is no doubt done in accordance with that delegation, but nevertheless it remains the act of the Local Government.

The learned Government Advocate has contested this argument on two grounds: In the first place he has contended that the Director-General Posts and Telegraphs should be regarded as being a Local Government for such purposes. Secondly he has argued that as the Director-General has the power to remove, he has the power to sanction the prosecution, even though his powers of appointment and removal have only been delegated to him by the Governor-General in Council. As regards the first contention, this is based on the schedule to the rules given in the 20th List of Corrections, dated 1st December 1933 to the General Regulations, Posts and Telegraphs Manual, Vol. 2, R. 123 dealing with instructions for the submission of petitions to the Governor General in Council. Under Cl. 5 of the Schedule, Heads of Departments are to be considered Local Governments for the purpose of the rules. This has nothing to do with the provisions of S. 197, Criminal P. C. As regards the second contention, the learned Government Advocate has cited no authority in support of the view urged by him. I see no ground for disagreeing with the view taken in the two rulings already cited. This view may be summed up very briefly by saying that where an authority delegates the power to remove a public servant to a subordinate authority, the pub-

lic servant for the purposes of S. 197, Criminal P. C., nevertheless continues to be removable by the original authority. In this case, as already remarked, on the material furnished, it appears that the appellant Newbould was a public servant in Central Services, Class 2. He would therefore be removable by the Governor-General in Council, a power superior to the Local Government and therefore under the provisions of S. 197, Criminal P. C., the sanction of the Local Government was necessary to his prosecution.

In view of this conclusion, it is unnecessary to discuss the case on the merits or deal with the other arguments raised. The failure to obtain a valid sanction vitiates the whole trial. I therefore accept the appeals, set aside the convictions and quash the whole proceedings. This will be no bar to the re-trial of the appellants if the authorities concerned think it desirable to bring them to trial again after obtaining proper sanction.

B.D./R.K.

Appeal allowed.

A. I. R 1936 Lahore 783

BLACKER, J.

Lorinda Ram—Plaintiff—Petitioner.
v.

Bhawani Mal and others—Defendants
—Opposite Parties

Civil Revn. Petn. No. 72 of 1934, Decided on 24th October 1934, from order of Senior Sub Judge, Multan, D/- 27th November 1933.

Civil P. C., (1908), S. 115—Finding of fact that party is not competent to sue—No revision lies.

When S. 115 speaks of jurisdiction, it means the jurisdiction of the Court and not the competence of any party to sue. A finding that a party is not competent to sue is not a finding affecting the Court's jurisdiction and no revision lies: 1928 Lah 140 and 1932 Lah 360, *Rel. on*; 1929 Bom 467, *Dissent*

[P 783 O 2; P 784 O 1]

Gobind Ram Khanna—for Petitioner.
M. L. Puri—for Opposite Party No. 1.

Order.—A preliminary objection has been raised that no revision lies and I am of opinion that this objection must prevail. S. 115, Civil P. C., refers in Ols (a), and (b) to jurisdiction and I am unable to hold that a finding that a party is not competent to sue is a finding affecting the Court's jurisdiction. There is no serious contention that a Court has acted illegally or with material irregularity in the exercise of its jurisdiction. It must be conceded

2. Abdul Khadir Sahib In re, 1917 Mad 844= 33 I O 648=17 Cr L J 168.

that on the petitioner's side there is an authority of the Bombay High Court. In 1929 Bom 467 (1), a Division Bench of that Court held that an erroneous finding that the plaintiff was not entitled to file a suit under S. 9, Specific Relief Act, amounted to a failure to exercise a jurisdiction which the Court should have exercised. With all due respect, it seems to me that if this principle is followed to its logical conclusion, wherever a Court has decided a case on a preliminary issue, it can be said, if that decision is wrong, to have failed to exercise its jurisdiction on the subsequent issues. On the other hand, though they do not appear to be exact authorities, similar points were at issue in two judgments of this High Court, 9 Lah 308 (2), and 13 Lah 537 (3). Those authorities confirm me in my view that when S. 115 speaks of jurisdiction, it means the jurisdiction of the Court and not the competence of any party to sue. In my opinion, therefore this is not a case in which this Court should interfere in revision, and I accordingly dismiss the application with costs.

R.W./R.K. *Application dismissed.*

1. Ratanlal Ghelabhai v. Amarsing Rupsing, 1929 Bom 467=122 I C 54=53 Bom 773=31 Bom L R 1042.
2. Sant Singh v. Mubarak Singh, 1928 Lah 140=106 I C 901=9 Lah 308=29 P L R 42.
3. Ishar Das v. Ayu Ram, 1932 Lah 360=136 I C 1=13 Lah 537=33 P L R 275.

A. I. R. 1936 Lahore 784

COLDSTREAM AND BHIDE, JJ.

Dwarka Das and others — Plaintiffs — Appellants.

v.

Rikhi Ram and others — Defendants — Respondents.

Second Appeal No. 1078 of 1929, Decided on 2nd June 1936, from decree of Addl. Dist. Judge, Ludhiana, D/- 28th January 1929.

Limitation Act (1908), Arts. 120 and 134 and S. 10—Mortgagees of endowed property — Suit for their ejectment more than six years after dates of mortgages is barred by Art. 120—S. 10 or Art. 134 does not apply.

A suit for ejectment against the mortgagees of property dedicated to an endowment, brought more than six years after the dates of mortgages being governed by Art. 120 is barred. It cannot come under S. 10 of the Act as that Section expressly excludes assignees for consideration. Nor does it come under Art. 134 as a Hindu religious endowment does not constitute a trust within the meaning of the Article

and secondly the suit is not for possession but merely for ejectment: 1922 P O 123, Rel. on. [P 784 C 2; P 785 C 1]

J. R. Agnihotri—for Appellants.

D. N. Aggarwal — for Respondents 1 and 2.

Bhide, J.—This judgment will dispose of civil appeals Nos. 1078 and 1224 of 1929, which are connected. They arise out of a suit by the worshippers of a Thakardwara at the village Fatehgarh, for ejectment of defendants 2 to 9 in whose favour certain alienations of land had been effected by Mathra Das defendant 1. The plaintiffs alleged that the property was wakf and that the alienations thereof which had been made without any necessity were void. The alienations consisted of two mortgages of the years 1914 and 1917 and one sale of the year 1920. The trial Court decreed the suit. On appeal, the decision was upheld except in respect of two mortgages. It was held that the suit was governed for purposes of limitation by Art. 120, Lim. Act and was therefore barred in respect of the two mortgages, the suit having been instituted more than six years after the dates of the said mortgages. From this decision the plaintiffs as well as the vendee have appealed. The sole point agitated in the plaintiffs' appeal (Civil Appeal 1078 of 1929) was that of limitation. It was contended that the suit was governed either by S. 10, Lim. Act according to which there would be no period of limitation at all for such a suit or by Art. 134 of that Act. S. 10 seems to be clearly inapplicable as the alienations in dispute consisted of transfers of the property in dispute for consideration, and such transfers are expressly excluded from the scope of S. 10. As regards Art. 134, it was held by the Privy Council, in 44 Mad 831 (1), that a Hindu religious endowment does not constitute a trust within the meaning of this Article. Secondly, the suit by the worshippers was not for possession but merely for ejectment of the alienees, while Art. 134 applies to suits for possession. At the date of the institution of the suit, the amending Act by which Arts. 134-A to 134-C were inserted in the Limitation Act had not come into force and consequently the question of

1. Vidya Varuthi Tirthaswamikal v. Baluswami Ayyar, 1922 P O 123=65 I O 161=48 I A 302=44 Mad 831 (P O).

the applicability of those articles does not arise. The only article, therefore, applicable to the suit was the residuary Art. 120. In my opinion the suit was rightly held to be barred in respect of the two mortgages of 1914 and 1917.

In the vendee's appeal (Civil Appeal 1224 of 1929) the only point urged was that the finding of the Court below that the property in dispute was wakf was not correct. The finding is one of fact, but it was urged that the document by which the property is said to have been dedicated to the Thakardwara was misconstrued. It appears from the evidence, that the property was originally gifted by Bibi Daya Kaur, to a Fakir Chand Hans Dass (Maheshdass?) of the village Sanghawal by way of charity (Batarik Dharma), by a 'patta' dated Katak Sambat 1898 (=1841 A. D.). It was urged that this was a personal gift to Hans Raj and was not a dedication for any charitable purposes. The language of the patta is not very clear as to this point, but there is evidence on the record to show that during the proceedings relating to an enquiry regarding the grant of a muafi for this land in 1852, Hans Dass as well as the lambardars of the village made statements to the effect that the land had been previously free from payment of revenue, owing to its being dedicated to the Thakardwara (Punarth Thakardwara). Taking these statements into consideration along with the deed of gift the Courts below have held that the land was 'wakf.' In view of the admission made by Hans Das in 1852, the burden certainly lay on the vendee (who is his successor-in-interest) to rebut the presumption raised by it and to prove that the admission was incorrect. The learned counsel for the appellant urged that Hans Das may have made a false statement just to secure a 'muafi' for the land. He also drew our attention to the fact that there were transfers of the land on previous occasions without any challenge and that even females were entered as owners of the land on some occasions. These points have been, however, considered by the Courts below along with the other evidence.

It was next urged that the mere fact that the income of the land was used at one time for the Thakardwara does not mean that the land was dedicated to it.

1936 L/99 & 100

2 Cal 341 (2) was cited in support of the contention. But the statement made by Hans Das in 1852 seems to go further and he seems to have admitted as stated above that the land was dedicated to the Thakardwara. On the whole, it seems to me that the finding is one of fact and there is no valid ground for interference with it in second appeal. I would accordingly dismiss both the appeals but in view of all the circumstances, leave the parties to bear their costs in civil appeal No. 1224 of 1929. In the other appeal, the appellant will pay the costs of the contesting respondent.

Coldstream, J.—I concur.

D.S./R.K.

Appeals dismissed.

2. Doorganath Roy v. Ramchunder Sen, (1877)
2 Cal 341=4 I A 52=3 Sar 681 (P C).

A. I. R. 1936 Lahore 785

ADDISON AND ABDUL RASHID, JJ.

Tola Ram Singh — Plaintiff — Appellant.

v.

Fazal Ahmad — Defendant — Respondent.

Letters Patent Appeal No. 143 of 1935, Decided on 17th February 1936, from order of Bhide, J., D/- 9th October 1935 : reported in 1936 Lah 244.

Letters Patent (Lahore), Cl. 10 — Order registering decree of civil Court as that of Revenue Court — Order is not judgment—Letters Patent Appeal from such order is not competent.

An order to register a decree made by the Subordinate Judge, as a decree of revenue Court, by which the suit was triable does not affect the merits or decide any issue between the parties. It is more in the nature of an administrative order which the Judge could for the sake of convenience either make or refuse to make than of a judicial order. Such order is not a judgment within the meaning of Cl. 10 of the Letters Patent and a Letters Patent appeal is not competent: 1922 Lah 880 ; 1935 Rang 267 ; 1920 Cal 797 and 1925 P C 155, Ref. [P 786 O 2]

Mehr Chand Mahajan and *J. L. Kapur* —for Appellant.

Barkat Ali, Faqir Chand and *Sheikh Muhammad Amin*—for Respondent.

Addison, J.—The District Judge of Attock, under the provisions of S.100, Punjab Tenancy Act, submitted the record of a suit decided by a Subordinate Judge, 1st Class, to this Court with the recommendation that the decree passed by the Senior Subordinate Judge should be registered as a decree of a revenue Court.

The reference came before a Single Judge of this Court, who accepted the recommendation and directed the decree to be so registered. Against this decision an appeal under the Letters Patent has been preferred.

A preliminary objection has been taken that no appeal lies to the Letters Patent Bench as the order passed was not a judgment within the meaning of Cl. 10, Letters Patent. It is clear that the Single Judge came to no conclusion on the merits of the case; all that he had to decide was that the suit was one triable by a revenue Court. Under sub-s. (2), S. 100 Punjab Tenancy Act, in these circumstances, this Court may order the decree to be registered as a decree of a revenue Court; and if this is done, the decree takes effect as if it were a decree of the Court in which it is ordered to be registered.

In 3 Lah 188 (1), a Bench of this Court held that in order to decide whether an adjudication should be treated as a "judgment" within the meaning of Cl. 10 Letters Patent, regard should be had not to the form of the adjudication but to its effect upon the suit or the civil proceeding in which it was made. If its effect was to put an end to the suit or proceeding the adjudication was a judgment within the meaning of the clause. It was further held that it was impossible to lay down any definite rule. A Full Bench of the Rangoon High Court in 1935 Rang 267 (2) held that the word "judgment" in the Letters Patent meant and was a decree in a suit by which the rights of the parties at issue in the suit were determined. All other decisions were orders and not judgments. For that reason an order of the High Court under S. 24, Civil P. C., transferring a suit from a subordinate Court to the High Court did not fall within the ambit of "judgment" in Cl. 13 Rangoon Letters Patent. A similar view was taken in 47 Cal 1104 (3), while it was held in 8 Lah 681 (4) that an order of a Judge of the High Court rejecting an

application for transfer could not be treated as a "judgment" within the meaning of Cl. 10 Letters Patent.

Again their Lordships of the Privy Council in 1925 P C 155 (5) held that the term "judgment" in the Letters Patent of the High Court meant in civil cases a decree and not a judgment in the ordinary sense. In 35 Mad 1 (6), it was held that an order of a Single Judge on the original side refusing to frame an issue asked for by one of the parties, was not a "judgment" within Cl. 15 of the Letters Patent, and was not appealable. The matter was again before their Lordships of the Privy Council in 47 Bom 724 (7), where the question of the meaning of "final judgment" "decree" or "order" was considered.

In the case before us nothing was decided. All that the Judge did was to register the decree made by the Subordinate Judge as a decree of the revenue Court, by which the suit was triable. This decision did not affect the merits or decide any issue between the parties. It was more in the nature of an administrative order which the Judge could for the sake of convenience either make or refuse to make than of a judicial order. In these circumstances, we are of opinion that the order passed is not a judgment within the meaning of Cl. 10 Letters Patent and that this appeal is incompetent. We dismiss the appeal but made no order as to costs.

B.D./R.K.

Appeal dismissed.

5. Sewak Jeranchand Bhogilal v. Dakore Temple Committee, 1925 P C 155 = 87 I C 813 (P O).

6. Tuljaram Rao v. Algappa Chetti, (1912) 35 Mad 1 = 8 I C 340 = 21 M L J 1 (F B).

7. Tata Iron & Steel Co. v. Chief Revenue Authority, Bombay, 1923 P C 148 = 74 I C 469 = 50 I A 212 = 47 Bom 724 (P O).

A. I. R. 1936 Lahore 786

TEK CHAND, J.

Kali Das—Decree-holder—Petitioner.
v.

Prabh Dayal and another—Judgment-debtors—Opposite Parties.

Civil Revn. No. 410 of 1936, Decided on 18th May 1936, from order of Senior Sub-Judge, Kangra, D/- 8th November 1935.

Co-operative Societies Act (1912), S. 43—Rules under, R. 18—Dispute between members of society A, B, C, relating to money alleged to have been borrowed by A from

1. Ruldu Singh v. Sanwal Singh, 1922 Lah 380 = 67 I C 388 = 3 Lah 188.

2. Dayabhai Jivandas v. Muragappa Chettiar, 1935 Rang 267 = 157 I C 1107 = 13 Rang 457 (F B).

3. Khatizan v. Soniram, 1920 Cal 797 = 60 I C 968 = 47 Cal 1104.

4. Pahlad Rai v. Shiv Ram, 1927 Lah 540 = 102 I C 848 = 8 Lah 681.

Society but in reality misappropriated by B and C—Dispute held was concerning business of Society—Executing Court declining to execute award—Revision could lie.

A dispute between A, B and C who were all members of Society related to a transaction which took place between A and the Society. The books of the Society showed that certain money had been borrowed by A from the Society, but in reality it had been misappropriated by B and C, the secretary:

Held: that the dispute was concerning the business of the Society between three of its members and revision could lie from an order of the executing Court refusing to execute an award on the dispute as it failed to exercise jurisdiction vested in it by law. [P 787 C 2]

Jhanda Singh—for Petitioner.

L. M. Datta—for Opposite Parties.

Order.—The appellant Kali Das and the respondents, Prabh Dayal and his son Saran Das were members of a Co-operative Society in the Kangra District. Saran Das was the Secretary of the Society. The books of the Society showed that certain sums had been borrowed by Kali Das which were still outstanding against him. Kali Das denied having received these sums and alleged that they had been misappropriated by the Secretary, Saran Das, and his father Prabh Dayal. Saran Das and Prabh Dayal denied these allegations and asserted that Kali Das had in fact, taken the amount shown against him in the books. A dispute having thus arisen between Kali Das and Saran Das and Prabh Dayal, who all were members of the Society, Kali Das referred the matter to the Registrar under Cl. (a) of R. 18 of the Rules framed by the Local Government under S. 43, Co-operative Societies Act. The Registrar, acting under the provisions of Cl. (b) appointed an arbitrator who after enquiry gave his award in favour of Kali Das, holding that both Saran Das and Prabh Dayal were liable to pay the amount with interest, to Kali Das. Against the award no appeal was filed to the Registrar under Cl. (i) of R. 18 within the time specified therein. The award therefore became final under Cl. (j).

Kali Das then took proceedings under Cl. (k) of the aforesaid Rule to execute the award as a decree in the Court of the Subordinate Judge, 3rd Class, Kangra. The Subordinate Judge dismissed the application for execution holding that the award was not enforceable as a decree as the dispute was not one "concerning the business of the Society" and consequently,

the reference to arbitration was ultra vires. The plaintiff appealed to the Senior Subordinate Judge, Dharamsala. He held that the dispute between Kali Das and Saran Das who was the Secretary of the Society was one "concerning the business of the Society" and, therefore, the award could be executed as a decree against him; but that as between the plaintiff and Prabh Dayal, the dispute was not one "concerning the business of the Society" and, therefore, as against him the award was a nullity and could not be executed as a decree by the civil Court. Kali Das has preferred a second appeal to this Court. No second appeal, however, lies as the value of the subject matter is below Rs. 500. His counsel admitted before me that this was so and prayed that the memorandum of appeal be treated as a petition for revision and the order of the Senior Subordinate Judge refusing to execute the award against Prabh Dayal set aside as the learned Judge had failed to exercise jurisdiction vested in him by law.

After hearing counsel for the respondents I am satisfied that this contention is well-founded and must succeed. As already stated, both Kali Das and Prabh Dayal were members of the Society and the dispute related to a transaction which is alleged to have taken place between Kali Das and the Society; the books of the Society showed that the money had been borrowed by Kali Das from the Society, but in reality it had been misappropriated by Prabh Dayal and his son Saran Das. This was clearly a dispute "concerning the business" of a Co-operative Society between three of its members and therefore under Cl. (a) of R. 18 any party to this dispute was competent to refer it to the Registrar, who, under Cl. (b) of that Rule had the power to nominate an arbitrator to settle it. The award given by the arbitrator, not having been appealed against in the manner laid down by the Rules, had become final, and was, at the instance of one of the parties executable by the civil Court against the members who had been held liable by the arbitrator. The lower Courts have, therefore, failed to exercise jurisdiction vested in them by law in declining to execute the award against Prabh Dayal. I accept the petition for revision and in modification of the order of the Senior Subordinate Judge, direct that the award be executed

against both respondents, Saran Das and Prabh Dayal. The petitioner will have his costs from Prabh Dayal respondent in this Court and his costs in the Courts below from Prabh Dayal and Saran Das.

D.S./R.K.

Petition accepted.

A. I. R. 1936 Lahore 788

AGHA HAIDAR, J.

Mt. Mulkh Bano and others—Defendants—Appellants.

v.

Mohammad Banaras Khan—Plaintiff—Respondent.

Second Appeal No. 44 of 1936, Decided on 17th April 1936, from decree of Dist. Judge, Attock, D/- 16th October 1935.

(a) Evidence Act (1872), Ss. 65 and 90—Certified copy not 30 years old—Presumption under S. 90 cannot be drawn.

Where the certified copy of the document is not 30 years old, presumption under S. 90 cannot be raised in respect of it: 1929 P C 115, *Rel. on.* [P 789 C 1]

(b) Practice—Second appeal—Lower Court deciding question of title on inadmissible evidence and other evidence—Case can be remanded for fresh finding on other evidence or High Court can itself arrive at finding.

Where the lower Court has decided a question of title, which is one of fact on inadmissible evidence and other evidence, there are two courses which are open to the High Court in second appeal. It can remand the case to the lower appellate Court directing it to record a fresh finding after eliminating and confining itself to the other evidence in the case; or it may proceed under S. 103, Civil P. C. and arrive at its own finding on a perusal of the relevant and admissible evidence. [P 789 C 2]

Nand Lal—for Appellants.

Barkat Ali and Mohammad Amin (Sheikh)—for Respondent.

Judgment.—This is a defendants' appeal arising out of a suit for possession of a house, detailed in the plaint, by ejectment of the defendants. The trial Court dismissed the plaintiff's suit but on appeal the District Judge set aside the order of the original Court and decreed the plaintiff's claim. The defendants have come up to this Court in second appeal and Dr. Nand Lal, counsel for the appellants, has argued the appeal at an inordinate length and beyond all proportion to the points involved in it. The facts of the case are simple. The plaintiff came into Court on the allegation that, under a registered sale-deed, dated 7th April 1894, the ancestors of the defendants, who were brothers of Budha Khan, the grandfather of the plaintiff, had sold the

house in suit to Budha Khan. He further alleged that he had been in possession of the house throughout by right of inheritance and had been dispossessed by the defendants about two or three years ago.

The defendants pleaded that the house in suit was not sold by the ancestors of the defendants, that the plaintiff had never been in possession of the house within 12 years prior to the institution of the present suit and that defendants had been in adverse possession of the house for a period of more than 12 years. There were other points which were raised on the pleadings and on which issues were framed, but they do not seem to have been argued either before the lower appellate Court, or in this Court, and therefore they need not detain us. The plaintiff relied upon a certified copy of the sale-deed dated 7th April 1894 under which, according to the plaintiff, the ancestors of the defendants had sold the house in suit together with other property in favour of Budha Khan through whom the plaintiff claimed title. The lower appellate Court was satisfied that the original document had been lost and therefore the plaintiff could produce secondary evidence, which, in the present case, was the certified copy of the sale-deed. The defendants raised the objection that as this copy was not more than 30 years old no such presumption could be raised about it, as was laid down in S. 90, Evidence Act. Reliance is placed upon the observations of their Lordships of the Privy Council to be found at pp. 502 and 504 of 57 All 494 (1). In that case a copy of a certain will was produced and the Court was asked on the strength of that copy to presume the genuineness of the original. A number of decisions were cited before their Lordships, e. g., 5 Cal 886 (2), 41 All 592 (3), 22 All 294 (4), and it was argued that the copy can be admitted in evidence to prove the contents of the original. Their Lordships however observed that the decisions

1. *Basant Singh v. Brij Raj Saran Singh*, 1935 P C 182=156 I C 864=62 I A 180=57 All 494 (P C).
2. *Khetter Cnunder Mookerjee v. Khetter Paul*, (1880) 5 Cal 886=6 C L R 199.
3. *Dwarka Singh v. Ramanand Upadhia*, 1919 All 232=51 I C 275=41 All 592=17 A L J 711.
4. *Ishri Prasad Singh v. Lalli Jas Kunwar*, (1900) 22 All 294=1900 A W N 82.

cited did not contain a sound exposition of law. The remarks of their Lordships on account of their great importance are quoted verbatim below:

The section (i. e., S. 90, Evidence Act) clearly requires the production to the Court of the particular document, in regard to which the Court may make the statutory presumption. If the document produced is a copy, admitted under S. 65 as a secondary evidence, and it is produced from proper custody and is over 30 years old, then the signatures authenticating the copy may be presumed to be genuine, as was done in 52 Mad 453 (5).

These observations of the highest tribunal are entitled to great weight and must be loyally followed by all Courts in India. The copy in the present case admittedly is not 30 years old and therefore the presumption under S. 90, Evidence Act cannot be raised in respect of it. Their Lordships however in the case noted above were satisfied from other evidence on the record as regards the terms of the will on which reliance had been placed by the party who had produced the copy of the said will. Mr. Barakat Ali, the learned counsel for the respondent, realizing the difficulty created in his way by the Privy Council judgment noted above, invited the attention of the Court to the provisions of S. 65, Evidence Act, where it is laid down that a certified copy of the document mentioned in Cl. (f) was admissible. He has further referred to S. 68, Evidence Act and argued that, in the absence of any specific denial by the executant or his successors, the defendants, in the present case, it was not necessary to prove the execution of the will by producing one or more attesting witnesses. He has quoted 1929 Mad 881 (6) where a Division Bench had laid down that the proviso, which has been added by the Amending Act 31 of 1926, was retrospective. The point is not free from difficulty and I do not propose to go into it in detail. It was argued on behalf of the appellants that the copy of the sale-deed dated 7th April 1894 was not properly "tendered" in evidence. The document was however filed in Court along with the plaint and the plaintiff in his statement before the Court had mentioned it. I do not think that, in second

appeal I would have rejected this document and eliminated it from the record on the ground of defective procedure alone. The point however does not arise.

The lower appellate Court has held that the evidence consisting of the sale-deed coupled with other oral evidence produced by the plaintiff clearly shows that the plaintiff was the owner of the property in dispute; in other words it has held that the plaintiff had succeeded in proving his title. Now, the question of title is clearly one of fact and if in arriving at this finding of fact the Court has erroneously relied upon a copy in proof of the contents of the original, but in respect of which the presumption allowed under S. 90, Evidence Act cannot be made, there are two courses which are open to this Court in second appeal. It can remand the case to the lower appellate Court directing it to record a fresh finding after eliminating the copy from consideration and confining itself to the other evidence in the case; or it may proceed under S. 103, Civil P. C., and arrive at its own finding on a perusal of the relevant and admissible evidence. Having regard to the time which has already been spent in this Court in hearing this appeal, I have decided to adopt the latter course, instead of prolonging the litigation by remanding the case.

I have gone through the evidence on the record and I am fully satisfied that the plaintiff has been able to prove that his grandfather Budha Khan had title to the house in dispute and that the plaintiff and his ancestors have been exercising throughout acts of ownership and putting their own tenants in it. The adverse possession pleaded by the defendants has not been proved. The result therefore is that the plaintiff has succeeded in proving his title and the further fact that he has been in possession of the house within 12 years prior to the institution of the present suit. The plaintiff's suit was therefore rightly decreed by the lower appellate Court. I therefore affirm the decree of the lower appellate Court and dismiss this appeal with costs.

V.B.B./R.K.

Appeal dismissed.

5. Seethayya v. Subramanya Somayajulu, 1929 P O 115=117 I C 507=56 I A 146=52 Mad 458 (P O).
6. Thayammal v. A. T. Muthukumaraswami Chettiar, 1929 Mad 881=121 I O 858=57 M L J 588.

A. I. R. 1936 Lahore 790

ADDISON AND ABDUL RASHID, JJ.

Mutual Bank of India, Ltd. and others
—Defendants—Appellants.

v.

Sohan Singh and others—Plaintiffs and
others—Defendants—Respondents.

First Appeal No. 2298 of 1934, Decided on 16th January 1936, from decree of Sub-Judge, First Class, Rawalpindi, D/- 28th August 1934.

(a) **Company—Allotment of shares—Applications for, forwarded as enclosures to letter containing conditions to be fulfilled by Chairman before shares were deemed to be purchased—Allotment made without fulfilling conditions held to be invalid.**

Applications for the allotment of shares of a Bank were signed and forwarded to the Chairman as enclosures to a letter stating that the purchase of the shares was conditional upon the acceptance of certain conditions by the Chairman. The Chairman proceeded to allot shares without fulfilling the conditions:

Held: that the applications for allotment and their acceptance without fulfilling the conditions did not constitute a valid contract and allotment was invalid. [P 791 C 1, 2](b) **Companies Act (1913), S. 101, sub-s. (3)—Any allotment made without payment of at least 5 per cent of the nominal value of shares is invalid.**

Sub-s. 3 is applicable to all allotment of shares whether at the time of floating of the company or at any subsequent period and any allotment made without payment of at least 5 per cent of the nominal value of shares is invalid. [P 791 C 2]

H. J. Rustomji and M. C. Shukla—for Appellants.*Mehr Chand Mahajan*—for Respondents.**Judgment.**—This appeal has arisen out of an action brought by the plaintiffs for a declaration to the effect that they were not the share-holders and directors of the Mutual Bank of India, Limited, defendant 1. The allegations of the plaintiffs were that in the month of March 1931, Lala Narinjan Das, defendant 2, Chairman of the Mutual Bank of India, Limited, and Lala Sain Das, Secretary of the Bank, approached Malik Mukhbain Singh, Barrister-at-law, plaintiff 3, and asked him to persuade some influential and rich men of Rawalpindi to become Directors of the Bank and take over its management. During the course of the negotiations it was represented to the plaintiffs that the Bank had suffered some losses but that these losses will be made good by the Chairman and defendants 3

to 9, that a sum of Rs. 6,000 had been deposited in the Bank by the directors, and that investments to the extent of Rs. 35,000 had been made by the Bank. As a result of these misrepresentations, each of the plaintiffs and Bhagat Jaswant Singh, defendant 10, agreed to buy 100 shares of the Bank of the value of Rs. 100 each and also to become its Director, provided certain conditions which were embodied in a letter, dated 14th April 1931, written by plaintiff 3 to the Chairman of the Bank were fulfilled.

The plaintiffs prayed that as they had been induced by misrepresentations to sign the applications for the allotment of shares and to consent to become Directors and as the conditions embodied in the letter referred to above had not been fulfilled, the action of defendants 2 to 9 allotting shares to the plaintiffs and in announcing that they had been appointed as Directors was irregular and ultra vires and that they were entitled to a decree that they were not share-holders and Directors of the Mutual Bank. Defendants 2 to 4 and 7 to 9 pleaded that they had not induced the plaintiffs to purchase shares by means of any misrepresentation, that the plaintiffs' offer to purchase shares was unconditional and that the terms embodied in the letter dated 14th April 1931, were to be fulfilled after the plaintiffs had become share-holders and Directors of Mutual Bank. It was admitted by the defendants that the plaintiffs did not pay any money along with their applications for allotment of shares, but it was pleaded that according to an agreement between the parties this money was to be paid by the plaintiffs when the head office of the Bank was shifted to Rawalpindi. On these allegations, the defendants maintained that the names of the plaintiffs were duly entered in the register of the share-holders of the Bank, and that they must therefore be regarded as its share-holders and Directors. It was also pleaded on behalf of the defendants that a suit for mere declaration that the plaintiffs are not share-holders or Directors of the Bank was not maintainable.

The trial Court decreed the plaintiffs' claim, and as the Bank had gone into voluntary liquidation while the suit was pending in the trial Court, the voluntary Liquidator and Lala Narinjan Das, Chairman of the Bank, have preferred an ap-

peal to this Court. It was contended by Mr. Rustomji on behalf of the appellants that each of the plaintiffs had signed an application for allotment of shares on 7th April 1931, that these applications had been forwarded to the Bank on 14th April that 100 shares had been allotted to each of the plaintiffs by the Directors in their meeting on 16th April 1931, and that the plaintiffs must therefore be regarded as the share-holders of the Bank since 16th April. It was contended that the applications for allotment and their acceptance by the Directors constituted a valid contract between the parties, and that the terms embodied in the letter dated 14th April could not in any way invalidate this contract. It was maintained that the terms mentioned in the letter referred to above were not to be fulfilled before the allotment of shares but that these terms could be carried out by the Chairman and the Secretary of the Bank after the allotment. In any case, according to the learned counsel these terms were not in the nature of conditions precedent to the allotment of the shares. It appears that the application forms were not forwarded to the Chairman of the Bank on 7th April. They were forwarded as enclosures to the letter dated 14th April. In this letter Mr. Mukhbain Singh made it perfectly clear that he and the other plaintiffs were prepared to buy shares and become Directors of the Bank only if the conditions mentioned in the letter were accepted by the Chairman and the Directors of the Bank, and if the information conveyed to him by Lala Sain Das was correct. The conditions mentioned in this letter were as follows:

(1) The Chairman was to give a personal guarantee on a stamped paper in respect of the Bank's investments. (2) The Chairman was to be personally responsible, in the stated manner in the letter, for making good the loss of Rs. 14,000 suffered by the Bank up to April 1931. (3) Rupees 3,000 were to be paid straight off by the Chairman on account of an additional payment of Rs. 30 per share by the Directors. (4) The fixed deposit of the Directors in the Bank was to be Rs. 6,000 and that was not to be withdrawn. (5) 300 more shares were to be sold by the Chairman out of the shares that had been forfeited. The reply of the Chairman dated 18th April shows that practically none of the conditions imposed by the letter dated

14th April had been fulfilled by the Chairman and the Directors up to 16th April 1931, when they proceeded to allot shares to the plaintiffs and defendant 10 and to appoint them as Directors. It is therefore clear that the application of the plaintiffs could not be taken into consideration by the Directors on 16th April nor could any valid allotment of shares be made on that day. It is common ground between the parties that no money was forwarded by any of the plaintiffs with their applications for allotment of shares. The applications no doubt state that the sum of Rs. 1,000 being a deposit of Rs. 10 per share in respect of 100 shares had been paid but this is admittedly incorrect. S. 101, Companies Act, lays down the procedure to be followed at the time of the allotment of shares. Sub-s. (3) is to the effect that the amount payable on application on each share shall not be less than 5 per cent. of the nominal amount of the share. It was held by the lower Court that S. 101 does not apply to any allotment of shares subsequent to the allotment of shares at the time of the formation of the company. This is an erroneous view of the law. Sub-s. (6), S. 101 is in the following terms:

This section, except sub-s. (3) thereof, shall not apply to any allotment of shares, subsequent to the first allotment of shares offered to the public for subscription.

It is obvious therefore that sub-s. (3) is applicable to all allotments of shares whether at the time of the floating of the company or any subsequent period. Any allotment which is made without payment of at least 5 per cent. of the nominal value of the shares by the applicant is therefore invalid. The objection with respect to the maintainability of the suit in a declaratory form is also without any substance. In the present case, no money was paid by the plaintiffs and a prayer to the effect that the register of the company may be rectified by the removal of the plaintiffs' names from the list of share-holders would merely be a prayer for a nominal relief. In the peculiar circumstances of this case therefore the plaintiffs have substantially asked for all the reliefs to which they were entitled. For the reasons given above, we dismiss this appeal. The appellants will pay the costs of the plaintiffs-respondents.

D.S./R.K.

Appeal dismissed.

* A. I. R. 1936 Lahore 792

ADDISON AND ABDUL RASHID, JJ.

Mohammad Zaman Khan — Appellant.
v.*Malik Umar Hayat Khan* — Respondent.

Letters Patent Appeal No. 129 of 1935, Decided on 16th January 1936, against judgment of Agha Haidar, J., D/- 8th April 1935, reported in 1935 Lah 865.

* Easement — Dispute about insufficiency of light — Light acquired by grant or prescription can be taken into account — Other sources of light excluding sources in dispute should be taken into consideration : 159 I C 702=1935 Lah 865, *Reversed*.

In cases of dispute about interference of light, light acquired by grant or prescription, and not light which has not yet been acquired by prescription but was only in process of being so acquired can be taken into account. Light coming in sufficient amount from sources other than those in dispute should be taken into account : 159 I C 702=1935 Lah 865, *Reversed*. ; *Colls v. Home and Colonial Stores Ltd.*, (1904) A C 179, *Expl.* ; 1914 P C 45 ; 8 P R 1909 ; 1928 Lah 980 and 35 Cal 651, *Ref.*

[P 793 C 1]

R. C. Manchanda—for Appellant.*M. L. Puri*—for Respondent.

Addison, J.—The plaintiff sued the defendant for the issue of a perpetual injunction, directing the latter to remove the obstruction caused by his building to ventilators Nos. 1 and 2, opening into room A of the plaintiff's house, and to restrain the defendant from continuing the building so as to obstruct ventilators Nos. 3 and 4 in room B and half of ventilator No. 5 in room C. The trial Court found that the wall in which these ventilators were situated was a party wall, and dismissed the suit on the ground that a joint owner of a party wall could not acquire an easement against the other joint owner. A single Judge of this Court however took the opposite view and held that such an easement could be and had been acquired with respect to the ventilators, and the suit was returned for decision on the merits. The trial Court and the first appellate Court held that there would be practically no diminution of light in room C. With respect to room A it was found that after the closure of ventilators Nos. 1 and 2, there was ample light for ordinary purposes. With respect to the central room B, in which are situated the ventilators Nos. 3 and 4, it was found that the room had become darker than the others but that the light

would still be sufficient. The conclusion of the trial Court and the first appellate Court therefore was that if other sources of light and air at present used by the plaintiff and available to him were taken into consideration, no actionable nuisance resulted by closing the ventilators in dispute.

Before these Courts it was urged that the light available and being used from other sources could not be taken into consideration. This contention was repelled and the claim of the plaintiff for the issue of an injunction was dismissed but he was allowed damages to the extent of Rs. 200. There was a second appeal by the plaintiff to this Court, which was heard by a single Judge. He came to the conclusion that the other sources of light, used by and available to the plaintiff, could not be taken into consideration. He therefore accepted the appeal and decreed the plaintiff's suit. Against this decision the defendant has preferred this Letters Patent appeal. The facts are not in dispute and, indeed, the findings of fact arrived at by the trial Court and the first appellate Court must be accepted. They are as already stated. It might be added that the first appellate Court also held that if the plaintiff closed all other sources of light at present used by him, the rooms would not be inhabitable or, at any rate, their comfort would be materially reduced. The light, still left to the plaintiff and used by him comes from a road and from a large open court-yard of his own : It was held in (1904) A C 179 (1), that

To constitute an actionable obstruction of ancient lights it is not enough that the light is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and, in the case of business premises, to prevent the plaintiff from carrying on his business as beneficially as before.

It was said in the course of that decision by Lord Lindley that in applying the rule it was impossible to avoid considering how much light was left and where it came from ; but that the question to be decided was not how much light was left but whether the plaintiff had been deprived of so much as to constitute an actionable nuisance. In the present case,

1. *Colls v. Home and Colonial Stores*, (1904) A C 179=78 L J Ch 484=90 L T 686=53 W R 30=20 T L R 475.

it has been held that sufficient light is left, even if the ventilators in the party wall are closed. In the course of the same judgment Lord Lindley again remarked that as regards light from other quarters, such light could not be disregarded; for the light from other quarters, and the light the obstruction of which was complained of, might be so much in excess of what was protected by law as to render the interference complained of non-actionable. He apprehended however that light to which a right had not been acquired by grant or prescription, and of which the plaintiff might be deprived at any time, ought not to be taken into account.

It was this last sentence that the learned counsel for the respondent relied upon. He contended that what was meant was that only such other light as had been acquired by grant or prescription could be taken into account and not that light which came from the plaintiff's private property. It seems to us however that this is not so. Lord Lindley made it clear that light acquired by grant or prescription, and not light which had not yet been acquired by prescription but was only in process of being so acquired, could be taken into account. He did not say that light coming in sufficient amount from the plaintiff's own premises could not be taken into account. Obviously, light which the plaintiff was only in process of acquiring by prescription, could not be taken into account. That seems to have been his meaning. Their Lordships of the Privy Council in 42 Cal 46 (2) reiterated the principles laid down in (1904) A C 179 (1). In 8 P R 1909 (3), a Judge of this Court pointed out that in considering the sufficiency of the light, the locality and the light coming from other quarters should be considered. This was based on (1904) A C 179 (1). Similarly, in 1928 Lah 980 (4), it was said that other sources of light should be taken into consideration. The learned Judge of this Court relied upon 35 Cal 661 (5).

2. Paul v. Robson, 1914 P O 45=24 I O 800=42 Cal 46=41 I A 180 (P O).

3. Vir Bhan v. Ramji Das, (1909) 8 P R 1909=1 I O 441.

4. Sohan Singh v. Jagat Singh, 1928 Lah 980=114 I O 698.

5. Anath Nath Deb v. Galstaun, (1908) 85 Cal 661=12 C W N 519.

That was however a case in which an injunction was not granted. Further, the learned Judge who decided that case stated at p. 670 of the report that on the evidence which had been given before him, he was of opinion that, even taking into account this reflected light, there had been such a diminution of the light coming to the plaintiff's premises as to amount to a nuisance. Anything therefore which he said on the question that it was no defence that the amount of the reflected light which now came to the plaintiff's premises was sufficient for the ordinary user thereof, was in the nature of obiter dictum. On the authorities and on the findings of fact, we are of opinion that the trial Court properly dismissed the suit for the issue of an injunction. The obstruction complained of did not amount to an actionable nuisance. We therefore accept this appeal, set aside the order of the single Judge of this Court and restore the decree of the District Judge on appeal. We make no order as to costs.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 793

ADDISON AND ABDUL RASHID, JJ.

Atma Ram and another—Petitioners—Appellants.

v.

Harnam Singh and another—Objectors and *others*—Petitioners—Respondents.

First appeal No. 1500 of 1935, Decided on 18th May 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 27th May 1935.

Civil P. C. (1908), O. 41, R. 20—Appellate Court informing appellant about wrong person being impleaded and giving time to implead right person—Right person not impleaded within time—No sufficient cause within S. 5, Lim. Act—O. 41, R. 20 held not applicable.

The appellate Court informed the appellant that a wrong respondent had been impleaded and was given 15 days' time to implead the right person who was specially made a party in the trial Court to the knowledge of the appellants. The appellant failed to bring the right person on record within the stated time:

Held: that it was neither a case for the application of O. 41, R. 20, Civil P. C., nor was there a sufficient cause within S. 5, Lim. Act and the appeal was time-barred. [P 794 O 1]

D. D. Khanna—for Appellants.

Harnam Singh—for Respondents.

Addison, J.—A preliminary objection was taken that this appeal is barred by time. Of the two respondents one Har-nam Singh was impleaded in time, while the second was described as Santa Singh son of Gulab Singh, Jat, of Lobgarh. He was not however the second objector, his name being Santa Singh son of Natha Singh of another village Kokbri Bhaini-wal, who was specially made respondent by the Sikh Gurdwaras Tribunal and who contested the case before it. There was a special order of the Tribunal to this effect, which must have been within the knowledge of the appellant. It was contended however that the decree sheet of the Tribunal was in this respect misleading. This however is not an important matter in this case for counsel for the appellant was informed by the Registrar of this Court on 12th March 1936, that a wrong respondent had been impleaded and he was given 15 days to implead him. He did not implead him till the 6th April instead of 27th March. There is no excuse for the delay between 27th March and 6th April. The matter must have been known originally to the appellant in view of the formal order of the Tribunal. It was brought to his notice and he was given a stated time to bring the right person on the record. This is certainly not a case for the application of O. 41, R. 20, Civil P. C., and we are also of opinion that in the circumstances stated it is impossible for us to hold that there was sufficient cause within the meaning of S. 5, Lim. Act. We therefore dismiss the appeal as time-barred with costs.

R.W./R.K.

*Appeal dismissed.***A. I. R. 1936 Lahore 794**

JAI LAL, J.

Mt. Ratan Kaur — Plaintiff — Petitioner.

v.

Sobha Ram — Defendant — Opposite Party.

Civil Revn. No. 62 of 1936, Decided on 27th March 1936, from decree of Dist. Judge, Amritsar, D/- 21st October 1935.

(a) Arbitration—Award directing one party to pay certain sum to another periodically does not require registration.

An award which merely directs one of the parties to pay a certain sum of money to the other periodically, does not require registration and therefore must be treated as a valid award to that extent. [P 795 C 1]

(b) Arbitration — Award — Arbitrator not having power to make portion of award—It is invalid and can be expunged.

Where the arbitrator has no power to make a portion of the award, that portion must be excluded and held to be invalid. It must therefore be expunged from the award. [P 795 C 1]

(c) Civil P. C. (1908), Sch. 2, Para. 20, 21—Application to file award without intervention of Court—Invalid portion separable from valid portion—Valid part can be filed.

Where an application to file an award made without the intervention of Court is filed and the invalid portion in the award is separable from the valid portion, the Court can direct the filing of the valid part: 1914 P C 105 and 1933 All 59, Rel. on; 1935 Lah 80, Disting.

[P 795 C 2]

Dev Raj Sawhney—for Petitioner.*Jai Gopal Sethi*—for Opposite Party.

Order.—The petitioner *Mt. Rattan Kaur* had a dispute with the respondent *Sobha Ram* her father-in-law about her maintenance. The dispute was referred to arbitration and the arbitrator made an award fixing her maintenance at Rs. 22 per month to be paid by *Sobha Ram* and after his death by his widow. He also provided in the award that if *Sobha Ram* made default in the payment of the maintenance *Mt. Rattan Kaur* would be entitled to enforce the payment thereof from the rent of a certain shop specified by him but it was provided that she would not be entitled to any interest in the shop itself. It was, however, added in the award that *Sobha Ram* would not be entitled to alienate the shop. The learned District Judge on appeal has held that the proviso relating to the enforcement of the maintenance against the rent of the shop and the restriction on the power of *Sobha Ram* to deal with the shop is invalid because it relates to a matter which was not referred to arbitration. No question has been raised before me that this conclusion of the learned District Judge is not correct.

The respondent's counsel has further contended that the award of the arbitrator that the maintenance shall also be payable by the widow of *Sobha Ram* after his death must be treated similarly to be invalid. *Sobha Ram* alone was a party to the arbitration and the dispute referred to the arbitrator was merely between *Sobha Ram* and *Mt. Rattan Kaur*. The arbitrator was not, therefore, competent to make any award as to the liability of *Sobha Ram's* heirs after his death. This portion of the award must also be held to be invalid. The only valid and enforceable

award, therefore, is that Sobha Ram shall continue to pay Rs. 22 per month to Mt. Rattan Kaur. The award was signed by both the parties in token of their acceptance of the same and it seems that Sobha Ram had made no default for three months in paying the maintenance to Mt. Rattan Kaur as determined by the award. An application was subsequently made by Mt. Rattan Kaur under para. 20, Sch. 2, Civil P. C., for an order that the award be filed in Court. An objection was raised to the filing of the award on the ground that it required registration and this objection has been allowed by the learned District Judge on appeal, and this is the only matter which has been agitated before me. Having held that the portion of the award which had any reference to the shop or its rent was invalid as being a matter which was not referred to arbitration the Court should have excluded that part of the award from the rest. The rest of the award relates merely to the liability of Sobha Ram to pay Rs. 22 per month to Mt. Rattan Kaur. An award which merely directs one of the parties to pay a certain sum of money to the other periodically, does not require registration and therefore must be treated as a valid award to that extent. The enforceable portion of the award in the present case does not require registration. It is, however, contended on behalf of the respondent that for the purpose of deciding whether the award required registration or not, the award as it stands without excluding the invalid portion thereof must be looked to.

With this contention I am unable to agree. Owing to a legal objection to the power of the arbitrator to make a portion of the award, that portion must be excluded and held to be invalid. It must, therefore, be expunged from the award and the only enforceable portion of the award is that which does not require registration. It is also contended on behalf of the respondent that on an application under para. 20, Sch. 2, Civil P. C. to file an award which had been made on a reference made without the intervention of the Court, it is not competent for the Court to file or to direct that a part of the award be filed in Court. This contention I would have upheld having regard to the wording of para. 21, which provides that where an award is not open to any objection such as is mentioned in para. 14 or 15

the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. The first ground mentioned in para. 14 provides that:

The Court may remit the award or any matter referred to arbitration to re-consideration of the same arbitrator or umpire, upon such terms as it thinks fit, where the award has left undetermined any of the matters referred to arbitration or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred.

36 All 336 (1), a judgment of their Lordships of the Privy Council is an authority in support of the petitioner's contention that in such cases the Court should separate the invalid part of the award from the valid part and direct that the valid portion be filed in Court. The same appears from a judgment of Allahabad High Court in 143 I C 423 (2). It is therefore, permissible to separate the invalid portion of the award from the valid portion in a case like the present where they are separable and there is nothing in paras. 20 and 21, Sch. 2, Civil P. C. which militates against this procedure. The award, therefore, which is to be enforced by the Court, and which is the only valid award in this case, does not require registration and is therefore admissible. This is the only ground on which the learned District Judge has reversed the order of the trial Judge and has refused the application to file the award. 1935 Lah 30 (3) cited by the learned counsel for the respondent does not, in my opinion, apply to the facts of the present case. In that case it was held that in order to make an unregistered document admissible which, as it existed, required registration, a party is not competent to ignore or to exclude the portion which made the document compulsorily registrable. That case, however, related to a document which was valid as a whole. We are concerned with a document which is partly valid and partly invalid and it is the invalid portion thereof which makes the document compulsorily registrable and that portion cannot be enforced by a Court and according to the decision of the Court must be held

1. Ameer Begam v. Badruddin Hussain, 1914 P O 105=28 I O 625=36 All 336=17 O O 120 (P O).
2. Bachchan Lal v. Narottam Dutt, 1933 All 59=143 I O 423=1932 A L J 1090.
3. Ladha Mal v. Sardari Lal, 1935 Lah 30.

not to be a part of the award. This fact in my opinion makes 36 All 336 (1) applicable to the present case. I, therefore, accept this petition, set aside the order of the learned District Judge of Amritsar and restore that of the trial Judge but after excluding the portion of the award which made the widow of Sobha Ram responsible for the maintenance of Mt. Rattan Kaur. The respondent shall pay the costs of the petitioner throughout.

R.W./R.K.

*Petition accepted.***A. I. R. 1936 Lahore 796**

AGHA HAIDAR, J.

Mohammad Rafi — Plaintiff — Petitioner.

v.

Qazi Mazhar Hussain — Defendant — Opposite Party.

Civil Revn. No. 811 of 1935, Decided on 7th February 1936, from decree of Small Cause Court Judge, Delhi, D/- 5th August 1935.

Negotiable Instruments Act (1881), S. 93—Cheque dishonoured—Failure by assignee of cheque to give notice of dishonour to endorser—Endorser is discharged from liability.

On a cheque being dishonoured, it is incumbent on the assignee of the cheque, under S. 93, to serve the endorser with notice of dishonour. If he fails to do so, the endorser is discharged from the liability and the assignee cannot maintain an action for the amount for which the cheque is issued. Nor can the assignee sue on the original consideration: 27 *Mad* 540; 25 *Mad* 580 and 1929 *Lah* 577, *Rel. on.* [P 796 C 2]

Shamair Chand—for Petitioner.

Mohammad Monir—for Opposite Party.

Order.—This is an application in revision against the order of the Small Cause Court Judge of Delhi dismissing the plaintiff's suit. The plaintiff brought a suit for the recovery of a sum of Rs. 103-12-0 plus Rs. 7 as interest plus Re. 0-5-3 cost of notice, total Rs. 111-1-3. The case for the plaintiff was that there were dealings between the parties and that as a result of those dealings a sum of Rs. 298-3-0 was the outstanding balance against the defendant. The defendant raised various pleas and the Court was of opinion that the plaintiff had failed to prove that he had sold goods worth Rs. 298-3-0. In the end however the defendant admitted that a sum of Rs. 290-15-6 was due by him to the plaintiff which he had paid. The plaintiff's case therefore is that out of this amount the payment of a sum of Rs. 100 was sought to be made by means of a cheque which was given by

the defendant to the plaintiff and that since that cheque has been dishonoured he was entitled to recover the amount of Rs. 100 plus interest and costs of notices. The trial Judge has held that no notice of dishonour was served upon the defendant by the plaintiff and therefore the defendant, endorser, was discharged from all liability. He accordingly dismissed the plaintiff's suit.

In revision it was argued by Mr. Shamair Chand, counsel for the petitioner, that the plaint does not indicate that the suit was one for the recovery of the amount due under a cheque which had been dishonoured but that the plaintiff merely asked for a sum of Rs. 100 as regards which consideration had failed by reason of the cheque not being cashed by the Bank upon which it was drawn. Mr. Mohammad Monir, counsel for the opposite party, on the other hand, has argued with considerable force that under the provisions of S. 93, Negotiable Instruments Act, it was incumbent upon the plaintiff to serve the defendant with notice of dishonour and that in the absence of such notice he could not maintain the present action. He further pleaded that in the circumstances the plaintiff could not sue even on the original consideration. He relied upon 27 *Mad* 540 (1) and 25 *Mad* 580 (2) and also upon 1929 *Lah* 577 (3). The legal position no doubt is correctly stated by Mr. Mohammad Monir. The fact however remains that the suit was really brought for a sum of Rs. 100 which remained outstanding, after the payments had been made by the defendant. The defendant, although he raised the legal pleas which were open to him in his written statement, yet he admitted that as the plaintiff had neither given notice to him that the cheque had been dishonoured nor did he mention the fact of dishonour in the notice which he actually served upon the defendant, he was under the circumstances not entitled to realise costs of the suit.

He further made an offer that he was prepared to pay the sum of Rs. 100 which

1. *Kuttayan Chetty v. Palaniappa Chetty*, (1904) 27 *Mad* 540.
2. *Dargavarapu Sarrapu v. Rampratapu*, (1902) 25 *Mad* 580.
3. *Bahadur Chand Prabh Dial v. Gulab Rai Nanak Chand*, 1929 *Lah* 577=116 I C 887=11 *Lah* 34.

was due to the plaintiff from him provided the plaintiff paid the costs of the defendant. The defendant seems to be a straightforward person who wants to deal honestly with those with whom he does business. He virtually offered to pay the amount and thus admitted his liability though he insisted upon his costs being paid by the plaintiff. In the circumstances of the case, in my opinion, the Court below has taken a too technical view of the matter. It would have been right and proper if, having regard to the position taken up by the defendant in his written pleas, the Court had passed a decree in favour of the plaintiff for a sum of Rs. 100 making a suitable order as to costs. Mr. Shamair Chand for the petitioner has agreed to pay to the defendant the taxed costs. I therefore set aside the order of the Court below and direct that the defendant should pay to the plaintiff a sum of Rs. 100 which was due to him while the plaintiff will have to pay the taxed costs incurred by the defendant both in this Court and in the Court below. The application in revision is allowed in these terms.

R.M./R.K. *Application allowed.*

A. I. R. 1936 Lahore 797

JAI LAL, J.

Usman—Plaintiff—Appellant.

v.

Rahmat and others—Defendants and Plaintiff—Respondents.

Second Appeal No. 2331 of 1935, Decided on 25th March 1936, from decree of Dist. Judge, Mianwali, D/- 8th October 1935.

Easement—Easement and Right of public pathway — Difference between — Right of easement attaches to land and is exercisable over another's land—Exercise of right of passage does not require person to be owner of some land—User of way for fixed period is not necessary.

A right of easement is claimable on the land of another by the owner of land. It is not a personal right but it attaches to land and is exercisable over another's land. A public pathway however may be on another's land but the exercise of a right of passage over it does not necessarily require that the person claiming it must prove that he is owner of some land. In other words the existence of a dominant tenement is not necessary. And it is not necessary to prove the user and the exercise of right of way for 20 years or even for any fixed number of years. User will be only evidence of original dedication in such cases: 62 P R 1898, *Rel. on.* [P 797 O 2; P 798 O 1]

Bishan Narain—for Appellant.

Ram Lal Anand I—for Respondents.

Judgment.—This second appeal is by Usman, one of the plaintiffs. Their suit was for an injunction restraining the defendants from obstructing the public pathway and for directing them to remove the obstruction that they had placed on the pathway by constructing a chhapper thereon. The suit was decreed by the trial Judge but has been dismissed by the District Judge of Mianwali on appeal. The District Judge has proceeded on the assumption that the plaintiffs have to prove an uninterrupted user as of right of the pathway for 20 years as provided by S. 26, Lim. Act. The plaintiffs however did not claim a right of easement. On the other hand they claimed that the pathway in question was a public pathway and in order to establish a right to use such a pathway it is not necessary for the plaintiffs to prove 20 years' user. A right of easement is claimable on the land of another by the owner of land. It is not a personal right but it attaches to land and is exercisable over another's land. A public pathway however may be on another's land but the exercise of a right of passage over it does not necessarily require that the person claiming it must prove that he is the owner of some land. In other words the existence of a dominant tenement is not necessary. This question was discussed in detail in 62 P R 1898 (1) in which the implications of a public pathway were discussed and it was clearly laid down that it was not necessary to prove the user and the exercise of right of way for 20 years or even for any fixed number of years. The learned District Judge appears to have been misled by an unnecessary issue (issue 2) framed by the trial Judge, which was "whether the right of easement has been established by user." It may be that it was the alternative claim of the plaintiffs. If so it has been negatived by the District Judge but the plaintiffs' real case was that the passage in question was a public pathway which they had a right to use. The learned District Judge has found that the passage was a shamilat land.

The evidence leaves no doubt that the pathway has been used by all the residents of the village. An examination of the plan clearly shows that the passage

1. Ganpat Singh v. Kangra Valley State Co., (1898) 62 P R 1898.

cannot be but a public pathway. On both sides of it abut houses of the residents of the village. The presumption, therefore, is that the passage has been kept for the common use of the residents of the village and is therefore a public pathway. Under such circumstances there must be a presumption of dedication of the land under the passage for a public pathway and as I have already stated user for any number of years is not necessary to establish a right to pass over the public pathway. User on the other hand is merely an evidence of original dedication in such cases. In my opinion, therefore, the plaintiffs had clearly established their right for the decree that they had claimed. I accept this appeal, set aside the decree of the District Judge and restore that of the trial Court with costs throughout.

R.W./R.K.

*Appeal accepted.***A. I. R. 1936 Lahore 798**

TEK CHAND, J.

Kashi Ram—Plaintiff—Appellant.

v.

Des Raj—Defendant—Respondent.

Second Appeal No. 2010 of 1935, Decided on 28th April 1936, from Senior Sub-Judge, Ambala, D/- 14th October 1935.

Provincial Small Cause Courts Act (9 of 1887), Art. 35, Cl. (ii)—Suit to recover money in respect of which offence under S. 379, I. P. C., committed—Suit is unclassified one and falls within Art. 35, Cl. (ii).

Clause (ii), Art. 35 applies even though the claim is restricted to the value of the property misappropriated or stolen and does not in so many words include a claim for compensation. [P 798 C 2]

Plaintiff sued to recover money from defendant in respect of which an offence under S. 379, I. P. C. had been committed by his wife. He sued the defendant not for the recovery of identical coins which his wife had stolen from him and given to defendant, but sued for the amount which had been stolen :

Held : that the suit was an unclassified one and fell within the scope of Art. 35, Cl. (ii), and was not cognizable by a Small Cause Court : 1924 Lah 668 ; 1923 Oudh 38 and 1926 All 760, *Rel. on.* [P 798 C 2]

Asa Ram Aggarwal—for Appellant.

Judgment. — The plaintiff brought a suit for recovery of Rs. 300 on the allegation that this money had been stolen by his wife Mt. Shaman from his house and had been given to her paramour Des Raj defendant. It was alleged that Des Raj had handed over the money to his partner Kapuria from whom it was taken possession of by the police in the course of

the investigation in connection with the murder of Maya Ram, brother of Des Raj. Kanshi Ram plaintiff was suspected of this murder. He was tried by the Sessions Judge and convicted, but was acquitted on appeal by the High Court. Under the orders of the Sessions Judge, the sum of Rs. 300 which had been recovered by the police from Kapuria in the course of the investigation was ordered to be refunded to Des Raj on his furnishing security for refund in the event of its being held by a civil Court to be the property of some other person. The plaintiff accordingly brought this suit, alleging that it was his money which had been stolen by his wife and given by her to Des Raj. Des Raj admitted that the amount had been given to him by Mt. Shaman, wife of the plaintiff, but stated that she had paid it in liquidation of the amount which he (defendant) had spent during the illness of Mt. Shaman and Des Raj. The trial Judge decreed the suit. The defendant appealed to the Senior Subordinate Judge who disagreeing with the conclusion of the trial Judge dismissed the suit.

The plaintiff has appealed and the first contention raised on his behalf is that this suit was an unclassified one and therefore the appeal lay to the District Judge, and the Senior Subordinate Judge had no jurisdiction to entertain and decide it. It appears to me that this contention is well founded and must prevail. On the allegation made in the plaint, the suit is really one for recovery of the money in respect of which an offence under S. 379, I. P. C., had been committed. This being so, it is excepted from the jurisdiction of the Small Cause Court under Art. 35, Cl. (ii). It may be that the Rs. 300 which were made over under orders of the Sessions Judge to Des Raj after the conclusion of the murder case were not identical coins which had been stolen by Mt. Shaman from the plaintiff as alleged by him, but this circumstance is immaterial, for Cl. (ii), Art. 35 has been held to apply even though the claim is restricted to the value of the property misappropriated or stolen and does not in so many words include a claim for compensation : see 75 I C 928 (1), 72 I C 916 (2) and 49 All

1. Raghbir Singh v. Singh Ram, 1924 Lah 668=75 I C 928.

2. Uttam Prasad v. Kodai, 1923 Oudh 38=72 I C 916=26 O C 200.

85(3). The suit was therefore an unclassified one and its value being Rs. 300 the appeal lay to the District Judge, Lala Ram Kanwar, Senior Subordinate Judge, having been invested with powers to hear appeals in "unclassified suits" to the extent of Rs. 100 only. This being so the decision of the learned Senior Subordinate Judge was without jurisdiction and must be set aside. I accept the appeal, set aside the judgment and the decree of the learned Senior Subordinate Judge and order that the memorandum of appeal presented by Des Raj defendant be returned to him by the Senior Subordinate Judge for presentation in the Court of the District Judge and disposal in accordance with law. Court-fee on appeal will be refunded; other costs will be costs in the cause.

R.W./R.K.

Appeal accepted.

3. Deeki Rai v. Harakh Narain Lal, 1926 All 760=97 I O 129=24 A L J 1017=49 All 85.

A. I. R. 1936 Lahore 799

COLDSTREAM, J.

Arjan Singh and another — Plaintiffs
— Appellants.

v.

Maqbul Ahmad and other — Defendants
— Respondents.

Second Appeal No. 2094 of 1935, Decided on 13th February 1936, from decree of Dist. Judge, Lyallpur, D/- 17th July 1935.

(a) Promissory note—Place specified—Pro-notes in North India are generally made payable at specified place—Name of particular town is sufficient.

Where the place where a pro-note is made payable is the residential site of a revenue estate where the lender lives, the naming of it is sufficient to make the note only payable at a specified place. It is a matter of common knowledge that negotiable instruments in the Northern part of India are generally made payable at a particular town: 1935 Lah 623 and 1935 Pesh 132, *Foll.*

[P 800 C 1]

(b) Promissory note — Presentment is necessary—Plaintiff must show that by non-presentment either party does not suffer.

A promissory note must be presented unless it is not payable at a specified place. Presentment is the cause of action in a suit based upon such an instrument. It is for the plaintiff to prove that the other party suffered no damage from non-presentment of the pro-note: 1926 Lah 828 and 1925 All 442, *Ref.*; 1935 Lah 153, *Dissent.*

[P 800 C 2]

Amar Nath Chopra—for Appellants.
Tasaddug Hussain—for Respondents.

Judgment.—The circumstances giving rise to this second appeal are as follows; Fateh Ali, Lambardar of Chak 172 G. B. in Lyallpur District executed a promissory note for Rs. 1,355 in favour of the appellants Arjun Singh and Kartar Singh, residents of Chak 232 G. B. on 28th June 1931 promising to pay the amount with interest. The note was made payable at Chak 232 where the appellants resided. The appellants sued to recover Rs. 1,845 principal and interest. Fateh Ali pleaded that the rate of interest claimed was not the stipulated rate and that the note had not been duly presented. The Subordinate Judge 3rd Class held that the note had been executed for the consideration stated in it and that the interest claimed was chargeable. He dismissed the suit however on the finding that the note had not been duly presented, it having been admitted by the plaintiffs' counsel that the note had been presented at Chak 172 and not at Chak 232 where this note was made payable. The plaintiffs appealed. Fateh Ali died and the appeal proceeded against his legal representatives the present respondents. The memorandum of appeal set forth seven grounds but the learned District Judge dismissed it because the only plea relied upon before him by the appellants, namely, that the maker of the promissory note would not suffer damage from the want of proper presentation [(Cl. (d), S. 76, Negotiable Instruments Act)] had not been raised in the trial Court and could not be entertained as its consideration might require the production of more evidence. Against this judgment Arjan Singh and Kartar Singh have presented the present second appeal. It is argued before me by their counsel firstly that the note was not payable at a 'specified place' inasmuch as a 'Chak' is not a sufficiently definite place for the purpose of S. 69 of the Negotiable Instruments Act and secondly that the learned District Judge ought to have held that no presentment was necessary, it being obvious that the maker or drawer of the note could not suffer damage from the note being presented at Chak 232. I see no force in the first of these arguments. As remarked in 1935 Lah 623 (1), whether the place specified for payment is a specified place for the purpose of S. 64, Negotiable Instruments Act, is a question to

1. Mehr Bakhsh v. Hari Chand, 1935 Lah 623 = 160 I O 536.

be decided according to the circumstances of each case. In that particular case the promissory notes were payable at Sialkot, but none of the parties belonged to that town, and it appeared probable that Sialkot was named in order to make the money recoverable in British India, the original holders of the notes being residents of British India. In the present case the place is the residential site of a revenue estate where the lender lived and I have no doubt that the naming of it was sufficient to make the note only payable at a specified place. It is a matter of common knowledge that negotiable instruments in this part of India are generally made payable at a particular town. In 1935 Pesh 132 (2), a note payable at Peshawar was held to be "a specified place."

In support of his second argument appellant's counsel relies first on 7 Lah 113 (3). The judgment was in a suit based on hundis where the drawer and the drawee were the same persons and from the nature of the case the drawer could not suffer damage from the want of such presentment. The same view was taken in 44 All 554 (4) and 47 All 572 (5). In none of these cases was the suit based upon a promissory note but appellants' counsel draws attention to the remark at pp. 573 and 574 of 47 All 572 (5) that no presentment of a hundi drawn by Muniruddin was necessary because in the form in which the bill was drawn Muniruddin being drawer and acceptor it was open to the holder to treat the document as a promissory note.

Muniruddin had not appealed and the remark was therefore obiter. We do not know moreover whether the bill was or was not payable at a specified place. The only judgment relating to a promissory note to which counsel has referred me, and this is the ruling on which he mainly relies, is the judgment of this Court in 1935 Lah 153 (6). Abdul Rashid, J. there

seems to have held that no presentment of a promissory note was necessary. But S. 64 clearly lays down that a promissory note must be presented unless it is not payable at a specified place. I do not find in any of these rulings authority for the broad proposition that presentment of a promissory note to the maker is not necessary. Presentment is the cause of action in a suit based upon such an instrument. It was for the plaintiffs-appellants to prove that the other party suffered no damages from non-presentment. S. 76 (d) was not even pleaded in the trial as excusing non-presentment. This disposes of the points taken before me and finding them not established I dismiss the appeal leaving the parties to bear their own costs.

B.D./R.K.

Appeal dismissed.

* A. I. R. 1936 Lahore 800

BHIDE, J.

Chhaibar Singh—Creditor—Petitioner.

v.

Mrs. E. M. Baines—Debtor—Respondent.

Civil Revn. No. 330 of 1935, Decided on 16th December 1935, from order of Dist. Judge, Rawalpindi, D/- 7th February 1935.

* Provincial Insolvency Act (1920), S. 9—Debt not in existence on date of alleged act of insolvency—Such creditor is not entitled to maintain petition under S. 9.

A creditor who files a petition under S. 9 is not entitled to do so, if the debt on which the petition is founded was not in existence at the date of the alleged act of insolvency, but was incurred later: 1927 *Mad* 153, *Disting.*; 1921 *Mad* 62; *Ex parte Hayward*, (1870) 6 Ch A 546 and *Ex parte Sadler*, (1878) 39 L T 361, *Rel. on.*
[P 800 C 2; P 801 C 1]

Basant Krishna—for Petitioner.*Badri Das*—for Respondent.

Order.—The sole point for decision in this revision petition is whether a creditor who files a petition under S. 9, Provincial Insolvency Act, is entitled to do so, if the debt on which the petition is founded was not in existence at the date of the alleged act of insolvency but was incurred later. The learned Judges of the Courts below have held that the creditor was not entitled to maintain the petition as his debt was not in existence on the date of the act of insolvency. In support of this decision reliance has been placed on 61 I C 756 (1), a Division Bench

2. *Sher Md. Khan Zamanuddin v. Haji Ahmad Gul Abdul Aziz*, 1935 Pesh 132=158 I C 89.

3. *Budhumal Permanand v. Gokal Chand*, 1926 Lah 328=92 I C 1015=7 Lah 113=27 P L R 75=8 L L J 3.

4. *Pach Kauri Lal v. Mulchand*, 1922 All 279=66 I C 503=44 All 554=20 A L J 437.

5. *Jhandu Lal Mittu Lal v. Wilayati Begam*, 1925 All 442=87 I C 488=47 All 572=23 A L J 349.

6. *Shiva Nath v. Bishambar Das*, 1935 Lah 153=1935 Cr O 239=152 I C 1006=36 Cr L J 217=37 P L R 31.

1. *Muthiah Chettiar v. Lakshmi Narasa Aiyar*, 1921 *Mad* 62=61 I C 756.

ruling of the Madras High Court. The learned counsel for the creditor who has preferred the present petition urges that there is no discussion of the point in the Madras ruling and it was apparently merely taken for granted. He contends that the language of S. 9 does not require that the debt should have been in existence on the date of the alleged act of insolvency and cites 50 Mad 396 (2) and that it is sufficient if the debt exists on the date of the petition. The latter ruling, however, does not seem to be in point. All that was held therein was that a creditor petitioning under S. 9 does not lose his right to maintain the petition merely because his debt is reduced to less than Rs. 500, after the date of filing the petition. The wording of S. 9 does not, I think, throw light on the point at issue. But the view taken by the Madras High Court seems to receive support from (1870) 6 Ch A 546 (3) and (1878) 39 L T 361 (4). In the former case Sir G. Mellish L. J. observed as follows :

It has always been the settled rule that the debt of the petitioning creditor must be a debt which existed at the time of the act of bankruptcy. The law was so settled not on the ground of any express words in any of the Bankruptcy Acts, but because it would be manifestly unjust that a person who commits an act of bankruptcy and who happens to have no creditor or pays all his creditors in full should be liable to be made bankrupt on account of that act by some person to whom he afterwards became indebted.

In view of the above decisions, I dismiss the petition but leave the parties to bear their costs.

K.S./R.K.

Petition dismissed.

2. S. K. Venkatarama Aiyer v. A. Buran Sheriff, 1927 Mad 153=99 I O 536=50 Mad 396.

3. Ex parte Hayward, (1870) 6 Ch A 546=40 L J B K 49=24 L T 782=19 W R 833.

4. Ex parte Sadler, (1878) 39 L T 361.

A. I. R. 1936 Lahore 801

JAI LAL, J.

Ram Labhaya—Plaintiff — Petitioner.
v.

Fateh Ali and another—Defendants—
Opposite Parties.

Civil Revn No. 349 of 1935, Decided on 15th October 1935, from decree of Senior Sub-Judge, Jhelum, D/- 6th February 1935.

Instalment Bond—Creditor passing receipt to debtor stating that 'what has been due to the creditor upto the date of receipt has been fully satisfied'—Some instalments becoming

1936 L/101 & 102

due after date of such receipt — Bond, held, is not completely wiped off—Instalments due after date of such receipt can be recovered.

A debtor executed an instalment bond in favour of his creditor. Later on, on receiving a certain amount from the debtor, the creditor passed a receipt wherein he stated that what was due to him upto the date of receipt was completely satisfied. On a suit based on the instalment bond, it was contended by the debtor on the strength of the receipt that the entire debt was wiped off:

Held: that the receipt only meant that only that amount that had become due upto the date of the receipt was satisfied and those instalments that became due after such date were still recoverable. [P 802 C 1]

Mukand Lal Puri—for Petitioner.

Firoz-ud-Din Ahmad — for Opposite Parties.

Order.—This is a petition for revision of a decree passed on appeal by the Senior Sub-Judge of Jhelum on 6th February 1935 dismissing the petitioner's suit for recovery of Rs. 470 claimed by him to be due to him from the respondents on account of instalments due on a bond, dated 1st October 1926. The first of these instalments fell due in September 1930. The trial Court had decreed the suit. The appellate Court dismissed it on the ground that a certain receipt set up by the respondents properly interpreted meant that the whole liability under the bond had been wiped off by the payment of Rs. 600 made on 8th January 1930. The oral evidence in support of their allegation produced by the respondents was not relied upon by the lower appellate Court as sufficient to establish the defendant's plea. It appears that a previous suit was instituted for recovery of Rs. 800 by the petitioner against the respondents on account of instalments due upto the date of the suit and that suit was dismissed on the plaintiff having been paid Rs. 600. He gave a receipt to the defendants on that occasion which is dated 8th January 1930 and which, it is claimed by the defendants, was intended, and is so expressed, to wipe off his entire liability under the bond. The learned Senior Sub-Judge has held that the receipt when properly interpreted supports the contention of the respondents. I may mention that there were two defendants in the case, one of them had admitted liability for the amount claimed by the plaintiff but had pleaded that it should first be recovered from the other defendant. The suit has been dismissed even against this defendant.

The other defendant, however, pleaded full discharge of the bond by payment of Rs. 600 as evidenced by the receipt of 8th January 1930. The only question, therefore, on this revision is whether the Senior Sub-Judge has rightly interpreted the receipt produced by the defendant. Now the receipt is quite clear that the only liability that was discharged by payment of Rs. 600 was "*baqi hisab kul jo har do ke zuma ab tak wajib ul wasul tha chhor diya hai*," that is to say, what was discharged was liability for the amount which was recoverable from the defendants upto the date of the payment. Surely the instalments which became due after that date were not recoverable on that date and could not, therefore, have been discharged by the payment of Rs. 600. There is force in the contention of the petitioner that the principal amount due under the bond was Rs. 700 and the plaintiff could not have accepted Rs. 600 in full satisfaction of the whole claim considering that he claimed Rs. 800 due to him consisting of Rs. 390 principal and Rs. 410 interest. Thus out of the principal Rs. 310 were still due to the plaintiff. In my opinion the receipt cannot possibly bear the construction that has been placed by the Senior Sub-Judge on it and to that extent his interpretation of it is clearly wrong and I hold that under the circumstances I have jurisdiction to revise his decree on this petition. I accept the petition and setting aside the decree of the Senior Subordinate Judge restore that of the trial Judge with costs throughout.

B.D./R.K.

*Revision allowed.***A I. R. 1936 Lahore 802**

BHIDE AND CURRIE, JJ.

Jawala Singh and others—Plaintiffs—Appellants.

v.

Mt. Santi and others—Defendants—Respondents.

Second Appeal No. 1854 of 1934, Decided on 6th November 1935, from decree of Dist. Judge, Lyallpur, D/- 30th June 1934.

Custom (Punjab) — Succession—Amritsar District—Collaterals are not entitled to succeed in preference to daughters.

In Amritsar District collaterals are not entitled to succeed to the self-acquired property of the deceased in preference to his daughter: 1935 Lah 419, *Rel. on.* [P 802 C 2; P 804 C 1]

Vishnu Datta for Badri Das and Badri Das—for Appellants.

Jiwan Lal Kapur and Faquir Chand Mittal—for Respondents.

Bhide, J.—The sole point for decision in this appeal is whether the plaintiffs who are reversioners of Wasawa Singh, in the 2nd degree, are entitled to succeed to his self-acquired property in preference to his daughter. The Courts below have decided the point against the plaintiffs and dismissed the suit. From this decision plaintiffs have appealed. The parties originally belonged to the Amritsar District but have now settled down in the Lyallpur District where the land in dispute is situated and in which occupancy rights were acquired by Wasawa Singh. On the death of Wasawa Singh, the occupancy holding was mutated in favour of his widow Mt. Nihali, and after her death in favour of her daughter Mt. Santi and Fauja Singh, a son of another daughter. The plaintiffs placed their reliance mainly on the answers to questions 60 and 61 in the Customary law of the Amritsar District prepared at the last Settlement, according to which it would appear that collaterals of any degree are entitled to succeed to the property of a deceased person whether ancestral or self-acquired in preference to a daughter. The plaintiffs produced a couple of instances and some oral evidence in support of their case but they were of little value and the learned counsel for the plaintiffs placed no reliance on this evidence before us.

Before proceeding to discuss the question of custom it may be mentioned that the learned Counsel for the appellants made an effort to argue that the land in dispute being an occupancy holding in the Chenab Colony, the succession is governed by S. 20 Punjab Colonization Act. This point was not taken up in the Courts below nor in the grounds of appeal and seems to me to have no force at all. In the present instance the succession with which we are concerned opened out on the death of Mt. Nihali, a female tenant, and it would consequently have to be decided according to the custom governing the parties as laid down in S. 21 (b) of that Act. Coming now to the question of custom, there is no doubt that the initial onus was on the respondents to rebut the presumption raised in plaintiffs' favour by the answers in the Customary law although the answers are not sup-

ported by instances: vide 45 P R 1917 (1), and 10 Lah 86 (2). It has been urged, however that the presumption is not strong in this case as the author of the Customary law has himself expressed the opinion in spite of the answer to question 61 given by the representatives of the tribe concerned that daughters have in reality a right to exclude agnates with reference to non-ancestral property. But as pointed out in 8 Lah 281 (3), at p. 285 this remark does not occur in the vernacular *Riwaj-i-am* of which the Customary law in English purports to be an abstract. It is not clear on what material this remark is based. However I consider it unnecessary to discuss this point further for the purpose of this appeal; for even taking the initial presumption to be unequivocally in favour of plaintiffs, it seems to me that presumption is sufficiently rebutted by the evidence on the record.

I have already pointed out above that the plaintiffs rely only on the answers to questions 60 and 61 of the Customary law and have not been able to produce any independent evidence in support of those answers. The defendants on the other hand produced a number of instances supported by documentary evidence. Some of these instances are of no assistance for want of sufficient details, but there are at least five which clearly support the defendants' case and two of them have been confirmed on appeal by this Court. I shall briefly refer to them. Ex. D. W. 1 a case relating to Jats of Amritsar District, who had migrated to Lyallpur as in the present case. It was held by the learned Senior Subordinate Judge who tried the case that daughters succeeded to non-ancestral property in preference to collaterals and this decision has been confirmed by this Court on appeal: vide 1935 Lah 408 (4). A number of instances were produced and relied on in this case and the case was decided after contest. Ex. D. W. 2 was a similar case and was decided in favour of the daughters. In this case it appears that no appeal was preferred to this Court. Ex. D. W. 5. Another case of the

same type, in which the decision was confirmed on appeal by this Court after a detailed examination of the instances produced: vide 1935 Lah 419 (5). Ex. 5-b certified copy of a mutation dated 4th December 1917, showing that land belonging to her father was mutated in favour of Mt. Sukhi in spite of the opposition of collateral. The mutation was confirmed on appeal by the Collector. The collaterals apparently made no attempt to challenge it in a civil Court. The parties were Jats of the Amritsar District. Ex. 5-c is a similar mutation relating to Jats, of the Amritsar District wherein land gifted by a widow in favour of her daughter was mutated in favour of daughter in spite of the opposition of a collateral. The latter apparently made no effort to establish his rights in a civil Court.

The learned counsel for the appellants has relied on three reported cases relating to Jats of the Amritsar District viz., 8 Lah 281 (3), 1925 Lah 556 (6) and 1933 Lah 898 (7). A perusal of these cases, however shows that all these cases were decided only on the basis of the presumption raised by the entries in the *Riwaj-i-am*, there being no evidence to rebut that presumption. On the other hand the learned counsel for the respondents has cited 3 Lah 257 (8) and 9 Lah 352 (9), in addition to the two recent cases 1935 Lah 408 (4) and 1935 Lah 419 (5) already referred to. The learned counsel cited some other cases, but these related to different tribes and are not helpful in deciding this case. The first two of the above cases are perhaps open to the criticism that they were decided without giving due weight to the entries in the *Riwaj-i-am*, but the latter two cases were decided after contest. The decision in 1935 Lah 419 (5) is based on considerable number of instances. In addition there are also three other good instances to support the respondent's case as shown above. The plaintiffs have on the other hand failed to produce a single instance to support the answers to questions 60 and 61

1. Beg v. Allah Ditta, 1916 P C 129=38 I C 354=44 I A 89=44 Cal 749=45 P R 1917 (P O).
2. Valshno Dutt v. Mt. Rameshri, 1928 P C 294=118 I O 1=55 I A 407=10 Lah 86 (P O).
3. Labh Singh v. Mango, 1927 Lah 241=100 I O 924=8 Lah 281.
4. Thakur Singh v. Dhan Kaur, 1935 Lah 408=157 I C 114=37 P L R 225.

5. Narain Singh v. Basant Kaur, 1935 Lah 419=158 I O 976=37 P L R 229.
6. Nadhan Singh v. Mt. Rajo, 1925 Lah 556=85 I O 789.
7. Santa Singh v. Mt. Santi, 1933 Lah 898=144 I O 483.
8. Gurdit Singh v. Mt. Ishar Kuar, 1922 Lah 392=68 I O 551=3 Lah 257.
9. Pir Bakhsh v. Ghulam Bibi, 1928 Lah 805=107 I O 280=9 Lah 352=29 P L R 475.

in the Customary law of the Amritsar District on which alone they rely. In that compilation also no instances in point are given in support of the answers. In these circumstances, I see no good reason to dissent from the conclusion reached by the Courts below. I would accordingly affirm the decree of the learned District Judge and dismiss the appeal with costs.

Currie, J.—I agree.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 804

ADDISON AND ABDUL RASHID, JJ.

Kartar Singh and others—Plaintiffs—Appellants.

v.

Mt. Banto and others—Defendants—Respondents.

Appeal No. 847 of 1935, Decided on 28th November 1935, from decision of Senior Sub-Judge, Lyallpur, D/- 27th February 1935.

Custom (Punjab)—Succession—Self-acquisition—Aulak Jats of Amritsar District—Collaterals exclude daughters.

Among Aulak Jats of the Amritsar District daughters are not entitled to succeed to the father's self-acquired property in presence of the collaterals: 1922 *Lah* 392; 1935 *Lah* 419 and 1928 *Lah* 305, *Disapproved*; 1927 *Lah* 241, *Rel. on.* [P 809 C 1]

Mehr Chand Mahajan, J. L. Kapur and Yashpal Gandhi—for Appellants.

Shamair Chand and S. D. Jhingan—for Respondents.

Addison, J.—The plaintiffs are collaterals in the third degree of Sohan Singh. Mt. Banto, defendant 1 is the widow of Sohan Singh while defendants 2 and 3 are her two daughters. Admittedly they follow custom. They belonged to the district of Amritsar. Sohan Singh acquired a square of land in Lyallpur District which was once a desolate tract but was colonized when canal water was made available for that locality. Mt. Banto, Sohan Singh's widow, has gifted this square to her two daughters, and the collaterals have brought this suit for a declaration that this gift would not affect their reversionary rights after the death of Mt. Banto who undoubtedly is entitled to a life-estate therein. The suit was resisted by the defendants on the plea that as the square of land was the self-acquired property of Sohan Singh, his daughters were under custom entitled to succeed upon the death of the widow and

that the gift thus only accelerated their succession to the property. It was claimed on this account that the suit should be dismissed. The trial Judge has dismissed the suit on the ground that it has established that the daughters are entitled to succeed to the self-acquired land of their father upon the death of their mother, this being the custom of Aulak Jats of the Amritsar District. Against this decision the plaintiffs have appealed.

Question No. 60 of the Customary law of the Amritsar District runs as follows:

Under what circumstances are daughters entitled to inherit? Are they excluded by the sons or the widows, or by the near male kindred of the deceased? If they are excluded by the near male kindred, is there any fixed limit of relationship within which such near kindred must stand towards the deceased in order to exclude his daughters? If so, how is the limit ascertained? If it depends on descent from a common ancestor, state within how many generations relatively to the deceased such common ancestor must come?

The answer is that nearly all tribes say that agnates however remote, exclude daughters. Four exceptions are given, namely, three small Mahomedan tribes, while Khatris and Brahmans of Ajnala Tahsil stated that they followed Hindu law. Below this reply is a note by the compiler of the Manual, which was prepared by the Settlement Officer of Amritsar in 1914. It is to the effect that the exclusion of a daughter is so strict that even in those cases where there is no agnate at all she is deprived of succession by members of the village community who may have no relationship with the deceased. The real fact was that daughters after their marriage often went to reside far from their father's village and amongst families with whom her father's brotherhood had no sympathy. The result was that on her father's death she failed to get possession of the property and could not get any support from the people of the village even if she had the courage to lodge a suit in the Courts. After this note it is added that the feeling against daughters was so strong amongst certain castes that agnates, however remote, were said not to allow unmarried daughters to keep possession till their marriage or death. All other tribes, however, allowed such possession to unmarried daughters, if no son or widow were alive. It may be said here that it is commonly the custom that an unmarried daughter suc-

ceeds to a limited estate upon the death of the widow until she dies or marries.

Question 61 runs as follows:

Is there any distinction as to the rights of daughters to inherit (1) the immoveable or ancestral, (2) the moveable or acquired, property of their father?

The answer was that no distinction was made, and the answers to question 60 were applicable. Then follows a short sentence, which is not in the Vernacular Riwayat-i-am but has been inserted by the Settlement Officer in the Manual Customary Law and must be taken to be a statement of his own opinion. This sentence is:

But in reality daughters have a right to exclude agnates with respect to non-ancestral property, though the right is seldom asserted for the reasons given under answer 60;

i.e., in the note which I have reproduced above. This sentence must, therefore, be taken not to be part of the custom stated by the people, but the opinion of the Settlement Officer, and it is obvious that this opinion must be based not upon conditions prevailing in Amritsar, but upon the custom followed in other places for the Settlement Officer has himself brought out very clearly in the answers to question 60 and question 61 that daughters seldom assert their rights either to ancestral or non-ancestral property. This being so, it must be taken that his opinion was based on the customs of other places and other tribes. In fact it had become customary even in the Courts to look upon custom as a thing generally followed and to place the burden of proof upon any person who asserted that his custom was not the same as the so-called general custom of the Province. If this person succeeded in proving the custom he alleged, the name "special custom" was given to it. This obviously was an attempt to legislate and there is no doubt that it resulted in many tribes being deprived of the customs they followed, because they were not in accordance with this so-called general custom which came to be wrongly looked upon as the law in the Punjab. This is obvious also from Rattigan's Customary Law where much is made of general custom and where all customs not in accordance with it are designated "special customs." That eminent Judge, Sir Meredyth Plowden, so far back as 1893 in 50 P R 1893 (1) pointed out that there is strictly speaking

no such thing as a general custom of the Punjab applicable to persons throughout the Province like the English Common law, while Sir Charles Roe in his Tribal law said that he was unwilling to say of any single principle of custom that it was absolutely true of the whole of the Punjab. In spite of that, the Chief Court of the Punjab continued to recognize this so-called general custom as the law prevalent throughout the Punjab and to place the burden on any one who said that that was not his custom or law. A Full Bench of the Chief Court again pointed out in 75 P R 1917 (2) at p. 300 that it found itself unable to give any answer to the question referred to it for the simple reason that custom varied from tribe to tribe and from one locality to another. If it were to answer the question put to it either one way or the other, its ruling would be quoted as applicable to all persons in the Punjab governed by custom whatever their tribe or residence.

The answer might be correct as regards some tribes and some localities and quite incorrect as regards others. Their Lordships of the Privy Council in 45 Cal 450 (3) pointed out, that it was incumbent on the appellant to allege and prove the custom on which he relied. In Civil Appeal No. 1335 of 1930 (4) a Bench of this Court, consisting of the Chief Justice and Rangi Lal, J. again laid down that there is no such thing as general Customary law and that according to S. 5, Punjab Laws Act, 1872, the party who relies on custom must prove in the first instance that custom furnishes the rule of decision and secondly what that custom is. Another Bench in Civil Appeal No. 2026 of 1931 (5) pointed out that the term "General Custom of the Province" was a misnomer. This Bench also went on to hold that an entry in the riwayat-i-am about the existence of a custom was a strong piece of evidence in support of that custom which cannot be subtracted from by general considerations, such as, that daughters succeed in this Province amongst the majority of tribes to the self.

2. Bessi v. Hira Singh, 1917 Lah 303=42 I O 898=75 P R 1917 (F B).

3. Abdul Hussain Khan v. Bibi Sona Dero, 1917 P O 181=48 I O 806=45 I A 10=45 Cal 450=12 S L R 104 (P O).

4. Samon v. Shahu, 1935 Lah 93=161 I O 245=38 P L R 198=17 Lah 10.

5. Kesar Singh v. Achhar Singh, 1936 Lah 68=161 I O 692=17 Lah 101=38 P L R 502.

1. Ralla v. Budha, (1893) 50 P R 1893.

acquired property of their father. The last mentioned decision is based on 45 P R 1917 (6). It was held by the Privy Council in that case that an entry in the *riwaj-i-am* in favour of the succession of a daughter's son whose father was a *khan-adamad* in preference to collaterals was a strong piece of evidence in support of such custom which it lay upon the plaintiffs collaterals to rebut, even assuming that there was a general custom of agnatic or collateral succession, in default of male issue to the exclusion of female heirs among the agricultural tribes of the Punjab, about which the decisions of the Punjab Chief Court were by no means uniform, especially in the case of *Muham-madan* tribes who are endogamous. It is clear from para. 2 at p. 172 of the report that the *riwaj-i-am* was not followed by the Courts in India on the ground that statements recorded therein required to be proved by instances before any value could be attached to them.

In spite of this decision there have been later decisions of the Punjab Chief Court and the Lahore High Court to the effect that a *riwaj-i-am* is of little evidentiary value unless supported by instances. Some of these were reviewed in 8 Lah 281 (7) by Fforde and Campbell, JJ. That was a case amongst *Handal Jats* of the *Amritsar District*. It was held in it that a custom exists in that district amongst those *Jats*, prohibiting the succession of daughters to the inheritance of their father, whether that inheritance consists of moveable or immoveable property acquired or ancestral. It was said that after the decision of the Judicial Committee in 45 P R 1917 (6) it could no longer be affirmed to be an established rule that a statement in a *riwaj-i-am* opposed to so-called general custom and unsupported by instances possessed little evidentiary value. It was further held in it that it had not been shown that the *riwaj-i-am* of 1865 or the new edition of 1914 had been in any way imperfectly compiled or was inaccurate (see pp 299 and 293 of the report). It may here be stated that the *riwaj-i-am* of 1865 is also not in favour of daughters—a matter which has been brought out in 8 Lah 281 (7). An attempt to discredit

the *riwaj-i-am* of 1865 had been made by the learned Judges who decided 3 Lah 257 (8) but at p. 304 of 8 Lah 281 (7), it has been made clear that in that respect 3 Lah 257 (8) did not contain a correct exposition of the facts. This authority, therefore, is a strong piece of evidence as a judicial instance where daughters were excluded from self-acquired property by collaterals amongst *Handal Jats* of *Amritsar District*. It makes no difference that in the present case the dispute is among *Aulak Jats*.

The main tribe is the same and it is only the sub-tribe that is different. In the Customary law of the *Amritsar District* prepared in 1914 the sub-divisions of *Jats* who were consulted are given at p. 5 of the preface. There were 26 sub-divisions of *Jats* including *Aulak Jats* consulted and the other tribes consulted are also given there. The reply of all tribes was the same with the limited exceptions already mentioned, which may be neglected. The second judicial instance in favour of the appellants and against the daughters is reported in 1933 Lah 898 (9), where it was held that daughters or their sons are not entitled to inherit even the self-acquired property of the father or grandfather amongst *Jats* of *Amritsar District*. The third judicial instance in favour of the appellants is given in 1925 Lah 556 (10). This again is a decision of a Division Bench which held that by the custom prevailing among *Sandhu Jats* of the *Amritsar District* daughters are ousted by collaterals of the last male owner in the matter of succession to self-acquired property. 1935 Lah 408 (11) was relied upon by the respondents as it was held in it that no custom was proved to exist among *Khaira Jats* of the *Amritsar District* whereby daughters were excluded by collaterals of the husband. It therefore went on to hold that they were governed by the general custom of the Punjab whereby daughters were given preference. In this case the *riwaj-i-am* was rejected for the reason that the sub-division of *Khaira Jats* was excluded from representation

6. Beg v. Allah Ditta, 1916 P C 129=38 I C 354=44 I A 89=44 Cal 749=45 P R 1917 (P C).

7. Labh Singh v. Mango, 1927 Lah 241=100 I C 924=8 Lah 281.

8. Gurdit Singh v. Mt. Ishar Kuar, 1922 Lah 392=68 I C 551=3 Lah 257.

9. Santa Singh v. Mt. Santi, 1933 Lah 898=144 I C 483.

10. Nadhan Singh v. Rajo, 1925 Lah 556=85 I C 783.

11. Thakur Singh v. Dhan Kuar, 1935 Lah 408=157 I C 114=37 P L R 225.

and was not questioned regarding its customs when the *riwaj-i-am* of 1914 was prepared.

This is not a correct statement of what happened in 1914. The Khaira Jats are not mentioned amongst the 26 sub-divisions of Jats who were consulted as given at p. 5 of the preface. That does not mean that they were not present and were excluded. They may have been a particularly small tribe and special mention of them was therefore, not made. This decision, therefore, is not a good instance for two reasons; the first being that the *riwaj-i-am* was deliberately rejected though it purports to contain the statements of all tribes; while the second is that the Judges then proceeded to fall back upon the so called general custom of the Punjab instead of allowing the parties to establish their own custom. It is unnecessary to go back to the authorities already mentioned beginning with 50 P R 1893 (1) to the effect that there is no such thing as general custom of the Punjab. In fact such an expression is a contradiction in terms. I would, therefore, reject this judicial instance, holding it of little or no probative value. The next four instances are amongst Kambohs, a tribe which gave the same reply as the Jats. It was held in 1926 Lah 142 (12) that the *riwaj-i-am* is a public record prepared by a public officer in the discharge of his duties and is clearly admissible in evidence to prove the fact therein entered and the statements contained in the *riwaj-i-am* form a strong piece of evidence in support of the custom.

It was further held that amongst Kambohs of the Amritsar District daughters did not succeed in preference to collaterals to self-acquired property. A similar view was taken in 1928 Lah 762 (13), 1931 Lah 320 (14) and 1933 Lah 379 (15). As the custom prevailing in the Amritsar District is obviously local and not tribal, these four judicial instances are good evidence that daughters are excluded from succeeding to the self-acquired property of their father by collaterals. There are thus seven judicial instances in favour of

the exclusion of daughters amongst agricultural tribes in this locality. In favour of the daughters the first judicial instance referred to was 3 Lah 257 (8) where it was held that as regards self-acquired property the general custom of the Province is that a daughter excludes collaterals in succession to self-acquired property and the entry in the *riwaj-i-am* of 1865 was not sufficient to prove a custom to the contrary, having regard to the remarks as to the value of this *riwaj-i-am* made in 5 P R 1885 (16). This judgment has been dealt with in great detail in 8 Lah 281 (7) where it is pointed out that the criticism as to the *riwaj-i-am* of 1865 was not warranted. Again, this decision turns on the so-called general custom of the Province being a universal rule of law to rebut which was the duty of any person alleging a custom to the contrary. I have already dealt with this subject in sufficient detail and it is quite clear that the basis of the decision is wrong. This instance, therefore may be rejected as being based on incorrect principles.

Next it was contended that 1935 Lah 419 (17) was in favour of the daughters, the decision there being that amongst Sarai Jats of the Amritsar District, daughters exclude collaterals from the succession to the self-acquired property of their father. This decision appears to have been based largely upon the opinion expressed by the Settlement Officer in the 1914 Manual, doubting the truth of the custom stated in the *riwaj-i-am* and it was said that this was entitled to weight and lessened the burden on those seeking to prove that the statement of custom by the tribe was not correct. Here again 5 P R 1885 (16) was relied upon but what was said in 8 Lah 281 (7) appears to have been lost sight of. All that has even been held heretofore is that it is the statements recorded in the *riwaj-i-am* which are of value and with all respect I am not prepared to endorse the view of this Bench to the effect that the opinion of an individual Settlement Officer is entitled to weight in discrediting those statements. It might be different if this opinion was based on instances but none were quoted. I have already pointed out that the Settlement Officer himself re-

12. Naraini v. Jowahir Singh, 1926 Lah 142=89 I C 724.

13. Wasakha Singh v. Mt. Gutti, 1928 Lah 762=112 I C 8.

14. Karmond v. Jowand Singh, 1931 Lah 320=133 I C 556=32 P L R 310.

15. Har Devi v. Mohan Singh, 1933 Lah 379=142 I C 68=34 P L R 331.

16. Dial Singh v. Deva Singh, (1885) 5 P R 1885.

17. Narain Singh v. Basant Kuar, 1935 Lah 419=158 I C 976=37 P L R 229.

corded that opinion against daughters was very strong and that daughters rarely set up any right as against collaterals. His opinion therefore seems to have been based on the so-called general Customary law of the Punjab which has no existence. This is a doubtful judicial instance. 9 Lah 352 (18) is again based on the view that the general rule of custom is that in succession to self-acquired land daughters exclude collaterals, para. 23 of Rattigan's Digest of Customary Law being relied upon in this respect. There is no discussion of the Customary law of the Amritsar District except that it was remarked that the general trend of opinion was that daughters succeeded to non-ancestral property to the exclusion of agnates in that district. On what this remark is based is not stated. I would reject this as a judicial instance of little or no value.

The only other judicial instance relied upon is the decision in Civil Appeal No. 1854 of 1934 (19) where 1935 Lah 419 (17) was followed. It was remarked in the judgment that certain of the cases relied upon were open to the criticism that they were decided without giving due weight to the entries in the *riwaj-i-am*; but it was added that the last two cases were decided after contest. That may be so, but as I have already shown they were influenced by considerations which were not of much evidentiary value. There are thus two judicial instances at most in favour of daughters and their value is in my judgment not equal to the decisions reported in 8 Lah 281 (7) etc. to the contrary. This means that there are seven good judicial instances against daughters and two of less value in their favour. It is curious that in this case most of the instances relied upon are those of the colonists from Amritsar in the Lyallpur District. I come now to the non-judicial instances. Ex. D.12 is a mutation in favour of her daughters by Mt. Santi, a widow of her husband's self-acquired property in the Lyallpur District. The Revenue Officer who sanctioned the mutation, stated that the property was self-acquired, that the reversioner lived far away in the Feroz-pore District and that they could seek their remedy in the civil Courts. A civil

suit was brought by them but it was ultimately withdrawn and the terms on which it was withdrawn have not been stated. This is not therefore a very important instance. Mutation No. 100 is the next instance relied upon in favour of daughters. Chanda Singh who came to Lyallpur from Amritsar was an Aulak Jat. He was succeeded by his two widows, one of whom gifted her land, which was self-acquired of her husband, to her daughters. In this case it is clearly proved that the collaterals consented to the gift. It therefore cannot be said to be an instance establishing very much. It is always open to the collaterals to give up what they are entitled to.

The next instance relied upon is mutation No. 102 according to which Mt. Jawandi made a gift of some land to her daughter Mt. Ram Kaur. It is clear however from the statements of Indar Singh (D. W. 4) that proprietary rights in this land were acquired by the mother Mt. Jawandi. According to all the decisions of this Court it was the self-acquired land of the widow and this is not an instance of daughters succeeding to their father's self-acquired property. The fourth instance relied upon is mutation No. 357. This is the same instance as is reported in 1935 Lah 419 (17) already referred to. The next instance relied upon by the lower Court is mutation No. 89. This is the same instance as 1935 Lah 408 (11), the instance of Khaira Jats where the *riwaj-i-am* was not looked at and the general custom of the Province followed. This instance I have already rejected. The next instance is a judgment of the Senior Sub-Judge, Lyallpur, dated 16th October 1928. The main decision in that case was that Sher Singh, the father of the plaintiffs, consented to the gift and that therefore his sons could not dispute it. This obviously therefore is not an instance in favour of the daughters. As regards mutation No. 110, there was a suit in Court and the issue framed was: "Are the daughters not entitled to succeed to the self-acquired property of their father in the presence of collaterals?" The decision of the Senior Sub-ordinate Judge again purports to follow the so-called general Customary law of the Punjab as given in para 23 of Rattigan's Digest of Customary Law. This is a case decided on the wrong view of the onus and is of little or no value. Muta-

18. *Pir Bakhsh v. Ghulam Bibi*, 1928 Lah 805=107 I C 280=9 Lah 352.

19. *Jawala Singh v. Mt. Santi*, 1936 Lah 802.

tion No. 108 is in favour of a daughter, but this is a case where there is no evidence that there were any collaterals in existence. None appeared before the Revenue Officer and the witness who supported this instance, Hakam Singh (D. W. 13), did not mention the existence of collaterals. Another instance is mutation No. 81. This is another case where no mention is made by any one of the existence of any collaterals.

The last instance relied upon by the Judge is mutation No. 92. Here the mutation itself mentions that no collaterals were in existence and that Gehl Singh had no heir. Most of the instances relied upon therefore are not instances in favour of daughters, while the few which are, have been decided on a wrong view of the onus. A good instance against daughters is Ex. P 16—a mutation which was not sanctioned by the revenue authorities. Bishen Singh, a Handal Jat, who had migrated from Amritsar District to Lyallpur, gifted his self-acquired land to his daughter. The collaterals objected and the revenue authorities refused to mutate the gift in favour of the daughter. Another good instance against daughters is Ex. P-9. This is a case amongst Kambohs where the District Judge of Amritsar held on 6th October 1917 that the daughter had failed to prove her right to succession in preference to collaterals to the self-acquired property of her father. Another instance against daughters amongst Kambohs is a mutation decided by the Collector, Sir Geoffrey de Motmorency, on 2nd July 1918, (Ex. P 8). He held that daughters were not entitled to succeed to the self-acquired property of their father in preference to collaterals. The *riwaj-i-am* therefore is strongly in favour of the collaterals, appellants. Nothing has been shown to discredit the *riwaj-i-am* of the Amritsar District; while the instances are on the whole, either inconclusive or in favour of the collaterals, though there are a few instances in favour of the daughters. The instances in favour of the daughters have usually been decided on a wrong view of the onus of proof and are not thus important. In my judgment the presumption arising from the *riwaj-i-am* entry has not been rebutted, and I accept the appeal with costs throughout and decree the plaintiffs' suit.

Abdul Rashid, J.—I agree.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 809

TEK CHAND AND DALIP SINGH, JJ.

Ahmad—Defendant—Appellant.

v.

Mohammad and others—Plaintiffs and Defendant—Respondents.

First Appeal No. 1522 of 1934, Decided on 10th December 1935, from the judgment of Senior Sub-Judge, Sargodha D/- 19th July 1934.

(a) Custom (Punjab) — *Riwaj-i-am* and *Wajib-ul-arz*—Entries not specifically referring to non-ancestral property refer to ancestral property only.

Entries in a *riwaj-i-am* or *wajib-ul-arz*, which do not specifically purport to mention non-ancestral property, must be taken to refer to ancestral property: 2 P R 1909; 1926 Lah 210; 1932 Lah 353 and 591; 1934 Lah 351 and 1935 Lah 518, Ref. [P 812 C 1]

(b) Custom (Punjab) — Succession — Non-ancestral property — Mikans of Shahpur District—Married daughters exclude collaterals—Collaterals have prior right in succeeding to ancestral property.

According to the custom prevailing in the Mikans tribe, and the Mahomedan landholders of Shahpur District generally, collaterals are excluded by married daughters in succession to the non-ancestral property of a sonless proprietor, but the collaterals have a prior right to succeed to his ancestral property. [P 813 C 2]

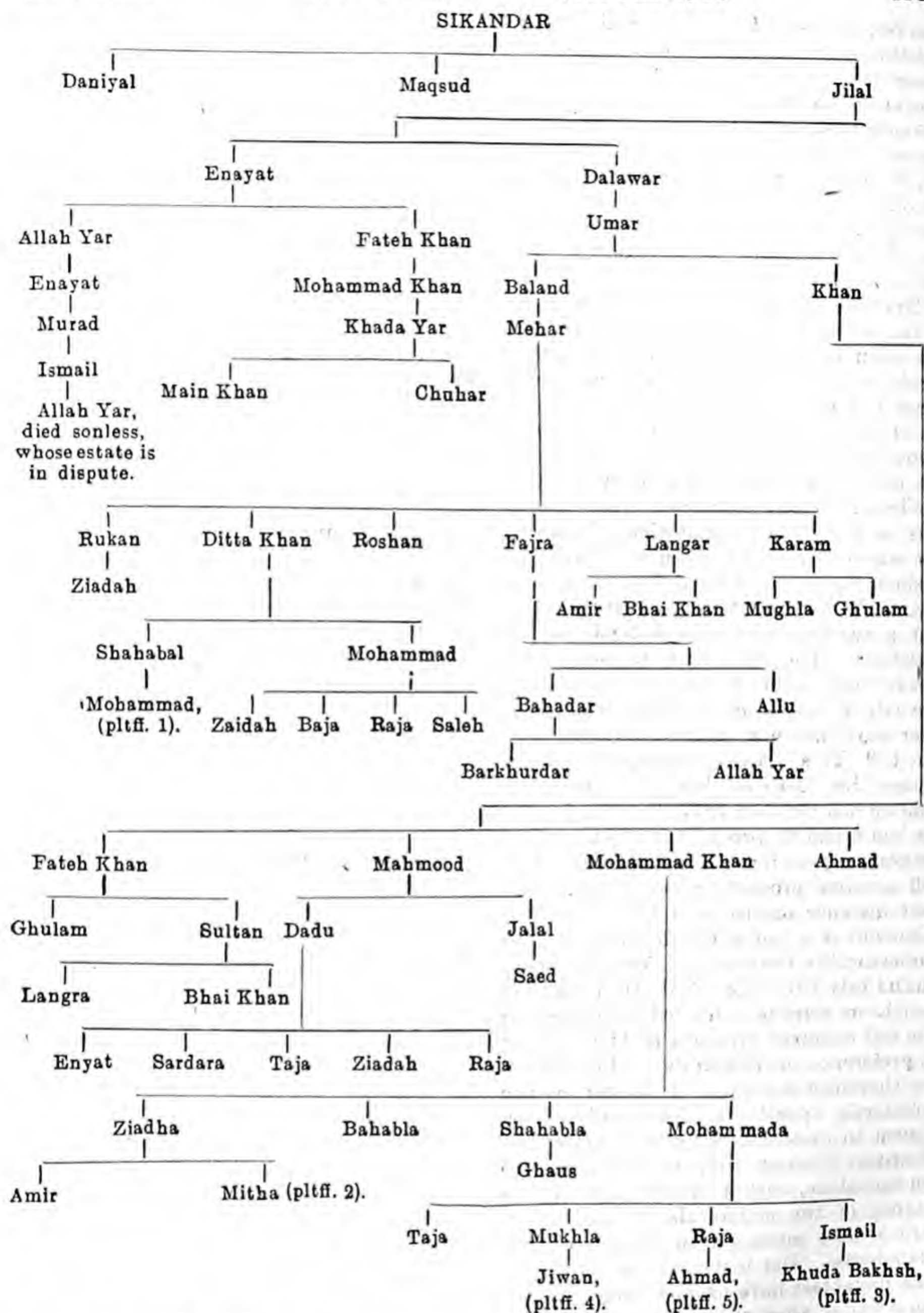
(c) Custom (Punjab) — Rattigan's Digest Para. 23 (1)—Statement is wrong.

Remark in para. 23 (1) of Rattigan's Digest that "a person cannot succeed to his maternal grandfather except in succession to his mother" is not a correct statement of the custom as actually existing in the Punjab Province: 1915 Lah 375; 1922 Lah 217; 1927 Lah 510; 1920 Lah 460; 1923 Lah 285 and 280; 1933 Lah 466 and 1935 Lah 425, Ref. [P 813 C 2]

Mehr Chand Mahajan, R. C. Manchanda and S. C. Manchanda—for Appellant.

Badri Das and J. L. Kapur—for Respondents.

Tek Chand, J.—The parties to this litigation are Mikans of mauza Vijh, Tahsil and District Shahpur, and their relationship will be seen from the pedigree-table given at the end of the judgment. [For pedigree-table, see next page] The last male holder of the property was Allah Yar, son of Ismail. Allah Yar died sonless on 7th September 1909 leaving three widows, Mt. Anayatan,



Mt. Wallan and Mt. Jallan. He had four daughters from Mt. Anayatan, namely Mt. Fazlan, Mt. Aitan, Mt. Sittan and Mt. Bakhan. He had also a daughter, Mt. Fateh, from his third wife Mt. Jallan. Mt. Wallan had no child. On Allah Yar's death the widows succeeded to the usual

life-estate and, on the death of Mt. Anayatan and Mt. Jallan, the whole property was entered in the name of Mt. Wallan. Mt. Fazlan, the daughter of Allah Yar, and Mt. Anayatan was married to Langar, from whom she had a son Ahmad, defendant 2. In May 1925 Mt. Wallan orally

gifted 599 kanals of land in mauza Sikan-darpur and 53½ kanals of land in mauza Vijh to Ahmad, defendant 2. Mutations of these gifts were sanctioned by the Revenue authorities on 22nd April 1926.

On 21st April 1932 Mohammad and Mitha (plaintiffs 1 and 2), who are collaterals of Allah Yar in the seventh degree, and Malik Mumtaz Mohammad, Khun Tiwana of Jahanabad, who claimed to be a transferee of the reversionary rights of plaintiffs 1 and 2, instituted a suit against Mt. Wallan and Ahmad for a declaration that the gift by Mt. Wallan to Ahmad was invalid and ineffectual against the reversionary rights of plaintiffs 1 and 2. The other collaterals equally related as plaintiffs 1 and 2, were impleaded as pro forma defendants. Three of them, Khuda Bakhsh, Jiwan and Ahmad, son of Raja, subsequently applied to be made plaintiffs, and this was done. The name of Malik Mumtaz Mohammad Khan was struck off the list of plaintiffs, as the right of his transferors to get possession of the land had not yet accrued.

In the plaint it was alleged that the land was ancestral qua the plaintiffs and that, according to the custom prevailing in the tribe, the gift by the widow of Allah Yar in favour of his daughter's son was invalid. The suit was resisted by Mt. Wallan and Ahmad, who denied the ancestral character of the land and further pleaded that the plaintiffs being distant collaterals had no right to sue in the presence of the daughters and the daughter's son of the deceased male owner, they being preferential heirs. The learned Sub-Judge held that the entire land in dispute was ancestral and, according to the custom prevailing in the tribe, married daughters are excluded by collaterals, howsoever remote in succession, to ancestral as well as non-ancestral property, and that, in any case, Ahmad being the daughter's son of Allah Yar could not succeed to his property except in succession to his mother Mt. Fazlan, and as the latter had not yet succeeded he could not be regarded as the heir of his maternal grandfather, as laid down in Para. 23 (1) of Rattigan's Digest. On these findings the learned Judge granted the plaintiffs a decree for the declaration prayed for. Ahmad appeals.

Before us counsel for both parties have argued—though for different reasons—

that it was not necessary to decide whether the land in dispute was ancestral or not. Mr. Mehr Chand for the appellant contended that the Answers to Questions 16 and 17 of Wilson's Customary Law of the Shabpur District, on which the learned Sub-Judge had relied, relate to succession of near agnates against daughters of a sonless proprietor, and that as plaintiffs are related to Allah Yar in the seventh degree they are not his "near agnates" and therefore there was no recorded custom showing that the plaintiffs had a preferential right to succeed to ancestral or acquired property. Consequently, the learned counsel argued, there arose no presumption in the plaintiffs' favour, and as the evidence produced by them was wholly insufficient to establish the alleged custom, their suit should fail on this short ground, irrespective of whether the property was ancestral or not. Mr. Badri Das for the plaintiff-respondents maintained, on the other hand, that the Answers to Questions 16 and 17 were general in their terms and declared that a married daughter "in no case" inherited her father's property, whether moveable or immovable, ancestral or acquired. He pointed out that these Answers are emphatically against married daughters and make no distinction between "near" and "distant" agnates, and must be taken to mean that collaterals, howsoever remote, excluded daughters from all kinds of property. The learned counsel also relied on the wajib-ul-arz of the Settlement of 1856-8 (Ex. P. 33) and maintained that the onus was equally heavy on the defendants with regard to ancestral as well as non-ancestral property, and that they had failed to discharge it. After consideration I find myself unable to accept either of these contentions. In my opinion the wajib-ul-arz is of very little assistance for the decision of the point before us. It stated that

No share devolves upon . . . the daughter in the absence of a writing by the last male-holder . . . Any daughter, who does not wish to marry, can be the owner of the paternal estate. If she intends to marry after getting possession, the collaterals of her father who effect her marriage shall be the owners of the heritage, and the daughter shall have no concern with the heritage of her father.

It was conceded by Mr. Badri Das that Cl. 1 of this paragraph did not correctly represent the custom as recorded in the riwaj-i-am of the second settlement, or as actually found existing, ac-

ording to which it was not open to a sonless proprietor to make a gift inter vivos of his ancestral property to his daughter to the prejudice of his collaterals. Secondly, it is by no means clear, what exactly is the meaning of the last clause. It seems to give the right to succeed, on the marriage of a daughter, only to those collaterals who "effect" her marriage, which presumably means arrange for her marriage and defray the expenses on the occasion. It is, therefore, not the nearness of agnatic relationship which determines the right to succeed, but the fortuitous circumstance of individual collateral or collaterals (whether near or remote) having contributed towards the marriage expenses. It would seem to follow that a distant collateral, who 'effects' the marriage, would exclude a nearer or equally related collateral who does not; and it is not easy to say what would be the position of several collaterals who contributed towards the expenses but not in equal shares. It is, however, not necessary to speculate on these points, for in this case it is not alleged that the plaintiffs had 'effected' the marriage of Mt. Fazlan, or that they had contributed towards its expenses. The plaintiffs, therefore, cannot derive any support from this entry. It may also be mentioned that similar entries in other villages of this district have been held in 1 Lah 284 (1) and C. A. 665 of 1905 to apply to ancestral property only. See also the discussion at pp. 293.4 of 13 Lah 276 (2). It is now well-settled that entries in a *riwaj i am* or *wajib ul arz*, which do not specifically purport to mention non-ancestral property, must be taken to refer to ancestral property only: 2 P R 1909 (3); 7 Lah 124 (4); 13 Lah 404 (5); 13 Lah 458 (6); 15 Lah 791 (7) and 1935 Lah 518 (8).

1. Ghulam Mahomed v. Gaubar Bibi, 1920 Lah 9=54 I C 419=1 Lah 284=10 P L R 1920.
2. Khan Beg v. Fateh Khatun, 1932 Lah 157=135 I C 769=13 Lah 276=32 P L R 890.
3. Nidhu v. Ram Singh, (1909) 2 P R 1909 = 1 I C 457.
4. Sham Das v. Moolo Bai, 1926 Lah 210 = 95 I C 337=7 Lah 124=27 P L R 154.
5. Rahmat Ali Khan v. Sadiq-ul-Nisa, 1932 Lah 353 = 138 I C 280 = 13 Lah 404 = 33 P L R 117.
6. Abdul Rahman v. Natho, 1932 Lah 591=140 I C 469=13 Lah 458=33 P L R 770.
7. Mahomed Alam v. Hafizan, 1934 Lah 351 = 150 I C 46=15 Lah 791=35 P L R 378.
8. Ganga Ram v. Naranjan Das, 1935 Lah 518 =17 Lah 61.

Questions 16 and 17 of Wilson's Customary Law of Shahpur District prepared in 1889.95 and the answers as recorded are also by no means as clear as they might have been. But taking them as a whole, I find myself unable to accept the contention of Mr Mehr Chand that the recorded custom must be taken to refer to "near" collaterals only. I have discussed this matter at length in 13 Lah 276 (2), see particularly pp. 294.7 and it is not necessary to repeat here all that was said in that judgment. It will be sufficient to say, that nothing has been urged before us which could throw any further light on the point. In my opinion, having regard to the recent Privy Council decisions, the onus is initially on the defendants to show that the daughters or their sons exclude the plaintiffs from succession to the property of Allah Yar.

The real question for determination, therefore, is whether the defendants in this case have succeeded in discharging this onus, with regard to either kind of property. Now so far as ancestral property is concerned, it may be stated at once that no evidence worth the name has been produced by the defendants to prove the exclusion of collaterals by daughters or their issue. With regard to non-ancestral property, however, we have two judicial instances on the present record: (1) Ex. D-1, *Mt. Jallo v. Mt. Sajadan*, decided by the District Judge of Shahpur, in which daughters were successful against collaterals of the 5th degree in succession to non-ancestral property; and (2) Ex. D-5 *Tora v. Mt. Mamry* decided by the Senior Subordinate Judge, Sargodha. In this case also the land was non-ancestral and the daughters succeeded in excluding collaterals. In addition to these, there are the following published decisions in which daughters were preferred to collaterals qua such property: 1 Lah 284 (1); 13 Lah 276 (2); and 1934 Lah 404 (9), all of which came from this district.

Mr. Badri Das seeks to minimise the value of these instances on the ground that in none of them did the parties belong to the Mikan tribe. This criticism, however, has no force as, according to Answers 16 and 17 in Wilson's Cus-

9. *Mt. Bhug Bhan v. Mohammad*, 1934 Lah 404=150 I C 786=15 Lah 73=36 P L R 449.

tomary Law, on which the plaintiffs themselves rely, the same custom exists among all Mussalman tribes of the district, except Tiwanas and Syeds, in whose case there are certain variations. The instances cited do not fall within the exception, as the parties in none of them were Tiwanas or Syeds. They were Khokhars in No (1), Noons in No. (2), Sipras in No. (3) and Awans in Nos (4) and (5). The custom in all these tribes being the same as among Mikans, all the instances are relevant.

As against this, not a single instance of exclusion of daughters from succession to non-ancestral property by collaterals as remotely connected as the plaintiff has been proved by them. The lower Court in its judgment at p. 46 has referred to certain instances but they all relate to ancestral property: Instances Nos (1), (2) and (3), Exs. P. 34, P. 35 and P. 36 referred to by the lower Court all relate to the property of one Bhai Khan, whose collaterals of the 2nd degree succeeded on the marriage of his daughters. Similarly instances Nos. (4) and (5) Exs. P. 37 and P. 39, relate to the estate of one Shamas whose unmarried daughter Mt. Umran succeeded originally, and on her marriage the property went to the collaterals of the 2nd degree. Instances Nos. (6) and (7) Exs. P. 38 and P. 40 relate to the succession of one Ahmad whose daughter Mt. Jallan originally succeeded and on her marriage the property went to collaterals of the 2nd degree. Similarly instances Nos. (8) and (9), Exs. P. 41 and P. 42 relate to the succession of one Khanjra or Fajra, whose daughters originally succeeded and on their marriage the property was taken by the collaterals of the 2nd degree. In none of these cases, however, has it been shown that the property was non-ancestral, nor were the collaterals related in the seventh or remoter degrees.

Both parties led considerable oral evidence but the witnesses made vague and conflicting statements trying to support the custom as alleged by the party who had summoned them, and were not able to cite any well-established instance in support thereof. Several of them contradicted themselves on various points and in most cases in which the daughters had excluded the collaterals, the witnesses eventually admitted that the land was ancestral. After careful considera-

tion I am of opinion that the defendants have succeeded in proving that according to the custom prevailing in this tribe, and the Mohammedan land-holders of Shahpur district generally, collaterals are excluded by married daughters in succession to the non ancestral property of a sonless proprietor, but that the collaterals have a prior right to succeed to his ancestral property.

The learned Senior Subordinate Judge has also held that the gift to Ahmad was, in any case, invalid as he is not an heir to his maternal grand-father, except in succession to his mother, and for this he has relied on a remark in para. 23 (1) of Rattigan's Digest. This remark, however, applies to ancestral property. Further it has been held in numerous cases that it is not a correct statement of the custom as actually existing in the province: see 41 P L R 1916 (10); 5 Lah 450 (11); 8 Lah 536 (12); 78 I C 778 (13); 9 Lah 95 (14); 109 I C 590 (15); 14 Lah 404 (16) and 16 Lah 160 (17). In view of these authorities Mr. Badri Das for the respondent very fairly and properly admitted that he was unable to support the judgment of the learned Senior Subordinate Judge on this point. On the finding on the question of custom, as given above, it becomes necessary to determine whether the property in dispute is wholly or partially ancestral qua the plaintiffs. As stated already, the land in dispute is situate partly in mauza Sikandarpur and partly in mauza Vijh. It is common ground between the parties that mauza Sikandarpur was originally a part of mauza Vijh, and that it was separated in the course of the settlement of 1905-06. It will appear from the pedigree table that the

10. Miran Bakhsh v. Mehr Bibi, 1915 Lah 375 = 31 I O 693 = 41 P L R 1916.
11. Gobinda v. Nandu, 1922 Lah 217 = 74 I O 644 = 5 Lah 450.
12. Nizamuddin v. Md. Bashir Khan, 1927 Lah 510 = 102 I O 238 = 8 Lah 536 = 28 P L R 564 = 9 L L J 376.
13. Ohanbeli v. Bishna, 1920 Lah 460 = 78 I O 778.
14. Saiful Rahman v. Md. Ali Khan, 1928 Lah 285 = 112 I O 41 = 9 Lah 95.
15. Kaman v. Ghafoor Ali, 1928 Lah 280 = 109 I O 590 = 9 Lah 496 = 29 P L R 620.
16. Ilahi Baksh v. Gbulam Nabi, 1933 Lah 466 = 141 I O 578 = 14 Lah 404 = 34 P L R 129.
17. Aitbar Khan v. Abdullah Khan, 1935 Lah 425 = 158 I O 220 = 16 Lah 160 = 37 P L R 405.

common ancestor of the parties was Jalal, son of Sikandar who lived more than 200 years ago. The land, therefore, cannot be held to be ancestral unless there are materials on the record from which it may be inferred with reasonable certainty that it had come to Allah Yar by inheritance from Jalal. The learned Senior Subordinate Judge has observed that:

The land in dispute comprises malkiyat and shamilat lands and that it was in possession of Allah Yar, the husband of the donor, in the first regular settlement of 1856-58.

We have spent considerable time in examining the revenue entries which have been placed on the present record, but find it impossible to connect the land in dispute with that which was held by Allah Yar in 1856-58, nor can we say definitely how much of the land in dispute was malkiyat in the hands of Allah Yar and how much of it was shamilat in that settlement or in the second regular settlement. If the entire land was malkiyat of Allah Yar in 1856-58, the case would be easy of decision, for we find it impossible to hold that it was ancestral qua the plaintiffs. The lower Court has largely relied on the note to the pedigree table of the proprietors of mauza Vijn prepared in the course of the second regular settlement (Ex. p. 48 printed at p. 85 of the paper-book). It is stated therein that mauza Vijn was originally founded by Vijbour, common ancestor of the parties 532 years ago, and that it was deserted sometime later, and was refounded by Sikandar with the assistance of his sons, Jalal and Daniyal, about 200 years ago, and that it has not been deserted since. There is, however a complete blank as to how the various landholders held the land during this period of 200 years which elapsed after the second foundation of the village. The earliest record is that of 1856-58 which shows that there was great disparity in the lands held in ownership by the descendants of Enayat and those of Dilawar, sons of Jalal. The area owned by the former was 800 odd ghumaons, while that owned by the latter was 1323 ghumaons. Among the descendants of Enayat, Allah Yar is entered as the owner of 463 ghumaons while Mian Khan of 338 ghumaons only. Besides, in khata No. 25 we find Dilawar's descendants holding four shares, while a stranger, Dayal Singh Arora, owned four shares in this khata.

In other khatas also the land is held by various persons in different shares, which is inconsistent with the theory that the land had descended among the descendants of the original founders according to ancestral shares. The onus of proving the ancestral nature of the land was clearly on the plaintiffs, but in view of all the facts set out above and the circumstance that the tenure of the village was bhayyachara, possession being the measure of ownership, it cannot be said that they have succeeded in discharging it, merely by the recital under the pedigree-table of the second 1889-95 regular settlement that the village was founded by their common ancestor several centuries ago and that it has not been deserted since. This question was considered at length in a recent decision of this Court in 1935 Lah 658 (18) in which the rulings relied upon by the lower Court, namely 90 P R 1914 (19) and 62 I C 984 (20) were considered and explained. I, therefore, hold that such of the land in dispute as can be traced to the ownership of Allah Yar in the khewat of 1856-58, cannot be held to be ancestral qua the plaintiffs.

With regard to the land which was shamilat in 1856-58, the materials on the record are unfortunately in such a confused state that it is not possible for us to come to any definite conclusion. For some reason, which has not been explained on the record, the usual procedure of having a tabular statement tracing the khasra numbers of the land in dispute to the earliest available revenue records was not followed. The special kanungo, who was examined on interrogatories, gave incomplete and unsatisfactory replies, from which no definite conclusion can be arrived at. We have spent considerable time in wading through the documents, which have been placed on the record by the parties, but in spite of the assistance of both the counsels, who had spent considerable time and labour over it it has not been possible to trace satisfactorily any of the khasra numbers in dispute to the land owned by Allah Yar in the settlement of 1856-57. In these circumstances the only course open

18. *Shib Singh v. Suba Singh*, 1935 Lah 658=159 I C 837.

19. *Natha Singh v. Mangal*, 1914 Lah 373=26 I C 812=90 P R 1914=237 P L R 1915.

20. *Umra v. Khotu*, (1921) 62 I C 984.

to us is to send the case back to the lower Court with the direction that the special kanungo, or some other revenue official, be examined again and a tabular statement prepared showing the khasra numbers of the land in dispute and the corresponding khasra numbers in the three regular settlements giving in each case the entries in the proprietary column. It may also be stated that Mr. Badri Das argued before us that the question that the shamilat land was ancestral is res judicata by reason of a certain decision in a civil suit between the ancestors of the parties. The plaint in that suit is printed at p. 70 of the paper-book but the jawab-dawa and the decision of Mr. Rose, Subordinate Judge, who decided the case, do not appear to have been placed on the record. A translation of the judgment on appeal by Mr. Bullock, Divisional Judge, dated 25th February 1892, is also on the record but has not been printed. From the plaint and the translation of the judgment of the Divisional Judge it is not possible to ascertain definitely what the pleadings of the parties were and what was the exact decision given in that case. In order to enable us to adjudicate upon the plea of res judicata raised by counsel, it seems necessary to have before us the record of the civil suit No. 39 of 1890, *Sahib Khan v. Mohammada*, instituted on 12th February 1890 and decided by Mr. Rose, Subordinate Judge, on 22nd October 1891, and that of the appeal decided by the Divisional Judge on 25th February 1892. The Senior Subordinate Judge will arrange to send these records with the report of the special kanungo or the revenue official.

Both counsel have been directed to cause their respective clients to appear before the Senior Subordinate Judge, Sargodha on 13th January 1936, on which date the learned Judge will give a date on which the special kanungo or another revenue official is to appear, when directions will be given to him to prepare the necessary statements. The return shall be submitted to this Court on or before 16th March 1936.

B.D./R.K.

Order accordingly.

A. I. R. 1936 Lahore 815

TEK CHAND, J.

(Haji) Nur Mohammad—Plaintiff—Petitioner.

v.

Ahmad Ali Khan and another—Defendants—Opposite Parties.

Civil Revn. No. 117 of 1936, Decided on 24th April 1936, from decree of Addl. Judge, Small Cause Court, Delhi, D/- 15th November 1935.

Lease—Two lessees executing joint lease—One lessee put in possession—Other lessee not requesting lessor to be put in possession—Such other lessee not being obstructed by lessor is liable for rent.

Where two persons executed a joint lease and one of the lessees was actually in possession all along of the leased property and lessor has in no way obstructed lessee in entering into joint possession of the premises and where no request to this effect is ever made by the other lessee he is clearly liable to pay rent: 1918 Lah 288 and 25 Mad 587, *Disting.*; 33 Mad 499, *Rel. on.* [P 816 C 2]

Niaz Ali—for Petitioner.

M. A. Khan for Madan Lal—for Opposite Parties.

Order.—On 10th February 1935 Ahmad Ali Khan defendant 1, and his uncle Azam Ali Khan defendant 2, jointly executed a rent-deed in favour of the plaintiff Haji Nur Muhammad for a house in Delhi, agreeing to pay rent at Rs. 8 per mensem. The defendants failed to pay the rent as stipulated, and on 13th May 1935, the plaintiff sent them a notice of demand by registered post. The defendants sent no reply, whereupon on 5th June 1935 the plaintiff instituted a suit for recovery of the amount due. Defendant 1, Ahmad Ali Khan confessed judgment. Defendant 2, Azam Ali Khan admitted execution of the rent-deed but pleaded that he was not liable, as he had not been put in possession of the house by the plaintiff. The Additional Judge, Small Cause Court, decreed the suit against defendant 1 but dismissed it against defendant 2.

The plaintiff has come in revision and asks for a decree against defendant 2 also. In my opinion this revision must succeed. As stated already, the two lessees are uncle and nephew and had jointly executed a single rent-deed in favour of the plaintiff. Defendant 1 admittedly entered into possession and is still occupying the house. Defendant 2, when served with notice by the plaintiff, demanding rent and threatening a suit on 13th May 1935,

sent no reply. After the suit had been instituted, he wrote to the plaintiff on 24th June 1935, denying his liability to pay on the ground that he had not been put in possession. In the written statement which he filed in answer to the plaint, he stated that the arrangement was that he was to be put in possession of a half portion of the house, for which he was to pay rent at Rs. 4 only. This, however, is not borne out by the contents of the rent-deed. In the statement made by him as a witness he did not stick to this story, but stated that he and his uncle were inimical to each other, that he wanted the whole house for himself, and had asked the plaintiff several times to give him possession but that the latter failed to do so. He, however, led no evidence of his alleged enmity with defendant 1. Again, in the written statement, he stated that one-half of the house was really required for occupation by one of his sons, who had lately married and wanted to live separate from him. But he made no mention of this in the witness-box. Defendant 1, when examined as a witness for defendant 2 stated that, though defendant 2 had joined in the execution of the rent-deed, he had no intention of occupying the house. He also stated that his relations with defendant 2 were cordial. In view of these contradictory statements, there is little doubt that the defence set up by defendant 2 is false, and his plea that he had executed the lease without understanding its contents cannot be accepted.

In support of his conclusion, the learned Judge of the Court below has relied upon S. 108 (b), T. P. Act, 19 P R 1918 (1) and 25 Mad 587 (2), but none of them is applicable to the facts of this case. In S. 108 (b) it is laid down that a lessor is bound, on the lessee's request to put him in possession of the property. As observed by Mulla in his Transfer of Property Act p. 549, the liability of the lessor does not arise unless the lessee makes a request, and the lessor is not obliged to put an unwilling and recalcitrant lessee into possession. Here there is no reliable evidence that defendant 2 had made any request to the plaintiff to put him in pos-

session. In 19 P R 1918 (1) the lessor himself had never been in possession before the lease, his own title was being challenged by other parties and, therefore, in spite of request by the lessee he was unable to put him in possession. Accordingly his suit for rent was dismissed. The facts in 25 Mad 587 (2) were very peculiar, as was explained in 33 Mad 499 (3). In the last mentioned case it was held that where the lessor does not put the lessee in possession, but there is no obstruction or likelihood of obstruction to the lessee taking possession of the same, and he neither tries nor requests the lessor to put him in possession, in a suit by the lessor for rent the lessee is liable. Having regard to the fact that the two defendants are related as uncle and nephew, that they had executed a joint lease, that defendant 1 has been actually in possession all along, that the plaintiff in no way obstructed defendant 2 in entering into joint possession of the premises and, indeed, no request to this effect was ever made by him, he is clearly liable to pay rent. I accept the petition for revision and in modification of the decree of the lower Court, pass a decree for the amount claimed against defendant 2 also, with costs in both Courts.

B.D./R.K.

Revision allowed.

3. Narayanaswami Naidu v. Ram Krishnaya, (1910) 33 Mad 499=5 I C 479.

A. I. R. 1936 Lahore 816

TEK CHAND, J.

Jesa Ram and others — Defendants—Appellants.

v.

Ghulaman and another—Plaintiffs and others—Defendants—Respondents.

Second Appeal No. 131 of 1936, Decided on 14th May 1936, from decree of Dist. Judge, Mianwali, D/- 30th October 1935.

(a) Landlord and Tenant — Sale of Adna Malkiyat lands—To see whether shamilat land is sold or not Court has to look into circumstances and conduct of parties.

Where a person sells certain Adna Malkiyat lands, in order to decide as to whether the shamilat is or is not sold, the Court has to look into the surrounding circumstances and the conduct of the parties and then arrive at a conclusion after consideration of all these matters. [P 817 C 2]

(b) Transfer of Property Act (1882), S. 41—Words "with consent" explained.

The words "with the consent express or implied" in S. 41 do not govern the word "trans-

1. Abdul Karim v. Upper India Bank, 1918 Lah 238=40 I C 684=19 P R 1918=110 P L R 1917.

2. Zamindar of Vijiyanagaram v. Behare Surya Narayan, (1902) 25 Mad 587=12 M L J 249.

fer," but have reference to the real owner allowing the transferor to hold himself out as an ostensible owner of the property: 1934 All 193, Ref. [P 818 O 2]

Mehr Chand Mahajan and Nawal Kishore—for Appellants.

Pandit Bishan Narain—for Respondents.

Judgment.—On 24th September 1889, Ghulaman, plaintiff, sold certain Adna Malkiyat land in Mauza Jandanwala, Tahsil Bhakhar, District Mianwali, to Jesa Ram alias Khota Ram, defendant 1 for Rs. 30 by an unregistered deed. Mutation of this sale was entered by the Patwari on 13th December 1898, and was sanctioned on 17th October 1901. In the sale deed it was not mentioned whether the sale comprised the shamilat appurtenant to 45 kanals and 9 marlas of the Khewat land sold. In the mutation also, no mention was made of the shamilat having been sold, nor was the vendee entered as Malik Qabza. Shortly afterwards, Jesa Ram got entered the names of his three brothers Lal Chand, Shib Dayal and Kalu Ram as co-sharers of the land which he had purchased. Defendants 2 to 7 are the descendants of these persons. On 5th December 1932, Nirmal Das, defendant 5, son of Kalu Ram, sold a portion of this land, together with the appurtenant shamilat to Chotha Ram, father of Amir Chand and Jodha Ram, defendants 9 and 10, by a registered deed. This deed comprised some other land also, and was for Rs. 3,500.

Proceedings for partition of the shamilat land were started at the instance of some of the co-sharers before the revenue authorities, in which Ghulaman contended that he had sold only the Khewat land in 1889, and that he was still the owner of the appurtenant shamilat, while the defendants alleged that the sale included the shamilat also which was of no special value at the time. As a question of title was involved, the Revenue Officer gave no decision on the point, but referred the parties to civil Courts. Accordingly, on 3rd April 1934, Ghulaman and one Haq Nawaz, who claims to be a transferee from Ghulaman, brought a suit for a declaration that the plaintiffs were the owners of the shamilat appurtenant to the Adna Malkiyat land which had been sold by Ghulaman on 24th September 1889, to Jesa Ram, defendant 1. The defendant denied the claim and pleaded

that the sale of 1889 included the appurtenant shamilat also. Defendants 9 and 10 raised a further plea that their father, Chotha Ram, was a bona fide purchaser for valuable consideration from Nirmal Chand, who was one of the ostensible owners of the shamilat land and therefore in any case, they were protected in accordance with the principle of S. 41, T. P. Act.

The trial Court decreed the suit and gave the plaintiffs the declaration asked for. Defendants 1 to 4 and 6 went up in appeal to the District Judge who affirmed the decree of the trial Court. Before the learned District Judge, the defendants-appellants attempted to raise a new point that the suit was barred by O. 2, R. 2; but as the plea had not been taken in the trial Court, the learned District Judge did not permit the plaintiffs to argue it. On second appeal, three points have been urged before me by Mr. Mehr Chand Mahajan on behalf of the appellants: (1) That the decision of the learned District Judge that the sale of 1889 did not include the shamilat, is vitiated by the fact that the learned Judge has not approached the case from a correct legal standpoint and has misdirected himself as to the quantum of onus which lay on the defendants-appellants, in the circumstances of this case; (2) that the learned Judge should have allowed the defendants to argue that the suit was barred by O. 2, R. 2; and (3) that, in any case, the sons of Chotha Ram are protected according to the principle of law embodied in S. 41, T. P. Act.

After hearing the learned counsel at great length, I see no force in the first contention. As already stated, the sale deed in favour of defendant 1, and the mutation which followed, make no mention of the appurtenant shamilat having been transferred. This however is not conclusive on the point, for in those days land, especially shamilat which was mostly Banjar in the Western Districts of the Province, was not of much value. In order to decide therefore as to whether the shamilat was or was not sold, the Court has to look into the surrounding circumstances and the conduct of the parties and then arrive at a conclusion after consideration of all these matters. In this case, the learned District Judge has taken all these circumstances into consideration and has found that it could

not be said that the vendor had severed all connexion with the village or that he had taken no further interest in such property as was still owned by him in this village. This is a finding of fact arrived at after a consideration of the entire evidence on the record, and I can see no ground justifying interference by the Court of second appeal. Mr. Mehr Chand relied principally upon 14 Lah 496 (1), but I see no reason to hold that the learned District Judge had not kept in view the principles laid down in that judgment. The first contention therefore fails and must be disallowed.

The plea that the suit is barred by O. 2, R. 2 is sought to be based upon a certain suit which was instituted by Ghulaman, plaintiff, against the defendant to recover the land sold in 1889. This suit was ultimately withdrawn by him on 15th October 1907. The plaint in that suit is not on the record, nor have copies of other proceedings been tendered in evidence in the case. For these reasons, it is not possible to see whether the alleged omission to include the shamilat in the claim, as laid in that suit, operates as a bar to the present suit under O. 2, R. 2. If the plea had been raised at the proper time in the Court of the first instance, the record of the previous suit might have been sent for, or the plaintiffs might have met the plea by producing the necessary copies. It cannot therefore be said that the question is purely one of law, which the learned District Judge could have allowed to be taken for the first time in appeal. I overrule the second contention.

The third point deals with the case of the sons of Chotha Ram, who, as already stated were purchasers for value from Nirmal Das under a registered sale deed, dated 5th December 1932. This sale comprised a portion of the Khewat land which had been purchased by Jesa Ram, defendant 1, from Ghulaman, plaintiff, in 1889, and also the appurtenant shamilat. In the revenue papers, the shamilat has all along been entered as owned by the proprietors hasb rasas khewat. In the khewat, Jesa Ram and his brothers and nephews, including Nirmal Das, are not described as Malik Qabza, but are shown as full owners, like the other proprietors in the village. The learned District Judge

has therefore rightly observed that the vendee Chotha Ram was under no obligation to enquire further into their title to the shamilat. It is clear that Chotha Ram was a bona fide purchaser for value from one of the ostensible owners, and he had taken such reasonable care to ascertain his transferor's title as was necessary under the circumstances. The learned Judge has however held that the case does not fall within the principle underlying S. 41, T. P. Act, as the "first condition that the person now claiming an interest should have in some way either expressly or impliedly consented to the transfer is wanting in the present case." There is little doubt that in this statement of the law, the learned Judge has misread the clear provisions of S. 41 of the Act, and misunderstood the principle underlying the rule of estoppel enacted therein. As observed by Mulla in his Transfer of Property Act (Edn. 1), p. 160, the conditions necessary for the application of S. 41, are :

(1) That the transferor is the ostensible owner ; (2) that he is so by the consent, express or implied, of the real owner ; (3) that the transfer is for consideration, and (4) that the transferee has acted in good faith taking reasonable care to ascertain that the transferor has had power to transfer.

Obviously the words "with the consent express or implied" in the section do not govern the word "transfer," but have reference to the real owner allowing the transferor to hold himself out as an ostensible owner of the property: see 56 All 582 (2). Mr Bishan Narain for the plaintiff respondent frankly conceded before me that he was unable to sustain the reasoning of the learned District Judge on this point. This being so, it must be held that all the conditions necessary for the applicability of the rule laid down in S. 41 exist in this case, and the plaintiffs cannot question the right of Jodha Ram and Amir Chand, sons of Chotha Ram, to the shamilat land appurtenant to the portion of the khewat land sold by Nirmal Das to him.

At the conclusion of the argument, Mr. Bishan Narain urged that the decree of the lower appellate Court dismissing the suit should not be varied in respect of this land as Jodha Ram and Amir Chand had not joined in the appeal to this Court, which has been instituted by Jesa Ram

1. *Rup Chand v. Sardar Khan*, 1933 Lah 428 = 142 I C 227 = 84 P L R 324 = 14 Lah 496.

2. *Fazal Hussain v. Md. Kazim*, 1934 All 193 = 150 I C 81 = 56 All 582 = 1934 A L J 544.

and his brothers and nephews only. It appears that Jodha Ram and Amir Chand had not appealed to the District Judge against the decree of the trial Court, but had been impleaded as respondents in that Court, as they have been impleaded in this appeal also. The learned District Judge however had allowed the appellants to argue whether the suit qua the shamilat sold to these respondents should be dismissed because of the rule embodied in S. 41, T. P. Act. Presumably, this was done as the appellants were as much interested in the decision of the point as Jodha Ram and Amir Chand. One of the terms of the sale deed of 5th December 1932 is that if, for any reason, the transferee lost any portion of the property sold to him, he shall be entitled to receive compensation therefor from the transferor. Therefore Jesa Ram and his brothers and nephews are materially affected by the finding on this point, even though the variation in the decree of the lower Court will primarily benefit defendants 9 and 10. In these circumstances, I see no legal bar to my deciding this appeal on the third point raised by the appellants' counsel. In any case, O. 41, R. 33 gives this Court power to pass any decree which ought to have been passed in favour of these respondents even though they have not filed an appeal or cross objection.

For the foregoing reasons, I accept the appeal and in modification of the decree of the learned District Judge pass a decree in favour of the plaintiffs granting them a declaration that they are the owners of the shamilat appurtenant to the khewat land sold by Ghulaman, plaintiff 1, to Jesa Ram, defendant 1, by deed, dated 24th September 1889, except the shamilat appurtenant to that portion of the land, which has been sold by Nirmal Das to Chotha Ram, father of Jodha Ram and Amir Chand, defendants 9 and 10, by the registered sale deed, dated 5th December 1932. The suit qua that land is dismissed and defendants 9 and 10 are declared to be the owners thereof. Having regard to all the circumstances, I leave the parties to bear their own costs throughout.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 819

MONROE AND CURRIE, JJ.

Hardit Das—Appellant.

v.

Gurdit Singh and others—Objectors—Respondents

First Appeal No. 1512 of 1932, Decided on 2nd January 1935, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 8th August 1932.

Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 7 (1), 16 (2) (iii) — Petition under S. 7 (1) — Mere recitation of Granth Sahib does not convert institution into Sikh Gurdwara — Institution must be proved to be established for use by Sikhs for public worship — Institution found to be merely college of Udasi fakirs — Travellers and fakirs fed at langar — Granth Sahib read — Institution not held to be Sikh Gurdwara.

To declare an institution a Sikh Gurdwara under S. 16 (2) (iii), it is necessary to prove that the institution was (a) established for use by Sikhs for the purpose of public worship and (b) that it was used for such worship by Sikhs before and at time of presentation of petition under S. 7 (1). The mere recitation of the Granth Sahib does not in itself convert an institution into a Sikh Gurdwara. There is no provision in the Sikh Gurdwaras Act that raises any presumption that because the present form of worship is Sikh, it must be held that the Sikh form of worship was in vogue from the foundation of the institution. [P 821 O 2 ; P 822 C 1]

Where therefore it is not proved that the institution was established for use by Sikhs for the purpose of public worship and the evidence merely shows that the institution was a college of Udasi fakirs consisting of a Guru and his chelas, that travellers and fakirs were fed at the langar and the Granth Sahib was read, the institution cannot be held to be a Sikh Gurdwara: 1934 Lah 13, Ref.; 36 Mad 415, Disting. [P 822 C 1]

G. R. Khanna and Bhagat Singh—for Appellant.*J. L. Kapur, R. C. Manchanda and Gurcharan Singh*—for Respondents.

Currie, J.—This appeal has been preferred against the decision by a majority of the Sikh Gurdwaras Tribunal that an institution at Pakhowal, in the Ludhiana District, should be declared a Sikh Gurdwara. The appeal has been brought by mahant Hardit Das whose petition under S. 8, Sikh Gurdwaras Act, has been dismissed by the above decision.

The petitioner's case was that the institution was a dera of Udasi fakirs, which had been founded 200 years back by a spiritual ancestor, Dasondhi Das, as his place of residence. He claimed that in addition to his predecessors'

smadhs in the dera, there were pictures of Baba Sri Chand and Gola Sahib, which were worshipped.

The objectors' case was that the institution had been established by Sikh Zamindars in the eighteenth century, that they brought in Dasondhi Das from another village and settled him in the institution. It was further alleged that the present mahant was appointed by the panchayat and the lambardars, and that the inhabitants of the village were fully entitled to remove him. It was contended that the object of the worship was the Granth Sahib and that the institution was used for public worship by the Sikhs of the village. Thus, it was urged that the institution was a Sikh Gurdwara under the provisions of S. 16 (2) (iii), Sikh Gurdwaras Act.

The learned President summarised his findings under six heads at p. 41 of the paper book. He held:

(a) The institution was founded and endowed by the proprietors of village Pakhowal who are Sikhs. They brought Dasondhi Das who was a Chela of Mahant at Heran and placed him in charge of the institution.

(b) The proprietors of the village have exercised control in the matter of appointment of the Mahants when occasion required it.

(c) From the statements made by mahant Bishen Das and the village proprietors in 1850, it appears that the two prominent features of the institution were the regular recital of the Granth Sahib and the feeding of fakirs and travellers. The reference to the recital of Granth Sahib indicates that it was a public ceremonial recital which is, in essence, the Sikh form of public worship.

(d) Dharamsalas in this province are generally partly religious and partly charitable in their character and the evidence on the record shows that the present institution was of this type.

(e) In view of the proved fact that Sikh form of public worship has been in vogue in the institution at least since 1850, it may be presumed, in the absence of any evidence to the contrary, that the same form of worship prevailed since the foundation of the institution.

(f) The petitioner alleged that a picture of Baba Sri Chand, the Gola Sahib, and the smadhs were the objects of worship in the institution, but he failed to prove the allegations.

It will be convenient to examine these findings seriatim:

As regards the origin of the institution, it appears from a statement of Bishen Das made in 1850, that the zamindars of the village Pakhowal, in which were then included the villages of Kaila and Dhalian, invited Dasondhi Das of village Heran. According to this statement, Ex. O-14, the zamindars built a dharamsala for the

comfort of fakirs and sadhs, gave the land as a muafi for the food expenses of fakirs and got its revenue remitted by Rai Ahmad. In the muafi inquiry, a patta from Rai Mohammad of Raikot was produced, Ex. P-6, but this was considered by the officer conducting the inquiry to be probably spurious and no great weight attaches to it. There can, however, be no doubt that, as alleged, the original grant of revenue was made by one of the Rais of Raikot, who were then the rulers of this tract. Though the present proprietors of village Pakhowal are now mainly Sikhs, it does not necessarily follow that the proprietors who introduced Dasondhi Das about the middle of the 18th century — at least 100 years before the earliest statement made in the case when this part of the country was under Mohammadan rule — were themselves strictly orthodox Sikhs.

As regards the second question, viz. the appointment of the mahant of this institution, it is clear that throughout, the office has devolved from Guru to chela, the Guru, in his lifetime, nominating his successor generally from among his chelas. At the time of the succession of the present mahant Hardit Das there appears to have been some dispute. His brother, Gurdit Das, was the senior chela and would normally have succeeded, but predeceased his Guru Moti Ram. Though all his predecessors had been celibate, Hardit Das had a wife; and it is clear that this gave rise to apprehension in the minds of the other chelas and Hardit Das had to execute the agreement, Ex. O-13, dated 11th March 1904, in which, after reciting that he had been unanimously appointed mahant by the chelas of Mahant Moti Ram and the lambardars and members of the panchayat of Pakhowal, he undertook to give up the woman he had married by karewa and to provide the other chelas with food and clothing, and that if he appointed a new chela he should not be from amongst his near collaterals. In the event of a breach of these conditions, he authorised the panchayat and the lambardars to turn him out of the dera and appoint another mahant. It is obvious that this agreement was entered into for the benefit of his brother chelas. It is significant that it does not contain one single word regarding the maintenance of any form of worship, Sikh or otherwise. Had it been

dictated by the panchayat, it would be natural to expect some reference to the performing of the worship of the Granth Sahib. I do not think, therefore, that it can be said that the villagers, as a rule, exercised the power of appointing and removing the mahant of the institution. It will be convenient to consider the findings (c) and (d) together. These institutions in the Ludhiana District have been fully described in the final report on the Revision of Settlement of the Ludhiana District (1878-83) by Mr. Gordon Walker, which has been cited at length in 15 Lah 247 (1). These institutions are partly religious and partly charitable, in charge of an ascetic or sadh whose duty it is to keep the langar or alms-house going. In most cases he reads the Granth of the Sikh scriptures:

In the larger institutions of this sort the sadh and his chelas make up a college, the former being called the Guru or father of the chelas and the mahant of the institution.

It appears to me that the present institution is of the type described in this passage. It is clear that there have always been a number of fakirs in this institution with which is connected another institution, that at Awan Lobana in the Sheikhpura District, both the institutions having been under one and the same mahant throughout. It is significant that the institution has throughout been described as a dera, a term frequently associated with Udasi institutions, and that it has never been described as a gurdwara. There is nothing in the account of the foundation of the institution to show that it was founded for any purpose other than the entertainment of fakirs and sadhs. It is not till 1850 that there is any evidence to show any connection with Sikh worship. In the inquiry conducted in 1850 by Munshi Mehtab Singh, Deputy Collector, Bishen Das is described as a Fakir Nanakshahi and his occupation as Granth khwani. He further stated that 25 fakirs and some three or four labourers lived permanently at the dharmasala, and five to ten travellers came there every day and were supplied with food. The Granth was recited and a Granth was always kept open there. This statement was made on 20th July 1850. It is significant that in statements made both by the patwari and the lambardars on 6th April

1850, a clear reference was made to the presence of Thakars in the institution, it being stated by both the patwari and the lambardars that some of the income was spent on the bal bhog of the Thakars, in addition to feeding the fakirs. It was only when they were called again, two days later, before the Deputy Superintendent Munshi Mehtab Singh, that they stated that they had mentioned Thakars by mistake and that in reality they read the Granth and worshipped the same. From this it is apparent that at that time it is doubtful whether there was any public worship of the Granth Sahib, as it is inconceivable that, if there had been, the lambardars would have made no mention of it until they were questioned on the second occasion by Munshi Mehtab Singh.

As regards the fifth finding: in any case, even if we accept the conclusion that there was public worship by Sikhs in 1850, there is no ground for assuming that there was such worship 100 years previously at the time of the foundation of the institution. I do not think that it can be presumed, as was done by the learned President, that the proprietors of the village being Sikh, the place was used for public worship by Sikhs. There are many cases of institutions in Sikh villages, which have been held to be Udasi institutions and not Sikh Gurdwaras. The second presumption raised by the learned President was that where the Sikh form of public worship had been in vogue in an institution at least since 1850 it might be presumed, in the absence of any evidence to the contrary, that the same form of worship prevailed since the foundation of the institution. This view was apparently influenced by the ruling reported as 36 Mad 418 (2). But, in the present case there is no ground for raising such a presumption. It has been held in 15 Lah 247 (1) and in other cases that the mere recitation of the Granth Sahib does not in itself convert an institution into a Sikh Gurdwara. In the present case we know that the smadhs are a prominent feature of the institution, though the worship of Gola Sahib and the murti of Baba Sri Chand has not been proved. There is no provision, as far as I am aware, in the Sikh Gurdwaras Act that raises any presumption that because the present form

1. Arjan Singh v. Indar Das, 1934 Lah 13=151 I O 1005=15 Lah 247=36 P L R 458.

2. Ambalam v. Bathe, (1913) 36 Mad 418=13 I O 599=24 M L J 630.

of worship is Sikh, it must be held that the Sikh form of worship has been in vogue from the foundation of the institution.

To declare a place a Sikh Gurdwara under S. 16 (2) (iii), it is necessary to prove that the institution was (a) established for use by Sikhs for the purpose of public worship and (b) that it was used for such worship by Sikhs before and at the time of the presentation of the petition under sub-s. (1) of S. 7. In the present case it appears to me that it has not been proved that the institution was established for use by Sikhs for the purpose of public worship. The evidence points rather to the fact that the institution was a college of Udasi Fakirs consisting of a Guru and his chelas; travellers and fakirs were fed at the langar and the Granth Sahib was read. It is in fact an institution very similar to that at Latala dealt with in 15 Lah 247 (1). I would, therefore, hold that the institution is not a Sikh Gurdwara. I would accept the appeal with costs and grant the petitioner a decree declaring that the dera at Pakhowal is not a Sikh Gurdwara.

Monroe, J.—I agree.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 822

COLDSTREAM AND BHIDE, JJ.

Dial Singh—Objector—Appellant.

v.

Bhagat Ram and others—Petitioners—Respondents.

First Appeal No. 1929 of 1933, Decided on 17th March 1936, from decree of Sikh Gurdwaras Tribunal, Lahore D/- 10th July 1933.

(a) Punjab Sikh Gurdwaras Act (8 of 1925) S. 16 (2) (iii)—Sikh Gurdwara—Burden of proof is on petitioner.

It is incumbent upon the petitioner to prove that the institution has been established for use by Sikhs for the purpose of public worship and has been so used for that purpose up to the time of the presentation of the petition.

[P 822 C 2]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 16 (2) (iii)—Public worship—Isolated statements in muafi inquiries indicating public worship should not be laid much stress on.

The policy of the British Government was to continue endowments for the maintenance of religious establishments or charitable buildings like Dharamsalas for public accommodation, so long as the establishments or buildings were kept up. So mere isolated statements made in the course of muafi enquiries, including that there was public worship, cannot be laid much

stress on to establish an institution a place of public worship. [P 823 C 2]

(c) Punjab Sikh Gurdwaras Act (8 of 1925), S. 16 (2) (iii)—Sikh Gurdwara—Institution built by Hindu Udasi Sadh—Founder and his descendants living there with families—Kharas but no langar kept for travellers—Mere fact that Granth was kept and recited in institution held not sufficient to establish institution Sikh Gurdwara.

The Dharmasala institution was built by a Hindu Udasi Sadh. The founder and his descendants lived in the Dharmasala with their families and the Granth was kept only in a small portion thereof. There was a Kharas for the convenience of travellers but no langar was kept. The only fact that was proved was that the Granth had been kept and recited in the institution since 1853 and perhaps from an earlier date.

Held: that the institution was not a Sikh Gurdwara. The fact that Granth has been kept and recited by itself could not be attached much significance in the case of institution in charge of Udasi Sadhs as the Udasis also revered the Granth Sahib: 1934 Lah 13; 1936 Lah 819 and 1936 PC 93, Rel. on; 1934 Lah 63, 319 and 398, Disting. [P 824 C 1, 2]

Bhagat Singh—for Appellant.

Nanak Chand—for Respondents.

Bhide, J.—This appeal arises out of a petition under S. 8, Sikh Gurdwaras Act for a declaration that a dharmasala situated in the village Gill in the Ludhiana District is an Udasi dera and not a "Sikh Gurdwara" as claimed by certain Sikh worshippers in a petition under S. 7 of that Act. The only issue in the case was whether the dharmasala in dispute was a Sikh Gurdwara. The majority of the Tribunal who heard the petition found that the objectors, on whom the burden of proof lay, had failed to prove that the institution was a Sikh Gurdwara within the meaning of S. 16, Sikh Gurdwaras Act. The petitioners were accordingly granted the declaration prayed for and from this decision one of the objectors had appealed. According to S. 16, Sikh Gurdwaras Act, it was incumbent upon the appellant to prove that the institution had been established for use by Sikhs for the purpose of public worship and had been so used for that purpose up to the time of the presentation of the petition. The oral evidence produced by the parties was of little value and no stress was laid on it by either side before us. The case has therefore to be decided mainly on the documentary evidence produced in the case.

The earliest document available in connexion with the institution is a patta

of Muafi (Ex. P-1) in connexion with 172 ghumaons of land granted by Maharaja Ranjit Singh in Sambat 1885 corresponding to 1828 A.D. It appears from the patta that the "Muafi" had been already granted by some previous ruler and it was ordered that the land

should be allowed to remain muafi as of old, so that the person named above (Baba Tilok Dass, Sadh Udasi) may utilize its produce for his maintenance and may keep himself busy in praying day and night for the prosperity and glory of the ruler.

It will appear from this patta that Baba Tilok Dass was then in charge of the institution and that the muafi was granted to him personally. The Baba is described in the document as an Udasi Sadh and there is no mention therein of any institution or of any public worship. The other documentary evidence is furnished by the records of the different settlements under the British rule commencing from 1850. From the earliest records of 1850 it appears that the Dharm-sala had been built by Baba Tilok Dass, that he lived in it with six or seven fakirs, that he had sunk a well in the land attached to the Dharmsala and that he was to be responsible for payment of the land revenue if the Muafi was resumed. In the Khana Shumari papers of 1850 Tilok Dass is stated to be residing in the Dharmsala and is described as Fakir Udasi Hindu: (vide Exs. O-17, O-18, O-19 and Ex. P-4). In the course of the enquiry made in connexion with the muafi in 1850, a question was put as to whether the Granth was read in the Dharmsala. The reply was the Granth Sahib was read daily and it was also stated that travellers and fakirs were fed, but no particular stress is laid on the reading of the Granth and in the recommendation of the Extra Settlement Officer concerning the muafi and the order passed by the Settlement Officer, the reading of the Granth is not even mentioned: vide Exs. P-2 and P-3. In Ex. P-2 it is distinctly stated that the land should be considered as the property of the Muafidar.

In the inquiries made during the subsequent settlement also, statements were made to the effect that the Granth Sahib was read at the Dharmsala and travellers were fed. But it is significant that in 1882, it was stated that there was only a "kharas" for the convenience of travellers but no langar, although such fakirs and sadhus as happened to come at the

proper time were fed. It also appears from the statements made during the course of these inquiries that the descendants of Tilok Dass lived in the Dharmsala with their families and the Granth Sahib was kept in a small room. The learned counsel for the appellant has laid stress on a statement in the report of the Extra Assistant Settlement Officer in 1882, recommending the renewal of the Muafi, which runs as follows: "Dharmsala se gaonwalon ko prastish ka faida hai aur am musafiron ko qiyam ka faidah hai" (The Dharmsala serves as a place for worship to the villagers and as a resting place for travellers). The learned President has, however, pointed out in his judgment, that there is nothing on the record to show on what material this statement was based. The learned counsel has also laid stress on statements such as "Granth Sahib lagaya jata hai Granth Sahib Kholi Rakha Hai" (the Granth is ceremoniously opened) occurring in some of the statements made during the course of the muafi inquiries of 1909 (see O-9 and O-7) and urged that these indicate that there was public worship. But indications of this nature occurring in isolated statements cannot perhaps be laid much stress on and in any case, even if it be held that there was some form of public worship in 1882 or 1909, it cannot be assumed that the Dharmsala was founded for the purpose of any such worship. It has to be borne in mind in this connection that the policy of the British Government was to continue endowments for the maintenance of religious establishments or charitable buildings like Dharmsalas for public accommodation, so long as the establishments or buildings were kept up (cf. paras. 86, 191 to 196 of the Punjab Land Administration Manual). It was natural therefore for the incumbents of institutions enjoying muafis to try to make out that they were serving some religious or charitable purpose, whether they were originally established for such a purpose or not.

In 1858, Sarb Dial, one of the incumbents made a will in favour of his adopted son Bishen Dass appointing him as successor to three different Dharmsalas and the property attached to them. The villagers took no objection and had apparently no concern with the appointment of the incumbents of the institution (vide Exhibit O-5). It was urged next that the village

Gill is inhabited mainly by Sikhs, that the land attached to the Dharmasala was granted by the villagers, that no other object of worship in the institution has been proved and hence it should be presumed that the institution was founded for public worship by the Sikhs. It appears no doubt from the history of the village, as given underneath the pedigree table prepared at the Settlement of 1882, that Tilok Dass was given some land by the villagers, but it does not appear how much area was given to him and for what purpose. It appears however from the same document that grants were made by the villagers to Brahmans, Sanyasis, and other Udasi Fakirs. The mere fact that Tilok Dass was given some land by the villagers cannot therefore be held to be sufficient to prove that it was given for the purpose of any institution in which Sikh worship was carried on. The fact that no other object of worship—such as Gola Sahib or Thakars—has been proved to be kept in the institution is also inconclusive. For this argument presupposes that the institution was founded for the purposes of public worship while this is the very fact to be proved. The institution may have been originally an Udasi monastery and nothing more. It may also be mentioned here that it was admitted that there are other Dharmasalas in the village available for public worship.

To sum, the evidence on the record discussed above shows clearly that the Dharmasala itself was built by Baba Tilok Dass, a Hindu Udasi Sadh. The earliest patta of Muafi granted by Maharaja Ranjit Singh states that the muafi was granted for the maintenance of Baba Tilok Dass and contains no mention of public worship or any condition except that the muafidar should pray for the long life and prosperity of the ruler. The inquiry and report regarding the renewal of the muafi in 1850 show that Tilok Dass was considered to be the owner of the land and that he undertook to be responsible for the revenue in case the land was resumed. Tilok Dass and his descendants lived in the Dharmasala with their families and the Granth was kept only in a small portion thereof. There was a kharas for the convenience of travellers but no langar was kept, though fakirs and sadhus who came at the proper time were fed. All these facts militate strongly

against the appellants' contention that the Dharmasala was an institution founded for the purposes of public worship by the Sikhs. The only fact of any importance that the appellants have been able to prove is that the Granth has been kept and recited in the institution since 1850, and perhaps from an earlier date. But as pointed out in 15 Lah 247 (1), this fact by itself cannot be attached much significance in the case of institutions in charge of Udasi Sadhs as the Udasis also revere the Granth Sahib. The evidence relating to the early history of the institution in the present case points to the institution being merely an Udasi monastery in its inception. The evidence in Civil Appeal No. 1512 of 1932 (2) relating to a similar institution in Pakhowal in the Ludhiana District was stronger, but it was held by this Court to be insufficient to prove the institution to be a Sikh Gurdwara. Similarly in the case relating to Gurdwara Manak, which recently came up before their Lordships of the Privy Council, the evidence was much stronger, but the case failed mainly owing to absence of evidence to prove that the institution was established for the purposes of public worship by Sikhs: see 1936 P C 93 (3).

The learned counsel for the appellant relied on three cases reported at pp. 63 (4), 319 (5) and 398 (6) of 1934 Lah. But these cases are distinguishable as in each case there was evidence to indicate that the institution in question was founded for the benefit of the Sikh villagers. In the first case (at p. 63) the Dharmasala had been built by the villagers at a cost of Rs. 1,500. In the second case (at p. 319) there was an agreement executed by one of the incumbents from which it was found that the Granth Sahib had always been kept and worshipped in the institution. There was also evidence to show that when the British Government confiscated the muafi attached to the institution the whole village proprie-

1. Arjan Singh v. Indar Das, 1934 Lah 13=151 I C 1005=15 Lah 247=36 P L R 458.
2. Hardit Das v. Gurdit Singh, 1936 Lah 819.
3. Hem Singh v. Basant Das, 1936 P C 93=161 I C 529=17 Lah 146 (P O).
4. Bishan Das v. Gurbaksh Singh, 1934 Lah 68=148 I C 45.
5. Gurmukh Das v. Partap Singh, 1934 Lah 319=147 I C 834.
6. Puran Das v. Kartar Singh, 1934 Lah 398=151 I C 82=36 P L R 280.

tary body took upon themselves the responsibility for paying the land revenue thereof, which indicated that the public in general was interested in the up-keep of the institution. In the last case cited (at p. 398) also, there was evidence to show that the institution had been founded by Sikh inhabitants of the village for their own benefit. As pointed out in 15 Lah 247 (1), each case of this kind has to be decided after consideration of all the evidence available and no general principle can be laid down. After a careful consideration of the evidence in this case, I see no good reason to dissent from the conclusion arrived at by the tribunal and would therefore reject the appeal with costs.

Coldstream, J.—I agree.

V.B.B./R.K.

Appeal rejected.

A. I. R. 1936 Lahore 825

COLDSTREAM AND BHIDE, JJ.

Harnam Das—Petitioner—Appellant.
v.

Kartar Singh and others—Objectors—Respondents.

First Appeal No. 919 of 1935, Decided on 11th February 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 29th March 1935.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 7—No direct and clear proof of establishment of institution—Inferences, warranted by circumstances and also those drawn by Courts in similar circumstances in other cases, should be taken into consideration.

Where there is no direct and clear proof of the exact nature of the worship for which the institution is founded, inferences which appear to be warranted by all the circumstances established must be taken into consideration. At the same time inferences drawn by the Courts in other cases from similar instances have their importance. [P 825 C 2]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 7—Sikh Gurdwara—Mere fact that Granth Sahib is read in institution does not make that institution Sikh Gurdwara.

The Dharamsalas were managed by Mahants, the Udasi fakirs. They had their chelas also as Mahants of the institution. Muafi of land was granted on condition of Granth Sahib being regularly read. The Dharamsalas were not called Dharamsalas but were referred in documents as a dera. There were samadhs on the land of Mahants and samadhs were commonly found in Udasi institutions. Though there was langar or an alms-house, there was no place shown where Granth Sahib was read or recited:

Held: that the institution was not a Sikh Gurdwara and that the mere fact that the Granth Sahib was read was not sufficient to make it a Sikh Gurdwara. [P 827 C 1, 2]

Nanak Chand—for Appellant.

Bhaqat Singh—for Respondents.

Coldstream, J.—This is an appeal against an order passed by the Sikh Gurdwaras Tribunal declaring upon a petition presented to the Local Government under S. 8, Sikh Gurdwaras Act, by the appellant Harnam Das that an institution known as Dharamsala Panchaiti, in Lalton Kalan, a village in Ludbiana district, is a Sikh Gurdwara. The tribunal found it proved that the institution was established for use by Sikhs for the purpose of public worship and was so used before and at the time of the presentation of the petition under S. 7 of the Act claiming it to be a Sikh Gurdwara for such worship by Sikhs. It is contended before us on behalf of the appellant Harnam Das that the evidence does not justify this finding. A case of this kind must be decided wholly upon the evidence adduced by the parties, for the questions for decision are questions of fact, but, as in such cases the more reliable evidence, that of old documents, comes from a time long before the agitation began in favour of the purification of the management of religious and charitable institutions frequented by Sikhs, it is seldom that there is direct and clear proof of the exact nature of the worship for which the institution was founded, and we have to base our conclusion upon inferences which appear to be warranted by all the circumstances established in each case. At the same time it was obvious that for the purpose of deciding such cases inferences drawn by this Court in other cases from similar circumstances have their importance. The institution dates from towards the end of the 18th century. The first Mahant was Sham Das, an Udasi Sadh, who was given a grant of land revenue free. He was succeeded by his chela, Brahm Sarup, who was Mahant at the time of the British annexation and the muafi was continued in his favour by the village proprietors who were themselves assignees of the land revenue, and described themselves as istimrars. Brahm Sarup died in 1857 and was succeeded by his chela Balak Ram who died in 1888. His chela Hari Das was Mahant until his death in 1925. Harnam Das, the petitioner, was his chela.

The President and member of the Tribunal (the third member was not a party to the order) based their decision

on the following circumstances: (1) It appeared clear to the Tribunal from the statements of Brahm Sarup and others recorded at the first inquiry into the Muafi previously enjoyed by the Mahants that the grant of land had been made to the Mahant by the village proprietors for the maintenance of the Dharamsala, and in order that the produce should be spent upon travellers and for the recital of the Granth or Sikh scriptures. Brahm Sarup described his occupation as granth khani at the enquiry made at the next land revenue settlement in 1881 (Ex. O. 9); (3) in 1901 the istimrars resumed the muafi because Hari Das did not render service to travellers and did not recite the Granth Sahib (O. 12). In a petition presented to the Collector they stated that the Muafi land had been granted by the istimrars to Brahm Sarup on condition that the income of the land attached to the Dharamsala was spent on food and the entertainment of visitors, that Shabad Chauki was performed and the Granth Sahib remained open at all times and was recited by some able granthi, but Hari Das had not attended to visitors since he had become Mahant in 1888 nor fed them nor recited the Granth Sahib or have it recited; and (4) The oral evidence that the Granth Sahib was being worshipped in the Dharamsala was accepted by the Tribunal in preference to the evidence to the contrary led by the appellant. After hearing counsel at length and examining the evidence my conclusion is that the decision that the Dharamsala was founded for public worship by Sikhs is not warranted in the circumstances apparent from the evidence in this case.

The nature of the village Dharamsalas in Ludhiana District is described in the report on the revision of the land revenue settlement (1878-83) by Mr. Gordon Walker. The description has been quoted at some length in 15 Lah 247 (1) which dealt with a dispute about the Gurdwara Dharamsala Panchaiti in Latala and has also been referred to in C. A. No. 1512 of 1932 (2) decided by Monroe and Currie, JJ., on 2nd January 1935 where the dispute was over a Dharamsala at Pakhowal. These dharamsalas are partly religious and partly charitable institutions. They are ma-

naged by a Mahant who is an ascetic or Sadh whose duty it is to maintain a langar or alms-house. In most cases the Mahant reads the Granth or Sikh scriptures. In the larger institutions of this sort the Sadh and his Chelas made up a college or monastery, the former being the Guru, or father of the Chelas, and the Mahant of the institution. The circumstances of the institutions to which those judgments related appear to have been very similar in most respects to those of the institution in this case. In both, the Mahants were Udasi Fakirs and in both the Mahants in charge in 1850 described themselves as reciters of the Granth Sahib.

In the *Latala case* (1) it was observed that even if its muafi had been granted on condition that the Granth Sahib was read, this did not prove that the institution was established for the purpose of public worship by Sikhs and was used for such worship by Sikhs. On the other hand in the *Pakhowal institution* (2) there were idols (thakars) in 1850, and Latala Dharamsala was found to have been originally an Udasi College or monastery. As made clear in the *Latala case* (1) the reciting of the Granth Sahib may be a regular feature in an institution which is not a Sikh Gurdwara, and on the other hand an institution may from its foundation onwards have been managed by Udasi Fakirs and yet be a Sikh Gurdwara, for Udisis, though not orthodox Sikhs, reverence the Granth Sahib and that the Mahants of Sikh institutions have often been Udisis is a matter of common knowledge. (After recording the evidence his Lordship proceeded further.) All that there is in support of the Tribunal's finding in this documentary evidence is the fact that the Granth Sahib was read or recited in the Dharamsala between 1850 and 1889 and that in 1901 the istimrars resumed the Muafi because Haridas had misspent its revenue and had refused to read the Granth Sahib or have it read. As already noticed the mere fact that the Granth Sahib was kept opened or read in an institution will not by itself be proof of the institution being a Sikh Gurdwara. As regards the allegations made in the complaint, that the performance of Shabad Chauki was a condition of the grant, this is the first time such a condition was mentioned and I have no doubt at all that the condition was an

1. Arjan Singh v. Inder Das, 1934 Lah 13=151
I O 1005=15 Lah 247=36 P L R 458.

2. Hardit Das v. Gurdit Singh, 1936 Lah 819.

invention for the purpose of the complaint. In any case the muafi was at the disposal of the istimrars, and if it was conditional on the recitation of the Granth Sahib its continuation or confiscation would not necessarily prove that the institution had been founded for public worship by Sikhs.

Nor do the other circumstances established support such a decision. The Dharamasala has never, it seems, been called a Dharamasala, but has been referred to in some documents as a Dera by which name Udasi institutions are commonly known. There are five Sikh Gurdwaras in the village (two old and three new), and the fact that the bulk of the proprietors are now Sikhs is not an important piece of evidence. The istimrars of 1850 were not all 'Singhs'. There are Samadhs of Balak Ram and Hari Das on the land of the Mahants. Their existence may not be inconsistent with the Dharamsala being a Sikh Gurdwara, but Samadhs are commonly found in Udasi institutions and that their presence was regarded as indicating that the institution was not in reality a Sikh Gurdwara is apparent from the remarkable statement of one of the respondents' witnesses that they were built two days before he gave evidence, that is to say on 7th March 1935. It is true that the Dharamsala is not shown to have been in recent times a college or monastery, as the Latala dharamsala was found to be, but from the description of the Ludhiana Dharamsalas in the Settlement Report of 1878-83 to which I have referred above, it is clear that only the larger institutions of this kind were colleges or monasteries. We do, however, know that the Mahants of this Dharamsala had several chelas. Balak Ram had at least five.

The oral evidence produced to prove that public Sikh worship has been carried out in this institution does not appear to me convincing. In the plan of the institution submitted with the petition presented under S. 7, Sikh Gurdwaras Act, all the rooms in the building are described; but though there is a langar there is no place shown as the place where the Granth Sahib was kept or recited. An attempt to remedy this omission was made during the course of the proceedings before the Tribunal and a new map prepared by a draftsman was proved. The evidence of the draftsman shows that his plan was merely a

copy of the plan attached to the petition with a "chabutra" added. The place where this chabutra was inserted was shown in the first plan as a byre.

Though the respondents' witnesses alleged that the Granth Sahib was worshipped and offerings were made to it in the Dharamsala no witness tells us where this was done. It is difficult to believe that public worship by Sikhs was carried on in a building in which no room was set apart for the Granth Sahib, and it is not alleged that this worship was carried on outside the building. The oral evidence that Hari Das recited the Granth Sahib is not consistent with the complaint made against him in 1901 and the confiscation of the Muafi on the ground that he had refused to read the Granth Sahib or have it read. The evidence as a whole points definitely in my opinion to the conclusion that the Dharamsala was not founded for public worship by Sikhs. I would accordingly accept the appeal with costs and grant the petitioner appellant a decree declaring that the Dharamsala is not a Sikh Gurdwara.

Bhide, J.—I agree.

R.W./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 827

ABDUL RASHID, J.

Baij Nath—Petitioner.

v.

Ram Sarup—Opposite Party.

Criminal Revn. No. 271 of 1936, Decided on 28th May 1936.

Criminal P. C. (1898), S. 526—Transfer—Grounds—Magistrate, recording entire prosecution evidence, being rather busy—This is no good reason for transfer of case.

The fact that the Magistrate is rather busy does not provide any good reason for the transference of a case from his Court to another Court wherein almost the entire prosecution evidence had been recorded: 1918 Pat 152, Rel. on.

[P 828 O 1]

Chaman Lal—for Petitioner.

M. M. Aslam Khan—for Opposite Party.

Order—This is an application under S. 526, Criminal P. C., for the transfer of a criminal case pending in the Court of Mr. S. M. Rashid, Magistrate, 1st Class, Delhi, to the Court of Mr. Sri Ram Sud. The circumstances giving rise to this application are as follows: The respondents were prosecuted for offences under Ss. 420 and 392, I. P. C., in the Court of Mr. Sri Ram Sud. After the statements of a number of prosecution witnesses had

been recorded two out of the five respondents presented an application in the Court of Mr. Pool, Additional District Magistrate, Delhi, praying that the case may be transferred from the Court of Mr. Sri Ram Sud to some other Court of competent jurisdiction. In this application the respondents made a number of allegations, in order to substantiate the plea that they had a reasonable apprehension that they would not get a fair trial in the Court of Mr. Sri Ram Sud. Mr. Pool, Additional District Magistrate called for report from the trial Court. After going through this report Mr. Pool was of opinion that the allegations made against the Magistrate had not been made out. He, however, transferred the case from the Court of Mr. Sri Ram Sud to that of Mr. S. M. Rashid on the ground that the Magistrate had a lot of work and could not find time to dispose of the case quickly. The transfer of the case to the Court of Mr. S. M. Rashid has given rise to the present application under S. 526, Criminal P. C.

I am of the opinion that this case should not have been transferred by the Additional District Magistrate from the Court of Mr. Sri Ram Sud. The report submitted by Mr. Sri Ram Sud undoubtedly shows that he has a lot of work but that alone is no ground why a case in which almost the entire prosecution evidence had been recorded by Mr. Sri Ram Sud should be transferred from his Court to another Court. Mr. Sri Ram Sud observed in his report that he was full of work as he had to take cognisance of cases from two thanas and also to do a lot of administrative work under the Punjab Municipal Act. If the Additional District Magistrate wanted the trial of the present case to be expedited he could relieve Mr. Sri Ram Sud of some of the cases in which no evidence had so far been recorded or take away from him a part of the administrative work that he was doing. The fact that the Magistrate is rather busy does not provide any good reason for the transference of a case from his Court to another Court wherein almost the entire prosecution evidence had been recorded. Reference may be made in this connection to 19 Cr L J 119 (1) where it was observed that delay in disposing of a case by a Magistrate could not be a

ground for taking action under S. 528, Criminal P. C. and that if the District Magistrate thought there was delay he should have asked the Subordinate Magistrate to expedite the trial. In my opinion the order of the Additional District Magistrate dated 9th December 1935, transferring the case to the Court of Mr. S. M. Rashid is unsustainable. For the reasons given above, I withdraw this case from the Court of Mr. S. M. Rashid and remit it to the Court of Mr. Sri Ram Sud for disposal in accordance with law. The trial Magistrate should expedite the disposal of this case as far as possible.

R.W./R.K.

*Application granted.***A. I. R. 1936 Lahore 828**

AGHA HAIDAR, J.

Master Zodpa—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1173 of 1935, Decided on 2nd October 1935.

(a) Criminal P. C. (1898), S. 476-B—Complaint filed under S. 193, Penal Code—Prosecution ordered by trying Magistrate—Appeal lies under S. 476 B.

Where a complaint has been filed under S. 193, Penal Code, and the prosecution has been ordered by the trying Magistrate, an appeal lies under S. 476-B to the Sessions Judge: 1929 *Lah* 641 and 1929 *All* 899, *Foll.*; 1929 *Lah* 9, *Not Foll.* [P 829 C 1]

(b) Penal Code (1860), S. 193 — Hearsay statement recorded by Magistrate cannot be made subject of prosecution.

Hearsay evidence should not be recorded by a Magistrate while recording deposition of a witness. Even if such evidence is recorded under mistake of law, it cannot form the basis of a criminal prosecution under S. 193: 6 *I C* 390, *Foll.* [P 829 C 2]

(c) Penal Code (1860), S. 211—Giving evidence does not amount to institution of proceedings.

The fact of giving evidence is not tantamount to the institution of proceedings within the meaning of S. 211: 6 *I C* 390, *Rel. on.* [P 829 C 2]*Mehr Chand Sud, Diwan Chand Saini and Qabul Chand—*for Petitioner.*Nazir Hussain—*for the Crown.

Order.—Four persons, namely Thakur Mangal Chand, Khushal Chand, Prithi Chand and Gendenangchug, were placed before the District Magistrate, Kangra, being charged with the murder of one Tsondrui. The Magistrate recorded a volume of evidence and in the end came to the conclusion that the story for the prosecution which was based entirely on the statements of Munshi Saje Ram and Master Zodpa...has not been corrobo-

1. Jewraj Ramjidas v. Dullabji Howji, 1918 Pat 152=43 *I C* 407=19 *Cr L J* 119.

rated and clearly led to the presumption that a conspiracy existed between Munshi Saje Ram and Master Zodpa to fabricate a false charge of murder against the four accused. The four accused were accordingly discharged and the learned District Magistrate taking action under S. 476, Criminal P. C., ordered that complaints be filed against Master Zodpa and Munshi Saje Ram under Ss. 193/194, Penal Code, in respect of the statements made by them on solemn affirmation on 24th and 25th June 1935, in the Court of the learned Additional District Magistrate, Kangra. He further directed that a complaint be filed in the Court of the learned Additional District Magistrate, Kangra, at Dharamsala, against Master Zodpa and Munshi Saje Ram under S. 211, Penal Code. Against these orders three separate appeals were filed before the learned Sessions Judge who held that since the complaint had been filed at the instance of the trying Magistrate therefore no appeal lay to him. He relied upon a Single Judge (Zafar Ali, J.) decision of this Court reported in 1929 Lah 9 (1). That case undoubtedly supported the view of the learned Sessions Judge. It is unfortunate however that the learned Sessions Judge was not aware of the later decision of this Court. In 11 Lah 55 (2) there was a difference of opinion on this point between Zafar Ali, J. and Bhide, J. On a reference to the third Judge (Broadway, J.) it was definitely held that the view held by Zafar Ali, J. was erroneous and that an appeal lay under S. 476-B, when a complaint has been filed and prosecution has been ordered by the trying Magistrate; vide also 52 All 79 (3). In this view of the matter the order of the learned Sessions Judge holding that the appeal did not lie to him was erroneous. I accordingly set aside the order of the learned Sessions Judge and hold that he could entertain the appeal.

As the merits of the case were not gone into by the learned Sessions Judge, I have gone through the record and have heard counsel for the parties. Saje

Ram's statements before the learned District Magistrate is not only hearsay but it is hearsay upon hearsay, being evidence which reached Saje Ram third hand or even fourth hand. He did not see anything with his own eye and did not hear anything connected with the act of murder. In fact he had no perception of the crime in any way. He merely stated what he had heard from other persons who had heard in their turn from some other persons and so on. The whole evidence, therefore, was hearsay and a Magistrate exercising proper judgment should not have recorded it and, even if under a mistake of law he recorded it such evidence cannot form the basis of a criminal prosecution. The law on the subject is very clearly laid down in a judgment of a very experienced and learned Judge of the Allahabad High Court in 7 A L J 618 (4). The headnote brings out the point quite clearly. It runs as follows:

A hearsay statement should not be recorded by a Magistrate while recording the deposition of a witness. If such a statement is recorded it cannot be made subject of prosecution under S. 193, I. P. C.

The same line of reasoning applies to the case of Master Zodpa who also did not depose that he saw or heard anything connected with the act of murder. According to him he received certain information from some other persons. It is also hearsay and cannot be the basis of a prosecution under S. 193, I. P. C. The proceedings taken under S. 476, Criminal P. C., in respect of S. 211, I. P. C., are based upon grounds which are still more flimsy. So far as I have been able to ascertain from the record the two witnesses, namely, Saje Ram and Zodpa, did not initiate any proceedings. In fact the information was conveyed to the District Magistrate by one Rev. Asboe and he may perhaps be treated as the person who initiated proceedings or at any rate moved the machinery of law against the four accused persons. His case however is not before me and I refrain from expressing any definite opinion as to his culpability. The two witnesses, Saje Ram and Zodpa, merely gave evidence. The mere fact of giving evidence alone cannot by any stretch of reasoning be tantamount to the institution of proceedings within the meaning of S. 211, I. P. C. No authority

1. *Mt. Satto v. Emperor*, 1929 Lah 9=118 I O 537=80 Cr L J 163.

2. *Thiraj v. Emperor*, 1929 Lah 641=1929 Cr O 205=119 I O 265=80 Cr L J 1019=11 Lah 55.

3. *Emperor v. Ram Prashad*, 1929 All 899=1929 Cr O 491=120 I O 113=1930 A L J 203=52 All 79.

4. *Chedi v. Emperor*, (1910) 7 A L J 618=6 I O 390=11 Cr L J 351.

has been cited to me by the learned Crown Counsel that a witness who gives evidence which we would assume for the sake of argument to be false, makes him liable not only under S. 193, I. P. C., but also under S. 211 of the Code.

On this question also the authority of 7 A L J 618 (4) is helpful, the observations at p. 621 showing that in circumstances like those of the present case S. 211 would have no application. From whichever point of view the matter is looked at, the complaint cannot be filed against the accused persons either under S. 193/194 or S. 211, I. P. C. I have read and re-read the statements of the two witnesses and the order of discharge dated 13th July 1935, and I am satisfied in my mind that no useful purpose would be served if the two petitioners are prosecuted and the chances of conviction are extremely remote if not actually non-existent. I, therefore, allow the petitions for revision and set aside the order of the Sessions Judge as well as of the District Magistrate who took proceedings under S. 476, Criminal P. C. The petitioners I understand are on bail; they need not surrender to their bail bonds.

R.M./R.K. *Petitions allowed.*

A. I. R. 1936 Lahore 830

AGHA HAIDAR, J.

Sain Das—Appellant.

v.

Tikka Sant Singh—Respondents.

First Appeal No. 55 of 1936, Decided on 26th May 1936.

(a) Civil P. C. (1908), O. 21, Rr. 58, 63—No appeal lies against order under O. 21, R. 58.

An order passed by the Court under O. 21, R. 58 is conclusive and can only be challenged in a suit brought under O. 21, R. 63. No appeal lies against such order. [P 831 C 1]

(b) Execution—Property liable to attachment—Right of residence, although not attachable under S 60(1) (n), can be dealt with by way of equitable execution, by appointment of receiver to realize proceeds for satisfaction of decree.

Although the right of residence enjoyed by a judgment-debtor in certain landed property, is not attachable and saleable in view of the provisions of S. 60(1) (n), Civil P. C., such right, is in a proper case, liable to be dealt with in execution of a decree by adopting the remedy of equitable execution, namely the appointment of a receiver who would act under the orders and supervision of the Court, and realize the income of the property, and after defraying the incidental expenses and his own remuneration would devote the proceeds towards the satisfaction of the decretal amount. [[P 831 C 1, 2]

Mahtab Singh and Nand Lal Sadana—for Appellant.

Shamair Chand and Parkash Chandra—for Respondents.

Judgment.—The facts necessary for the determination of this appeal may be briefly stated as follows:

Bawa Ujagar Singh Bedi and Tikka Sant Singh are related to each other as father and son. There were some disputes and differences between them and they referred the same to the arbitration of Nawab Malik Mohammad Hayat Khan Noon, Deputy Commissioner of Gujranwala. On 9th November 1927 Nawab Mohammad Hayat Khan delivered his award. This award is a lengthy document and, for the purposes of deciding this appeal, reference is necessary only to a few clauses in it. Besides other properties an area of 1150 acres situated on the right bank of Parah canal was given to Tikka Sant Singh for the maintenance of himself, his wife and his children. In addition to it Tikka Sant Singh was given the right of residence in the estate and building known as "Cosy Nook" at Murree. It was further provided that Tikka Sant Singh would not have, during the life time of Bawa Ujagar Singh, the right to sell or mortgage or otherwise transfer or charge the estates granted to him for the purpose of maintenance and residence in any way.

The decree-holder obtained a decree against Tikka Sant Singh for a sum of Rs. 7,800. In execution of this decree the decree holder proceeded to attach and sell "Cosy Nook" at Murree. Bawa Ujagar Singh filed objections on 20th July 1935 to the effect that he owned the property in dispute and that, therefore, it was not liable to attachment and sale. On 7th December 1935 Tikka Sant Singh filed objections saying that, as he had no disposing power over the bungalow, the same could not be attached. He also relied upon S. 60, sub.s (1), Cl. (n), Civil P. C., saying that the attached house was in the nature of future maintenance and was immune from attachment and sale. The objections of Bawa Ujagar Singh were under O 21, R. 58, Civil P. C. They were allowed by the executing Court which held that the house "Cosy Nook" was owned by Bawa Ujagar Singh and could not be attached in execution of the decree. As regards the objection raised by Tikka Sant Singh

the Court held that the house could not be attached in execution of the decree because Tikka Sant Singh had no disposing power over it. On both points the decision of the Court was against the decree-holder.

The decree-holder has filed an appeal in which he has impleaded Ujagar Singh and Sant Singh as respondents. A preliminary objection has been taken on behalf of Ujagar Singh at a hearing of the appeal that, inasmuch as the objections of Ujagar Singh, dated 20th July 1935, were clearly under O. 21, R. 58, Civil P. C., and were upheld by the executing Court, no appeal lay to this Court against the order of the Court below. This objection, in my opinion must be sustained. The order passed by the Court under O. 21, R. 58, Civil P. C., is conclusive and can only be challenged in a suit brought under O. 21, R. 63, Civil P. C. The appeal, therefore, so far as Ujagar Singh is concerned, is not maintainable and I dismiss it with costs. So far as the appeal against Tikka Sant Singh is concerned, it may be taken that Bawa Ujagar Singh is the owner of the property called Cosy Nook. Under the terms of the award dated 9th November 1927, Tikka Sant Singh was given a large area comprising 1,150 acres for the maintenance of himself and his family. That area is not in dispute and, therefore, S. 60, sub-s. (1) Cl. (n), Civil P. C., is not infringed. Now, the house had been allotted to Tikka Sant Singh for his residence. It is situated at Murree which is a hill station and health resort. In fact, the right of residence was in the nature of a luxury which was allowed to Tikka Sant Singh by his father. Tikka Sant Singh may not have the power to transfer the house in which he had only a right of residence, but I do not see any legal objection to the decree holder proceeding against the right of residence enjoyed by Tikka Sant Singh in Cosy Nook. It is true that this cannot be put to sale in execution of the decree; but the decree holder can ask the Court to proceed against the house in dispute by the process of equitable execution which consists of appointing a Receiver.

In a judgment reported as 47 All 385 (1), their Lordships of the Privy Council, while holding that the right of maintenance enjoyed by a judgment-debtor in

certain landed property though not attachable and saleable in view of the provision of S. 60, sub-s. (1), Cl. (n), was still in a proper case liable to be dealt with by adopting the remedy of equitable execution, namely the appointment of a receiver who would act under the orders and supervision of the Court and realise the income of the property and after defraying the incidental expenses and his own remuneration would devote the proceeds towards the satisfaction of the decretal amount. I, therefore, allow the appeal of the decree-holder and set aside the decree of the Court below so far as Tikka Sant Singh is concerned and direct that the Court below should appoint a Receiver in the terms indicated above. The Receiver shall of course be the officer of the Court and it would be his duty to let the house Cosy Nook annually on rent, and after defraying the Municipal and other incidental expenses like repairs, etc., shall pay the balance into Court in satisfaction of the decree. The receiver shall get remuneration at five per cent on the income. The case shall go back to the Court for the purpose of carrying out the directions contained in this order. The appellant shall get his costs of this appeal from Tikka Sant Singh.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 831

BHIDE, J.

Narinjan Singh, Proprietor, Firm "Khalsa Clearing and Forwarding Agency," Srinagar—Appellant.

v.

Damodar Singh & another—Respds.

Second Appeal No. 2186 of 1935, Decided on 8th February 1936.

(a) Partnership—Minor partner not contributing capital, labour or skill—His guardian receiving separate wages for his labour—S. 239, Contract Act, implies personal labour of partner—No valid partnership.

Where in a partnership business prior to the Partnership Act (1932) out of the two partners one is a minor who is not to contribute any capital, labour or skill and his guardian appointed as a manager is paid for his labour separately, there is no valid partnership in law. Even if the guardian supplies labour on behalf of the minor, there is no valid partnership as S. 239, Contract Act, implies contribution of personal labour. [P 832 O 2]

(b) Insolvency—Partnership—Agreement—Insolvent entering into agreement but appointing minor son ostensibly as partner—Intention to defeat provisions of insolvency law—Agreement is void.

Where in a partnership business an insolvent enters into an agreement but since he cannot

1. Rajindra Narain v. Sundara Bibi, 1925 P O 176=87 IC 295=47 All 385=52 IA 262 (PC).

carry out any business in his own name appoints his minor son ostensibly as a partner, the agreement being obviously intended to defeat the provisions of the insolvency law is absolutely void. [P 832 C 2]

(c) **Hindu Law — Guardian — Contract by father not for son's benefit is void.**

Where a Hindu father enters into contract with another on behalf of his minor son but not for the latter's benefit, the contract is void.

[P 832 C 2]

(d) **Partnership—Accounts—Principal and agent—Rendition of accounts — Suit for — Plaintiff reciting D as agent of firm — Firm having no legal existence — X, one of partners alone not entitled to claim rendition of accounts from D — Plea of return of documents, relief incidental to rendition of accounts, not granted.**

In a suit for rendition of accounts, D was the agent of a firm according to the plaintiff. The firm had no legal existence. It was contended that X the partner was at any rate entitled to call upon D to render accounts as he was X's agent and also that he was entitled to return documents:

Held: that X alone would not be entitled to claim rendition of accounts from D. The return of documents was a relief incidental to rendition of accounts and hence not granted.

[P 832 C 2]

Harnam Singh—for Appellant.

S. L. Puri—for Respondents.

Judgment.—This second appeal arises out of a suit for dissolution of partnership, rendition of accounts and return of documents. It was alleged that the partnership was entered into between the plaintiff and Udhe Singh, a minor, through Damodar Singh his father as a guardian. Plaintiff was to supply the capital and Damodar Singh was to act as the manager of the firm. The suit was decreed by the trial Court, but was dismissed on appeal by the learned District Judge, who held that the contract of partnership was void as Udhe Singh was a minor. From this decision the plaintiff appeals.

The learned counsel for the appellant has urged that in this case the contract of partnership was entered into not by the minor personally but by Damodar Singh in his capacity as a guardian on behalf of his minor son, and such a contract was valid under Hindu law. But it seems to me that the alleged agreement of partnership did not satisfy the definition of 'partnership' as given in S. 239, Contract Act. This definition admittedly governed the agreement as the Partnership Act had not come into force when the agreement was entered into. According to this definition, in order to constitute a partnership the partners must combine their 'property, labour or skill'

in the partnership business. In this case the minor was not to contribute any capital, labour or skill. It was suggested that the labour was supplied by Damodar Singh on behalf of Udhe Singh. In the first place, the definition appears to me to imply contribution of personal labour and secondly Damodar Singh was appointed a manager and was to be paid for his labour separately. Consequently it seems to me, that there was no valid 'partnership' according to law. It appears that Damodar Singh was an insolvent at the time when the agreement was entered into and as he could not carry out any business in his own name, the son was only ostensibly shown as a partner. The agreement was obviously intended to defeat the provisions of the insolvency law and would appear to be void on this ground also. Lastly, it would appear that even according to Hindu law, Damodar Singh could only enter into a contract on behalf of his son, if the contract was for the benefit of the minor. It is not shown how the contract was for the benefit of the minor. It was urged that the minor was not to share the losses. But this was not provided in the agreement. I therefore agree with the finding of the learned District Judge on this point, though on different grounds. The next contention of the learned counsel was that the plaintiff was at any rate entitled to call upon Damodar Singh to render accounts, as he was his agent. This was however not the case set up. Damodar Singh was the agent of a firm according to the plaintiff and as the firm had no legal existence, the plaintiff alone would, in my opinion, not be entitled to claim rendition of account from Damodar Singh in this suit.

The last point urged was that the plaintiff was at any rate entitled to return of documents. But the documents apparently relate to partnership business. This is not a case of mere "restitution" on a contract being discovered to be void. The return of documents is a relief incidental to rendition of accounts. When the contract itself was void and was apparently intended to defeat the provision of the Insolvency law, I do not think, plaintiff can be given any relief in the present suit. I dismiss the appeal but in view of all the facts leave the parties to bear their costs of this appeal.

R.W./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 833

SKEMP, J.

Harnam Singh and others—Appellants.
v.*Emperor*—Opposite Party.

Criminal Appeal No. 747 of 1935, Decided on 25th July 1935.

(a) Criminal P. C. (1898), S. 162—Report to police cannot be used as positive evidence—It can only be used under S. 157, Evidence Act, to corroborate or contradict person making it.

A report made to a police officer cannot be used or relied upon as positive evidence supporting the prosecution. Under S. 157, Evidence Act, such statement can only be used to corroborate or contradict the person making it.

[P 834 C 1]

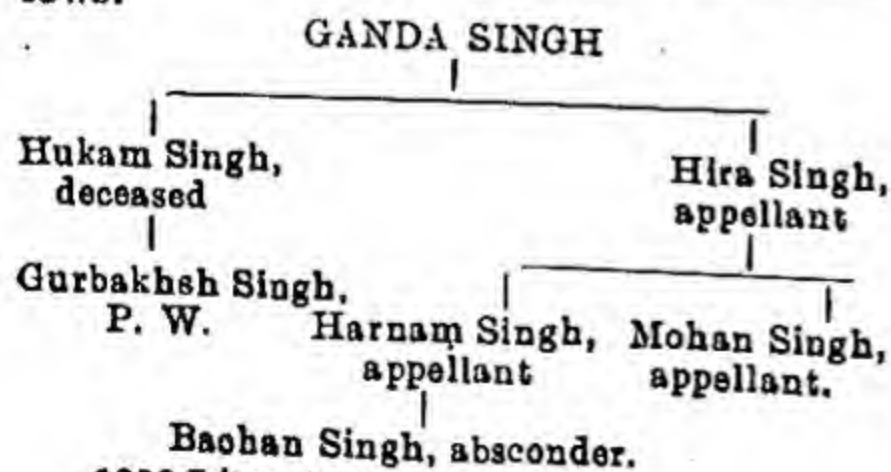
(b) Penal Code (1860), Ss. 304, 326—Accused hitting deceased with axe causing incised wound on left forearm with compound fracture of both bones—Death found to be due to gangrene—Conviction under S. 304 cannot be upheld—It should be altered into one under S. 326.

Where the accused hits the deceased with an axe, causing an incised wound on the left forearm with compound fracture of both bones, but it is found in the post mortem examination that death was due to gangrene, a conviction under S. 304 cannot be upheld and it should be altered to one under S. 326. [P 834 C 2; P 835 C 1]

(c) Criminal Trial—Sentence—One element in awarding sentence is element of vengeance—Such element absent—Main reason of awarding punishment, being to punish accused for having done a thing which is wrong—Severe punishment is not called for.

One element in awarding sentence is the element of vengeance; the natural resentment of the aggrieved persons must be satisfied lest they take the law into their own hands. Where, however, such element does not arise, and the main reason for awarding punishment is that the accused has done a thing which is wrong and in itself deserves a deterrent punishment, in the interests of society, severe punishment is not called for.

[P 835 C 1]

Faqir Singh and M. L. Puri—for Appellants.*Rattan Lal Chawla*—for Opposite Party.**Judgment.**—The parties to this case are cultivating goldsmiths of village Narwar, police station Barki, District Lahore. An abbreviated pedigree-table is as follows:

1936 L/105 & 106

Hira Singh and Hukam Singh had a joint site which, either by partition or by agreement between the two brothers, had fallen to Hukam Singh. Hukam Singh had built a kotha thereon. Hira Singh's sons disapproved of their father's action in letting Hukam Singh have this site, and on 2nd January 1935, according to the prosecution story, Hira Singh and his sons went to the spot and took possession by locking it. Hukam Singh and Gurbakhsh Singh remonstrated and this led to an altercation and a fight in the course of which Hukam Singh received a blow on the forearm from an axe and other minor injuries; and Gurbakhsh Singh also had a blow on the head. Gurbakhsh Singh brought his father into Lahore from Narwar, a distance of 17 miles, by lorry and took him to the Mayo Hospital. He was operated on within two or three hours of admission but died of gangrene on the 7th of January. A Head Constable named Barkatulla was stationed at the Mayo Hospital in order to take up medico-legal cases, and on his arrival at 2 p. m. he took a statement from Gurbakhsh Singh to the effect that Hira Singh, Harnam Singh, Mohan Singh and Bachan Singh wanted to take possession of the kotha in dispute. They did so by putting on their lock. Harnam Singh had a takwa; the others had dangs. At the instigation of Hira Singh who cried out "mar do," Harnam Singh struck Hukam Singh on the left forearm with the takwa; the others struck him with dangs. Gurbakhsh Singh added that Mohan Singh had struck him on the head with a dang.

Barkatulla telephoned to police station Barki, and the statement of Gurbakhsh Singh formed the basis of the first report. The following day the Sub-Inspector in charge, Narinjan Singh, came to the Mayo Hospital and took the statement of Hukam Singh which, as Hukam Singh afterwards died, has become a dying declaration. It is to the same effect as the statement of Gurbakhsh Singh, already recorded. The case is not supported by three eye witnesses Kesar Singh, Sohan Singh and Mohan Singh, who describe the fight in which Hira Singh, his two sons and grandson were concerned. In my opinion these three witnesses are not reliable, Kesar Singh because he admits enmity with the accused, his son was reported against by the accused for theft; and Hira Singh pointed out Kesar Singh's property

for attachment in execution of a decree. The other two, Sohan Singh, and Mohan Singh, are real brothers. Their statements were not recorded by the Sub-Inspector until the 22nd of January, and cross-examination reveals a long history of enmity and cases with the family of the accused, which it is unnecessary to detail.

Gurbakhsh Singh did not support the case for the prosecution and was treated as a hostile witness. He said that on the morning of the 2nd of January he went to the kotha in question and found a calf loose. He had a quarrel with Mohan Singh about this, in the course of which stick blows were exchanged. His father Hukam Singh who was chopping fodder in the adjoining haveli, tried to climb a wall and fell on a spade which caused the wound on the forearm. Gurbakhsh Singh further denied making the statement to Barkatulla. I see no reason to doubt that Gurbakhsh Singh made the report Ex. P. A. to Barkatulla, as testified by that officer; but the report cannot be used or relied upon as positive evidence. The matter is governed by S. 157, Evidence Act; such a statement can be used only to corroborate the testimony of the witness. Ex. P. A. does not corroborate the testimony of the witness and can only be used to contradict the evidence of Gurbakhsh Singh given in Court and as an indication that the defence story set up is false. It is inadmissible as a piece of positive evidence directly supporting the prosecution. On 2nd January, shortly after admission, a medical student on duty in the ward, Raja Ram, questioned Hukam Singh as to the cause of his injury in order to prepare the usual Bed-Head Ticket. This records:

History of present illness: At 9 a. m. on 2nd January 1935 the patient had a quarrel with his nephew about a piece of land. He said that the land was his and his nephew alleged that he also had a share of it. Both exchanged hot words. The nephew with an axe hit the left forearm of the patient.

Raja Ram, called as a witness, said:

I faithfully recorded what the deceased stated to me on 2nd January 1935, a few hours after he was admitted, i. e. two or three hours after his admission as he was taken to the operating theatre for immediate operation.

Another piece of evidence is an application lodged on 5th January 1935 by Bawa Faqir Singh, Advocate, who has argued the appeal, "under instructions from my client Hira Singh." It sets forth:

That on sudden provocation there was an

ordinary fight between my clients' children on one side and his brother and nephew on the other side on 2nd January 1935, in which a dang (blunt weapon) was used. That owing to a dang blow Hukam Singh fell down on the ground. There was a kahi there on the ground and Hukam Singh, while falling on the ground, struck against it, and got his arm injured.

This application shows that at that early stage, while the theory of accident had been thought of, it had not been developed to the length to which it was finally taken in Court. In my judgment, the evidence of the eyewitnesses, who support the prosecution theory, is unreliable. The first information report is inadmissible in evidence because it does not corroborate the statement of Gurbakhsh Singh. Gurbakhsh Singh has no doubt given false evidence but this does not prove the case for the prosecution. We are left only with the statement of Hukam Singh made to Dr. Raja Ram on the 2nd and his statement made to the Sub-Inspector Naranjin Singh on the 3rd, together with the circumstantial and medical evidence. Attempts were made before me to discredit Hukam Singh's declaration of the 3rd. No foundation for the arguments taken before me was however laid in the cross-examination of Naranjin Singh. He was cross-examined both before and after the charge, but no questions were put to him suggesting that the document of 3rd January was anything but a genuine document. We are therefore left with the two dying declarations. A possibility which cannot be excluded, is that after taking time for consideration Hukam Singh exaggerated the case against his assailants. At any rate, there is no positive evidence on the record to show that the declaration made to Raja Ram is not as good and reliable as that made to the Sub-Inspector, and the view most favourable to the accused must be taken. This leads to the acquittal of Hira Singh and Mohan Singh and to the conviction of Harnam Singh (the nephew) alone.

There remains the question of punishment. Dr. Ghulam Mohammad Khan, Casualty Medical Officer at the Mayo Hospital, who examined Hukam Singh on his admission, on 2nd January found that he had an incised wound on the left forearm with compound fractures of both bones. The ulna artery, nerves and muscles were cut. Dr. Quick, who performed the post mortem examination on 8th

January found that death was due to gangrene. I do not think that a conviction under S. 304, I. P. C., can be upheld. The wound on the arm was not an act done with the intention of causing death nor with the intention of causing such bodily injury as was likely to cause death, and death was not the natural result of the act. I think the conviction must be altered to one under S. 326, I. P. C. In passing sentence it must also be borne in mind that the complainant's party tried to hush the matter up on account of relationship. The matter was not reported to the panchayat in the village, which keeps a register of cognizable offences, and Gurbakhsh Singh has deliberately tried to spoil the case in Court. Now, one element in awarding sentences is the element of vengeance; the natural resentment of the aggrieved persons must be satisfied lest they take the law into their own hands. This element does not arise in this case and the main reasons for awarding punishment are that Harnam Singh has done a thing which is wrong and in itself deserves punishment, and, above all, in the interest of society as a deterrent. In these circumstances, I think, that a sentence of one year's rigorous imprisonment is sufficient, and I reduce the sentence accordingly. The order under S. 106, Criminal P. C., is set aside. No further proceedings need be taken against Bachan Singh, son of Harnam Singh.

R.M./R.K.

*Order accordingly.***A. I. R. 1936 Lahore 835**

JAI LAL, J.

Ishar Das and others — Plaintiffs — Appellants.

v.

Ghulam Mohd. and others — Defendants Respondents.

Second Appeal No. 1 of 1936, Decided on 25th March 1936, from order of Dist. Judge, Gujranwala, D/- 26th November 1935.

Limitation Act (1908), Arts. 120 and 141—Suit by reversioners for declaration that alienation by sonless proprietor should not bind them decreed, subject to proviso that they would take possession after death of certain widow, on payment of certain amount to alienees—Reversioners paying the amount and obtaining possession after death of widow—Suit for declaration of their owner-

ship to land is not one for possession and is governed by Art. 120.

Where a suit by reversioners for a declaration that an alienation made by a sonless proprietor should not affect their reversionary right, is decreed subject to the proviso, that after the death of a certain widow, the reversioners should take possession of the property, subject to payment of a certain amount found to have been taken by alienor for legal necessity, and the reversioners after the death of the widow institute a suit praying that they having deposited the required amount, and having obtained possession out of Court from the alienees, should be declared owners of the land, such suit is not one for possession and is governed by Art. 120. [P 836 C 1]

Achhru Ram and Indar Dev — for Appellants.

Ram Lal Anand I — for Respondents.

Judgment. — Counsel for both parties are agreed that the learned District Judge has misunderstood the real nature of the suit. A sonless proprietor effected an alienation of his land. The plaintiffs-respondents instituted a suit for a declaration that the alienation would not affect their reversionary rights. This suit was decreed in 1912 subject to the proviso that after the death of a certain widow the reversioners could take possession subject to payment of Rs. 260 to the alienees which apparently was found to have been taken for necessity by the alienor. The widow died in February 1931 and in August 1934 the suit out of which this second appeal has arisen was instituted by the reversioners, the plaintiffs in the previous suit, for a declaration that they had deposited Rs. 260 in Court and had obtained possession of the land out of Court from the alienees and therefore they should be declared to be the owners of the land. This was a simple suit, the success of which depended upon the proof of facts alleged by the plaintiffs. In order to succeed they had to prove two facts : first that they had paid Rs. 260 in Court ; and, secondly, that they had obtained actual or constructive possession of the land from the alienees prior to the institution of the suit.

The trial Court held that they had not obtained possession and therefore the suit was barred by time. It applied the provisions of Art. 2 (b), Punjab Limitation (Custom) Act of 1920, which provides a period of three years for a suit for possession of ancestral immoveable property which has been alienated on the ground that the alienation is not binding on the plaintiff according to custom in

cases where a declaratory decree has been obtained during the lifetime of the alienor. The learned District Judge, on the other hand, appears to have felt difficulty in applying this Article to the present suit and has held that though the suit must be treated to be one for possession, it is governed by Art. 141, Limitation Act, and therefore within time. He has therefore remanded the case for decision on the merits to the trial Court.

The suit however cannot be treated to be one for possession. It is not claimed to be a suit for possession and the learned counsel for the respondents frankly admits that it is not and cannot be a suit for possession. If it were a suit for possession then it would be barred by time and 95 I C 739 (1) would govern it. The learned District Judge has drawn a distinction between that judgment and the facts of this case, which does not exist if the suit were treated to be one for possession after the death of the alienor's widow. But the plaintiffs' real assertion is that it is not necessary for them to institute a suit for possession such as is governed by the Punjab Limitation (Custom) Act, because they have already obtained possession and paid Rs. 260 in Court. They therefore ask for a declaration of their title. Such a suit would be governed by Art. 120, Limitation Act. Therefore no question of limitation arises in this case. The question is one of fact whether the plaintiffs were, on the date of the suit, in actual or constructive possession of the land in dispute after having retained the same from the alienees. If they are, then, on a finding that they have paid Rs. 260, they are entitled to a declaration of title claimed by them. If however they are unable to prove that they were in possession of the land in suit on the date of the suit, the same must be dismissed on the merits and also on the ground that they are not entitled to sue for a mere declaration.

I accept this appeal, set aside the order of remand made by the District Judge and send the case back to him with directions to hear the appeal with due regard to the observations made above. The costs shall abide the result. The parties to appear before the District Judge on 27th April 1936.

R.M./R.K.

Appeal allowed.

1. Hafiz v. Jiwan, 1926 Lah 599=95 I C 739.

A. I. R. 1936 Lahore 836

ADDISON AND ABDUL RASHID, JJ.

Messrs. Tara Chand-Pohu Mal—Assessee—Petitioners.

v.

Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces, Lahore—Opposite Party.

Civil Ref. No. 75 of 1935, Decided on 19th February 1936, from Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, Lahore, D/- 11th December 1935.

(a) Income-tax Act (1922), S. 25-A (1)—Assessment as joint family—Application by assessee for registration of family as firm under alleged instrument of partnership—Registration without enquiry under S. 25-A (1)—Later, status of assessee still found to be of joint family—Wrong decision in previous year can be corrected in a subsequent year.

The assessee was assessed as joint Hindu family upto 1928-29. But during 1928-29 proceedings, a member of the family applied for registration of the family as a firm, alleged to have been constituted under an instrument of partnership. The Income-tax Officer registered the firm without holding any enquiry as to whether the family had actually effected a partition. Later in the 1933-34 assessment, the Income-tax Officer found that the status of the assessee was in fact of a joint Hindu family:

Held: it was open to the Income-tax Officer to go into the question whether the family was joint or not as it is an issue of fact and that a wrong decision in the previous year by the Income-tax Officer could be corrected in a subsequent year: 5 I T C 150 and 7 I T C 31, *Rel. on.* [P 837 C 1, 2]

(b) Income-tax — Profits — Money from branch in foreign country remitted to headquarters in British India is profit and not capital unless contrary is proved.

The ordinary presumption is that money remitted to the headquarters of a firm in British India from a branch situated in a foreign country is presumed to be profit and not capital unless the assessee proved the contrary: 1926 *Mad* 767 and 1930 *Mad* 449, *Rel. on.* [P 838 C 1]

(c) Income-tax—Assessment of—Books of account unreliable—Income-tax Officer adding certain sum for omissions held justifiable.

Where the books of account of the assessee did not give a complete and correct version of the actual business, and though the Income-tax Officer accepted them to a certain extent, he added a certain sum to represent the amount of omissions:

Held: that in making an assessment the Income-tax Officer should proceed on judicial principles, but as in the case under consideration there was evidence before him to show that books could not be relied upon, his inclusion of certain sum for omission was justifiable. [P 838 C 1, 2]

Kirpa Ram Bajaj—for Petitioners.

J. N. Aggarwal—for Opposite Party.

Addison, J.—In the matter of the 1933-34 assessment of income-tax of Messrs. Tara Chand-Pohu Mal of Tarn Taran the Commissioner of Income-tax, Punjab, has stated the case and formulated the following questions for the opinion of this Court: (1) Whether in the circumstances of this case the petitioners could rightly be assessed under law as a Hindu undivided family? (2) Has the registration of the firm rightly been refused? (3) Whether, having regard to the facts of the case inclusion of Rs. 10,000 on account of alleged omissions in the interest income returned by the petitioners is justifiable under law? (4) Whether the quantum of the estimate adopted by the learned Income-tax Officer pertaining to alleged omissions with respect to interest income, viz. Rs. 10,000 is based on any legal data or proper material? (5) Whether inclusion of Rs. 3,840 (correctly Rs. 3,640) representing the excess credit brought into British India from Bikaner is justifiable under law in the circumstances of the present case?

The facts of the case are fully stated in the reference. The assessees up till 1928-29 were assessed as a joint Hindu family, but during the 1929-30 proceedings a member of the family applied on 17th May 1929 for the registration of the family as a firm, alleged to have been constituted under an instrument of partnership, dated 4th January 1929. A separate claim was not put in to the effect that the Hindu undivided family had disrupted. In that year the Income-tax Officer registered the firm, apparently only on the ground that the document was in proper form. He held no enquiry under S. 25-A (1) as to whether the family had actually effected a partition. The officer continued to register the firm upto and including the assessment year 1932-33. His successor, who dealt with the year 1933-34 assessment, found that the status of the assessee was in fact that of a joint Hindu family. The only evidence against this was the partnership-deed, already referred to, which was very brief. He held that he was entitled to go behind the deed and to find as a fact that it did not represent the real thing. The deed confined itself to the business of money-lending and agriculture. It did not cover the family's

house property, which was very extensive, or shares in other firms. Further, the family's large estate consisting of house and landed property, and its considerable investments in money-lending and other firms had never been added or classified, much less divided amongst its members. The income-tax authorities therefore were of opinion that the family could not have separated without some documentary or other evidence on these points. Another circumstance was that though the family is alleged to have disrupted in January 1928, all legal proceedings on its behalf continued to be taken by Chaman Lal on the basis of a power-of-attorney signed by the members of the joint Hindu family as such. The income-tax authorities further found that the so-called crediting of each member's share of income to his account in the books was fictitious. The profits so credited were those returned for income-tax purposes. These of course should be different from the actual profits as some items of expenditure cannot be deducted from the income for tax assessments. Again, the only debits to these accounts represented income-tax paid on behalf of each person while the actual expenditure, personal or otherwise, incurred by the four members or their families was indiscriminately charged to a common account. These circumstances (and especially the last) clearly established that this family is still a joint Hindu family and the decision of the Income-tax Officer on the point is supported by ample evidence. It is open to him to go into this question which is an issue of fact: see 5 I T C 150 (1) and 7 I T C 31 (2), etc. It has long been held that a wrong decision in the previous year by an Income-tax Officer can be corrected in a subsequent year. For the reasons given we answer the first question in the affirmative.

The second question does not therefore arise but we might add that we are in agreement with the opinion of the Commissioner that there was no valid application for registration. As regards the 5th question the difference between the money received from a shop in Bikaner State and the amount sent there was taken to be profits accruing in Bri-

1. *Ram Lal Murlidhar v. Commissioner of Income-tax*, (1930) 5 I T C 150.
2. *Pyare Lal v. Commissioner of Income-tax*, (1933) 7 I T C 31.

tish India. This amount was Rs. 3,640. The case for the assessee as regards this question is that they are taking the capital out of the shop in Bikaner State into British India and leaving the profit there to be converted into capital in the State. It is clear that the assessee's books are unreliable in that they are designed to prevent a proper determination of their income and the mere fact that they show this state of affairs in the Bikaner books is not therefore important. These are said to show that the profits of the Bikaner shop are utilised in purchase and upkeep of house property in the State but that is obviously in the present case merely a fiction in order to show what is taken out of the State as capital in British India. The ordinary presumption is that money remitted to the headquarters of a firm in British India from a branch situated in a foreign country is presumed to be profits and not capital unless the assessee proves the contrary. In the present case he has not done so: see 49 Mad 465 (3) and 53 Mad 510 (4). We therefore answer the fifth question in the affirmative.

The third and fourth questions relate to the same matter. The Income-tax Officer found an omission of Rs. 200 in the return as regards interest. It is alleged that this was due to an oversight. There were other omissions as well and as the total value of these could not be accurately determined he added a sum of Rs. 10,000 to the income shown in the books. The finding in fact was that the account did not represent a complete and correct version of the actual business. The account books are kept in a special script for the deciphering of which the assessee's word has to be accepted. Interest items were not shown in the cash book; nor was an interest account maintained, though a list was prepared at the end of the year from the personal accounts of the debtors. For these reasons the Income-tax Officer held that the books did not give a complete and correct version of the actual business and though he accepted them to a certain extent he added a sum of Rs. 10,000 to represent the amount of omissions. In

making an assessment it is correct that the Income-tax Officer shall proceed on judicial principles, but in the present case there was evidence before him to show that the books could not be relied upon. We are therefore of opinion that the third and fourth questions should also be answered in the affirmative. The Commissioner will get his costs.

V.B.B./R.K.

Order accordingly.

A. I. R. 1936 Lahore 838

JAI LAL, J.

Roshan Lal—Plaintiff.

v.

Mt. Vidya Wanti and others — Defendants.

Civil Ref. No 76 of 1935, Decided on 11th May 1936, from Collector, Attock, D/- 14th December 1935.

Award—Stamp duty—Partition deed.

An award effecting a partition is not admissible unless property stamped under Art. 45, Stamp Act. [P 829 C 1]

Diwan Ram Lal—for Plaintiff.

Ram Lal Anand II — for Defendants.

Govt Advocate—for the Crown.

Order.—This is a reference under S. 61, Stamp Act, made by the Collector of Attock District. An award was made by Mr. Jagdishwar Nath, an arbitrator appointed by the parties otherwise than by an order of the Court in the course of a suit. By this award, the arbitrator partitioned the joint property of the three persons who had made the reference to him in equal shares. The total value of the property was estimated at Rs. 18,000. Subsequently, one of the parties made an application to file the award in Court and the Senior Subordinate Judge of Attock at Campbellpur directed that the award be filed in Court and passed a decree in accordance therewith. The award bore a stamp of Rs. 14 whereas according to the Collector the proper stamp duty should have been Rs. 90. It is thus claimed that there is a deficiency of Rs. 76. The calculation of Rs. 90 as stamp duty has been made under Art. 45 of the schedule to the Stamp Act which provides that duty on an instrument of partition shall be the same as on a bond for the amount of the value of the separated share or shares of the property.

It further provides that the largest share remaining after the property is partitioned (or if there are two or more shares of equal value and not smaller

3. *Murugappa Chettiar, In re*, 1926 Mad 767 = 97 I C 395 = 49 Mad 465 = 51 M L J 138.

4. *Subbiah Iyer v. Commissioner of Income-tax*, 1930 Mad 449 = 127 I C 131 = 53 Mad 510 = 58 M L J 581 (S B).

than any of the other shares, then one of such equal shares) shall be deemed to be that from which the other shares are separated. The Collector is therefore of opinion that the duty as on a bond should be calculated on Rs. 12,000, the value of the two shares separated from the third share. Art. 15 of the schedule to the Stamp Act relates to duty on a bond, but this article has been amended by a local Act according to which stamp duty on a bond should be Rs. 7.8 0 for the first Rs. 1,000 and Rs. 3.12.0 for every Rs. 500 or part thereof in excess of Rs. 1,000. Calculated in this manner the duty on the award in question should have been Rs. 90, and there is therefore a deficiency of Rs. 76. This is admitted to be correct by the learned counsel for Roshan Lal and Mt. Vidya Wanti, etc., who were parties to the arbitration. The arbitrator has not appeared before me as he is reported to be dead. The learned Government Advocate has appeared for the Crown and has supported the opinion of the Collector.

I am of opinion that the award should not have been admitted in evidence without the payment of a higher duty and penalty and that the higher duty should have been Rs. 90, and as the document is insufficiently stamped I direct that a copy of this declaration and the award shall be sent to the Collector as provided by S. 61, Stamp Act. There will be no order as to the costs of this reference.

B.D./R.K.

Order accordingly.

A. I. R. 1936 Lahore 839

TEK CHAND AND DALIP SINGH, JJ.

Digambar Dat Gir—Plaintiff—Appellant.

v.

Bhairon Gir—Defendant—Respondent.

First Appeal No. 1104 of 1933, Decided on 1st June 1936, from decree of Senior Sub-Judge, Karnal, D/- 5th December 1932.

Custom (Punjab)—Religious endowment—Succession to Gaddi of mahantship proved to be from Guru to Chela for eight generations—Gaddi is maurusi Gaddi.

Where the succession to the Gaddi (office) of mahantship of an institution has been from Guru to Chela for eight generations, the Gaddi must be held to be a maurusi Gaddi. [P 840 O 1]

Shamair Chand—for Appellant.

Prakash Chandra and Mohammad Amin—for Respondent.

Tek Chand, J.—This should be read in continuation of our order of remand, dated 3rd December 1935 (as reported in 1936 *Lah.* 228). By that order, the following two issues were sent down to the Senior Subordinate Judge, Karnal for inquiry and report: (1) Is the dera of Mandir Mahadev in Mauza Urnai Sangam a Maurusi institution, in which succession to the office of Mahantship has been from Guru to Chela? and (2) Is Digambar Datt Gir the Senior Chela of Rawan Gir? The Senior Subordinate Judge has recorded the evidence produced by both parties and submitted his report, finding both the issues in favour of the plaintiff Digambar Datt Gir. No objections to this report have been filed by the respondent. We have examined the evidence and heard counsel. The plaintiff propounded the following pedigree table:



As stated in the remand order it was established that Rawan Gir had succeeded his Guru Khushi Gir, who had succeeded Balwant Gir. Therefore, it had been established that for three generations succession was from Guru to Chela. The documentary evidence, consisting of entries in the settlement papers of 1887, Exhs. P. I/L and P. I/J, shows that Balwant Gir had succeeded his Guru Indar Gir. Similarly, Ex. P. I/M, which is a copy of the Asamiwar Khatauni, shows that Khushal Gir had succeeded his Guru Goman Gir. There is no documentary evidence to connect Indar Gir with Khushal Gir, or Goman Gir with Hardit Gir, or Hardit Gir with Ganesh Gir. The oral evidence however, including that of defendant's own witness, Bhibhuti Gir (D. W. 3), who has admittedly been one of his principal supporters from the very

beginning, shows that Indar Gir was the Chela of Khushal Gir, that Goman Gir was the Chela of Hardit Gir who was the Chela of Ganesh Gir, the founder of the institution. It is also admitted by Bhibuti Gir (D. W. 3) and other witnesses that Hardit Gir did not succeed Ganesh Gir as he got another big Dera worth several lacs of rupees and relinquished his right to succeed to this Gaddi in favour of his Chela Goman Gir. I agree therefore with the finding of the lower Court that it had been established that in this Gaddi the succession has been from Guru to Chela for eight generations. The Gaddi must therefore be held to be a maurusi Gaddi.

On issue 2 we find that there were only two Chelas of Rawan Gir, namely Digambar Datt Gir and Digambar Hari Gir. Digambar Hari Gir has appeared as a witness after remand, and has stated on oath that Digambar Datt Gir is the senior Chela of Rawan Gir. He has also stated that he has no claim to succession to this Gaddi, and he supports the case of Digambar Datt Gir. To contradict this the respondent has led no evidence to show that Digambar Datt Gir is not the senior Chela. I hold therefore that Digambar Datt Gir is the senior Chela of Rawan Gir. On these findings the plaintiff must be held to be entitled to succeed as the mahant in succession to Rawan Gir, and his suit for possession of the properties mentioned in the plaint must be decreed. I would accordingly accept the appeal, set aside the judgment and decree of the lower Court and decree the plaintiff's suit with costs throughout.

Dalip Singh, J.—I agree.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 840

AGHA HAIDER, J.

B. Shiv Deo Saran—Creditor—Petitioner.

v.

Kidar Nath—Judgment-debtor—Opposite Party.

Civil Revn. No. 730 of 1935, Decided on 5th February 1936, from order of Dist. Judge, Hissar, D/- 28th May 1935.

Provincial Insolvency Act (1920), S. 42 (1) (f)—**Mere speculation does not disentitle insolvent from claiming discharge.**

Mere speculation does not disentitle an insolvent from asking the Court for a discharge under S. 42 (1) (f). Many people indulge in all kinds of speculations, but the thing which

debars an insolvent from claiming his discharge is a rash and hazardous speculation. [P 840 C 2]

Shamair Chand—for Petitioner.

Achhru Ram—for Opposite Party.

Order.—This is an application in revision against the order passed by the District Judge of Hissar, accepting the appeal of one of the creditors only to this extent: that the order of discharge shall take effect after the expiry of one year from the date of the judgment of the Insolvency Judge, dated 26th June 1934. The order of the District Judge himself bears the date 28th May 1935, so that according to him, the insolvents would be entitled to a discharge on 26th June 1935. Kidar Nath, Sheo Nath and Phul Chand were adjudged insolvents on 20th July 1922 and the proceedings in insolvency have been going on ever since. The debts of the insolvents amounted to Rs. 62,591 and a sum of Rs. 29,865 has been actually realised from the assets of the insolvents, although the creditors themselves received only about 33%. Some of the assets thus realised are in the hands of the Receiver while a previous Receiver, who is now dead, realised a certain amount of assets without accounting for them to the Court.

The District Judge has come to a definite finding that through no fault of their own the assets of the insolvents have not been properly administered and the non-realisation of As. 8 in the rupee was not due to anything for which the insolvents can be held responsible. It is argued by the petitioner's counsel that the Judge had recorded a finding that the insolvents had been indulging in speculative transactions and therefore they were not entitled to discharge under S. 42 (1) (f), Provincial Insolvency Act. It may be observed that mere speculation would not disentitle an insolvent from asking the Court for a discharge. Many people indulge in all kinds of speculations, but the thing which debars an insolvent from claiming his discharge is rash and hazardous speculation. The finding of the District Judge is not to this effect and therefore it cannot be said that the discharge of the insolvents should be refused under the provisions of S. 42 (1) (f) on this ground. The income of the insolvent firm is almost at starvation point. Kidar Nath has an income of Rs. 28 p.m., and has to maintain a family of eight while Phul Chand has an income of about Rs. 17 per mensem and has to support seven

human beings. It cannot therefore be said that these insolvents should have made over these scanty personal earnings to the Receiver. This is also the finding of the District Judge and I agree with it.

It is true that previous to their adjudication, the insolvents had made some fraudulent alienations but that was in 1921. These alienations were subsequently cancelled. It was perhaps this conduct of the insolvents, evidenced by these transactions, which led the District Judge to postpone the discharge for a period of one year. The insolvency proceedings have been dragging on now for well-nigh 14 years and counsel for the petitioner has not been able to show that there was any reasonable prospect whatsoever of the insolvents coming into any property which can be taken over by the Receiver for liquidating the debts due by the insolvents. In my opinion, having regard to all the circumstances of the case, the order which has been passed by the Court below is right and proper and sitting in revision I do not feel inclined to disturb it. I may also note that out of 55 creditors only one has moved this Court in revision. This fact also shows that the remaining 54 creditors fully realized the hopelessness of the insolvency proceedings continuing for an indefinite period. The application is dismissed with costs.

V.B.B./R.K. *Application dismissed.*

A. I. R. 1936 Lahore 841

ADDISON AND ABDUL RASHID, JJ.

Ishar Das—Petitioner—Appellant.

v.

Bhagwan Singh and others—Objectors—Respondents.

First Appeal No. 1273 of 1935, Decided on 25th May 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 20th May 1935.

Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 8, 16 (2)—Holding Granth Sahib in reverence and reciting it do not by themselves make Udasi institution a Gurdwara.

Holding the Granth Sahib in reverence and reciting it ceremoniously do not by themselves make an Udasi institution a Sikh Gurdwara, unless it is otherwise established that the institution falls within the purview of any of the clauses of S. 16 (2). The Udis are Hindus, although in the wider sense of the term they are also Sikhs: 1934 Lah 18 and 1926 Lah 100, *Rel. on.*

[P 842 O 1]

J. G. Sethi and *Bhagat Singh*—for Appellant.

Charan Singh—for Respondents.

Abdul Rashid, J.—This appeal arises out of a petition presented by *Ishar Das* under S. 8, Sikh Gurdwaras Act, praying that the institution known as Gurdwara Tabli Sahib at village Pakhoki in district Gurdaspur be not declared to be a Sikh Gurdwara. The petitioner's case was that the institution in dispute was an Udasi temple founded by Baba Sri Chand, the son of Guru Baba Nanak, and that the objects of worship therein were the murtis of Baba Sri Chand, the Gola Sahib and Samadhs of the petitioner's ancestors. The objectors, on the other hand, pleaded that Gurdwara Tabli Sahib was a Sikh Gurdwara founded by Guru Nanak, the first Sikh Guru. It was stated by the objectors that Guru Nanak retired to village Pakhoki shortly before his death and performed meditation under the Tahli tree, that the sixth Sikh Guru also visited the place, and that it was in the memory of the first Sikh Guru that the institution in dispute was founded. According to the objectors Guru Granth Sahib was the only object of worship in this institution, and the institution was used predominantly by Sikhs as a place of worship. The Tribunal held that the institution known as Tahli Sahib, situate at village Pakhoki, was established in memory of Guru Nanak and that the institution was, therefore, a Sikh Gurdwara. Against this decision the petitioner has preferred an appeal to this Court. The onus of proving that the institution in dispute was a Sikh Gurdwara lay on the objectors. They have sought to discharge this onus by producing three or four sanads and by a reference to two historical books. (His Lordship then discussed the evidence and proceeded.) The oral evidence produced by the parties in the present case is of a vague and inconclusive character.

The only point satisfactorily established by the oral evidence is that, in the institution in dispute, the Granth Sahib has been recited for a number of years. It is, however, well-known that Udis hold the Guru Granth Sahib in great reverence and the fact that the Granth Sahib is recited in an Udasi institution does not make it a Sikh Gurdwara. Reference may be made in this connection to certain observations made by a Division Bench of this Court in 15

Lah 247 (1), which are to the following effect:

The Udasis are in fact a monastic order in their origin, and are followers of Bawa Sri Chand, son of the first Guru. Though they worship Samadhs, etc., they do reverence the Granth Sahib without completely renouncing Hinduism. They are often in charge of the village dharamsala or gurdwara, an institution partly religious and partly charitable, their duties being to feed the poor, keep the langar or almshouse going, and to read the Granth or Sikh scriptures. In some cases, however, the Sadh and his chelas constitute a monastery or college, the former being called the Guru or father of the chelas, and mahant of the institution. Owing to their intermediate position, it is possible for Udasis to be in charge of a Sikh Gurdwara, properly so called, but it does not follow that the institution is a Sikh Gurdwara and not a true Udasi institution merely because the Granth Sahib is read.

It was held in 7 Lah 275 (2) that the Udasi order constituted a separate sect of schismatics distinct from the orthodox Sikhs, and that, whereas some of the "Singhs" had renounced Hinduism the Udasis had all remained within its pale from its beginning. It was further observed that the acceptance of and showing of reverence to the "Granth Sahib" was in no way inconsistent with remaining a Hindu, that the Udasis were Hindus and in the wider sense of the word they were also "Sikhs." Holding the Granth Sahib in reverence and reciting it ceremoniously did not by themselves make the institution in dispute a Sikh Gurdwara. We are, therefore, of the opinion that it has not been established that the institution in dispute falls within the purview of any of the clauses of S. 16 (2), Sikh Gurdwaras Act. For the reasons given above, we accept this appeal, set aside the order of the Tribunal, dated 20th May 1935, and declare that the Gurdwara Tabli Sahib Dera Baba Sri Chand is not a Sikh Gurdwara. The respondents will pay the costs of the appellant throughout.

R.M /R.K.

Appeal allowed.

1. Arjan Singh v. Indar Das, 1934 Lah 13=151
I C 1005=36 P L R 458=15 Lah 247.

2. Basant Das v Hem Singh, 1926 Lah 100=94
I C 695=27 P L R 115=7 Lah 275.

A. I. R. 1936 Lahore 842

JAI LAL, J.

Shadi and others—Judgment debtors—Appellants.

v.

Ram Ditta—Decree-holder — Respt.
Execution Second Appeal No. 211 of 1936, Decided on 22nd May 1936.

(a) Civil P. C. (1908), O. 21, R. 2 — "The decree" means decree of any kind — Adjustment must be certified within ninety days.

The words "the decree" in O. 21, R. 2, surely mean 'a decree of any kind' and would include a decree for possession of a house. No adjustment of such decree can be recognised by the Court unless it is certified and no application for certification can be made except within 90 days.

[P 843 O 1]

(b) Punjab Relief of Indebtedness Act (7 of 1934)—Scope—Rights already lapsed cannot be revived by subsequent enactment.

The enactment of the Punjab Relief of Indebtedness Act subsequently cannot revive a right which has already been extinguished.

[P 843 O 1]

*Mohsin Shah—*for Appellants.

*Vishnu Datta—*for Respondent.

Judgment. — This appeal is by the judgment-debtors. They made an application that the decree had been adjusted and therefore they objected to its execution. The decree was for possession of a house, and the judgment-debtors, it appears, have done all they could to obstruct the decree-holder in getting possession of the house. The present application is based on an allegation that the decree-holder has agreed to take 12 kanals of land in lieu of the house. The judgment-debtors, however, belong to an agricultural tribe, and though an application has been made to the Collector, which application is signed by the decree-holder, to sanction the transfer of the land to the decree-holder, it does not appear to have been sanctioned. Moreover, possession of the land has not yet been given to the decree-holder. Therefore it is not an adjustment as that term is understood for the purpose of O. 21, R. 2. It further appears that the judgment-debtors are undischarged insolvents and their land vests in the Official Receiver. The Official Receiver is not a party to the so called adjustment. The application to certify the adjustment was made more than three months from the date of the alleged adjustment and has been dismissed by the District Judge on that ground also. It is, however, claimed that it is neither an application for certification of the adjustment nor does the transaction in question amount to an adjustment so as to come within the purview of O. 21, R. 2.

It is contended that O. 21, R. 2, only applies to money decrees. 1926 Mad 749

(1) has been cited in support of this contention, but 46 Bom 226 (2) lays down that O. 21, R. 2, applies to all kinds of decrees and is not confined to money decrees, and this is obvious from the rule itself, which says "where any money payable under a decree of any kind is paid out of Court, or the decree otherwise adjusted in whole or in part 'The decree' surely means 'a decree of any kind' and would include a decree for possession of a house as in this case. No adjustment can be recognised by the Court unless it is certified and no application for certification can be made except within 90 days. The objection of the appellants, therefore, was untenable and could not be entertained.

It is, however, contended that the Punjab Relief of Indebtedness Act, applies to this case and no question of limitation arises. That Act, however, came into force after the period of three months had already expired and the right of the judgment-debtors to apply for the certification of the alleged adjustment had already become extinguished. The enactment of the Act subsequently cannot revive a right which has already been extinguished. The view of the learned District Judge is correct and I dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

1. Narayanaswami Naidu v. Rangaswami Naidu, 1926 Mad 749 = 95 I C 731 = 50 M L J 547 = 49 Mad 716.

2. Gharry v. Gowrya, 1922 Bom 380 = 64 I C 490 = 23 Bom L R 931 = 16 Bom 226.

A. I. R. 1936 Lahore 843

COLDSTREAM, J.

Tulsi Ram—Judgment-debtor—Appellant.

v.

E. D. Sassoon & Co., Ltd., Bombay—Decree-holder—Respondent.

Misc. First Appeal No. 1481 of 1935, Decided on 2nd March 1936, from order of Sub.Judge, First Class, Lahore.

(a) Civil P. C. (1908), S. 48 — Application for execution of decree by attachment — Judgment-debtor raising certain objections, execution suspended until decision of objections—Request by decree-holder for re-attachment after period of limitation—Request for re-attachment held to be in continuation and ancillary to original application.

The right of a decree-holder to obtain execution of the decree will not necessarily be defeated by objections raised by the judgment-

debtor, or proceedings taken by Court for which the decree-holder is not responsible which prevent the completion of execution proceedings initiated by an application made within the period of limitation. So where on an application for execution of a decree, judgment-debtor raised certain objections and execution was suspended until their decision and after that, request was made by decree-holder for re-attachment after period of limitation, the request was held to be in continuation and ancillary to the original application for execution : 18 All 482, Rel. on.

[P 844 C 2]

(b) Civil P. C. (1908), S. 48 (2) (a)—Fraud—Dishonest circumvention is fraud—But mere raising of objections so as to prolong execution proceedings beyond the period of limitation is not necessarily fraud.

Though dishonest circumvention is fraud, mere raising of objections so as to prolong execution proceedings beyond the period of limitation is not necessarily fraud for the purposes of S. 48, Civil P. C. So objections raised to the jurisdiction of a Court were held not to be dishonest. But an objection falsely stating that judgment-debtor is not a partner of a firm was held to be a fraud within S. 48, Civil P. C., so as to enlarge the period of limitation : 1922 All 145, Dissent.; 1931 All 134 and 1935 Pat 380, Rel. on.

[P 845 C 1]

(c) Punjab Relief of Indebtedness Act (7 of 1934), S. 34—Scope—Applies to non-agriculturists also.

The section, excepting the second proviso to it, is not restricted to agriculturists only, but applies to non-agriculturists also. [P 845 C 2]

Panna Lal Bahl—for Appellant.

Azim Ullah and Jagan Nath Malhotra—for Respondent.

Judgment.—Messrs. E. D. Sassoon and Company obtained a decree based on an arbitration award in Karachi against the firm Shivji Ram Devi Das of Lahore. They had this decree transferred to Lahore and applied to the Subordinate Judge, First Class, on 9th November 1924, to have the decree executed by attachment of the property of Tulsi Ram who had signed the contract upon which the decree was based and some property was attached. Tulsi Ram objected to this attachment on several grounds including the plea that he was not a partner of the judgment-debtor firm. The question whether the executing Court had jurisdiction to decide whether he was or was not a partner had then to be decided. Tulsi Ram contended that the Lahore Court had no jurisdiction to decide this matter and the Subordinate Judge found that this was so. He released the property from attachment. On appeal this finding was reversed by the High Court who remanded the case in November 1928.

The Subordinate Judge decided on 20th March 1935, that Tulsi Ram was a partner and asked the decree-holder's counsel what further steps he wanted to take in execution. The reply was that an application was already pending, and as the objections by Tulsi Ram had been dismissed, Tulsi Ram's property should be re-attached. A prayer was added asking for execution by the arrest of Tulsi Ram. Tulsi Ram again raised objections pleading that this request was a fresh application for execution and was barred by limitation not having been made within 12 years of the date of the decree, that he was a pauper and that he was exempted from arrest by S. 34, Punjab Relief of Indebtedness Act.

The Subordinate Judge overruled all these objections holding that the original application for transfer could be continued and, therefore, the proceedings were not barred by limitation; that the judgment debtor was estopped from raising the plea that he was a pauper, having previously resisted an application to have him declared insolvent, and that S. 34, Punjab Relief of Indebtedness Act, applied only to judgment-debtors who were agriculturists. He also held that even if the request for re-attachment made in 1935 had been a fresh application for execution, the period of limitation had been extended by Tulsi Ram's fraudulent behaviour. Tulsi Ram has appealed. It is contended before me that the request for the re-attachment made in 1935 was barred by limitation as being a fresh application for execution not made within 12 years of the date of decree and that the warrant for the appellant's arrest was in contravention of S. 34, Punjab Relief of Indebtedness Act.

It is clear to my mind that the request made in 1935 by the decree-holders for re-attachment of Tulsi Ram's property was not a fresh application for execution. The temporary release of Tulsi Ram's property from attachment because Tulsi Ram had raised the objection that he was not a partner of the judgment-debtor firm did not bring the proceedings taken upon the application of 1927 to a final adjudication, but postponed them. As stated in the decree-holders' reply to the Court's query regarding the steps to be taken after Tulsi Ram had been held to be a partner, the proceedings consequent on the application for execution of 1924

had not been completed. There is ample authority for the proposition that the right of a decree-holder to obtain execution of the decree will not necessarily be defeated by objections raised by the judgment-debtor, or proceedings taken by the Court for which the decree-holder is not responsible, which prevent the completion of execution proceedings initiated by an application made within the period of limitation [see the Full Court Ruling of the Allahabad Court in 18 All 482 (1) which has been followed by other High Courts]. Applying this principle, I hold that the lower Court was correct in treating this request of 1935 as merely in continuation of and ancillary to the application of 1924 so far as the properties mentioned in the proceedings of that time are concerned. The counsel for the decree-holder states that his clients do not propose to attach any other properties. These properties certainly include a kothi in Qilla Gujar Singh and a house in Akbari Mandi of which plans were prepared and are on the record.

The application for execution by arrest of the appellant was, however, not made in 1924, and in asking for arrest the request of 1935 added substantially to the relief sought in 1924. In this respect, therefore, it must be held to be a fresh application barred by the 12 years' rule unless it is held that the judgment-debtor had by fraud or force prevented the execution of the decree at some time within twelve years before the date of the application. For the decree-holders it is argued that the word "fraud" in Cl. (a), sub-r. (2), S. 48, Civil P. C., must be interpreted to include any conduct of the judgment-debtor deliberately adopted with a view to defer and delay the just payment of his debt by frivolous and futile objections which are dishonest on the face of them. Support for this conclusion is found in 44 All 319 (2) where Walsh, J. remarked in dealing with the meaning of fraud in this section:

Fraud is moral turpitude . . . the word "fraud" in this section should not be narrowly interpreted—Nobody can doubt that the object of its insertion in this section was to prevent the tricks which are constantly played by judgment-debtors. . . .

1. Rahim Ali Khan v. Phul Chand, (1896) 18 All 482=1896 A W N 142 (F B).
2. Lalta Prasad v. Suraj Kumar, 1922 All 145 =65 I C 877=20 A L J 185=44 All 319.

In that case, so far as the judgment discloses, there had been no deception of the decree-holder or any misleading of him, but merely obstruction. The judgment cites other judgments of the same Court to the same effect. Walsh, J. referred also to observations made in English cases, but the rulings cited are in cases where it appears that some deception had been practised or attempted or some misleading statement made. The fraud pleaded by the decree-holders here is the conduct of the appellant in delaying the completion of the attachment proceedings until the statutory period of limitation had passed by objecting to the attachment on the ground that the executing Court in Lahore had no jurisdiction to adjudicate on the question whether he was or was not a partner of the judgment-debtor firm and by raising the false plea that he was not a partner.

The judgment in 44 All 319 (2), was by implication, at any rate, dissented from by a Division Bench of the Allahabad Court in 1931 All 134 (3) and was not accepted as correct by the Patna Court in 1935 Pat 380 (4), and I am unable to hold that the mere raising of objections so as to prolong execution proceedings beyond the period of limitation must, in all cases, be regarded as fraud for the purposes of S. 48. If the objections are patently frivolous they can ordinarily and ought to be disposed of speedily by the Court if the decree-holders are diligent. But as remarked in 1927 All 668 (5) there is a considerable and consistent body of cases in support of the proposition that fraud should not be interpreted in a narrow sense, but so as to cover circumvention. I do not think that the objection raised by the appellant to the jurisdiction of the Lahore Court can be regarded as dishonest. But the objection that Tulsi Ram was not a partner of the judgment-debtor firm was found to be false. It was a trick by which the decree-holders were forced by no fault of their own to delay execution proceedings until this period of 12 years had expired. I consider that the appellant's conduct in

raising this plea was fraudulent and that it had the effect of enlarging the period of limitation. It is argued for the appellant that no particular fraud were specified by the decree-holders, and that when the plea of fraud was raised, an issue on the point should have been raised and opportunity given to the appellant to rebut it. But the plea was based simply on the fact and the nature of the objection for which the evidence was on the record and could not be rebutted. My conclusion therefore is that the request for the judgment-debtor's arrest was not barred by limitation.

The question still remains however whether the Subordinate Judge was right in issuing a warrant of arrest in view of the provisions of S. 34, Punjab Relief of Indebtedness Act. It is true that the appellant was given opportunity to show cause against its issue, but the learned Subordinate Judge appears to have decided against the appellant simply on the ground that S. 34 of that Act does not apply to non-agriculturists. I see no justification for this view of the scope of the section. Chap. 8 of the Act in which this section comes, is headed "Miscellaneous Amendments of the Civil law." The second proviso to the section appears to relate only to agricultural land but its other provisions are not so limited. On these findings I dismiss this appeal so far as it relates to the attachment of the property specifically mentioned by the decree-holders in prosecuting their application for execution made in 1924. I accept it so far that I remand the case to the executing Court for re-decision of the question whether a warrant of arrest should issue in view of the provisions of S. 34, Punjab Relief of Indebtedness Act. The parties will bear their own costs in this Court.

D.S./R.K.

Appeal partly allowed.

A. I. R. 1936 Lahore 845

ADDISON AND ABDUL RASHID, JJ.

Chhaju Ram—Decree-holder—Appellant.

v.

Muzaffar Ahmad—Judgment-debtor—Respondent.

Misc. Second Appeal No. 118 of 1936, Decided on 1st June 1936, from order of Dist. Judge, Hissar, D/- 30th October 1935.

3. *Bandhu Singh v. K. T. Bank, Ltd.*, 1931 All 184=129 I C 716=1931 A L J 894=53 All 419.

4. *Bishwanath Prasad v. Lachhmi Narain*, 1935 Pat 380=156 I C 297=16 P L T 505=14 Pat 816.

5. *Ambica Nalk v. Ram Raj Tewari*, 1927 All 668=108 I C 277=25 A L J 842.

Punjab Alienation of Land Act (13 of 1900), S. 16—Decree—Execution—Decree nullifying Act of legislature should not be passed by Court—Land of agriculturist could not therefore be sold even in execution of mortgage decree under S. 16.

Though in the majority of cases the decree of the Court must be executed as it stands, yet, when that decree would have the effect of nullifying an Act of the legislature the Court must hold its hand. Under S. 16 therefore land belonging to a member of an agricultural tribe could not be sold in execution even though a decree had been obtained by the mortgagee for the sale of such land: 1933 Lah 397, *Approved*; 1935 Lah 443, *Dissent*; 1931 Lah 545, *Disting.* [P 847 C 1, 2]

R. L. Anand I and Shamair Chand—for Appellant.

Mohsin Shah—for Respondent.

Abdul Rashid, J.—The facts of the case, bearing on the question of law involved in this appeal may be shortly stated. Muzaffar Ahmad, judgment-debtor, mortgaged his land in favour of Chhajju Ram, decree-holder. As the mortgage money was not paid Chhajju Ram filed a suit on the basis of the mortgage-deed, and obtained a preliminary decree on 20th March 1933, which was followed by a final decree on 22nd August 1933. In execution of this decree notice was issued to the judgment-debtor under O. 21, R. 66, Civil P. C., to show cause why the mortgaged land should not be sold in execution of the decree. The preliminary objection taken by the judgment-debtor was that he was a Sheikh Qureshi of Hissar, and that as he belonged to a notified agricultural tribe his land was not liable to sale in execution of the decree dated 22nd August 1933, by virtue of the provisions of S. 16, Punjab Alienation of Land Act. The executing Court held that the judgment-debtor had established that he was a Sheikh Qureshi by caste, and that as this tribe was a notified agricultural tribe in the Hissar District the mortgaged land could not be sold in execution of the decree of Chhajju Ram. Against this decision the decree-holder preferred an appeal to the learned District Judge. The learned District Judge, after a consideration of the entire evidence, came to the conclusion that the judgment-debtor had succeeded in establishing that he was a Sheikh Qureshi by caste, that this tribe was a notified agricultural tribe in the Hissar District, and that the land in dispute was therefore immune from sale in execution of the decree of Chhajju Ram. The appeal of the decree-holder having

been dismissed, he has preferred a second appeal to this Court.

The learned counsel for the appellant placed his reliance on 1931 Lah 545 (1) and urged that the objection, that the land of a member of an agricultural tribe could not be sold in execution of the decree, could not be taken in the executing Court for the first time, as the sale was ordered by the decree and the executing Court was not entitled to go behind the decree. It was contended that if the judgment-debtor had failed to rely on the provisions of S. 16, Punjab Alienation of Land Act during the course of the trial it was not open to him to seek protection under S. 16 for the first time in execution proceedings. In my opinion 1931 Lah 545 (1) is not of any assistance to the appellant. In the reported case a non-agriculturist had mortgaged his land to a certain person and the mortgagor had sold the equity of redemption to the appellant. The mortgagee sued on his mortgage and there was a compromise decree in the usual terms except that instalments were fixed and there were certain other conditions not included in O. 34, Civil P. C. In execution of this decree the land was sold but the sale was set aside on 11th March 1929. On 28th March one Tej Bahadur Singh alleging that he had purchased the decree from the original decree-holder put in an application for execution, and asked for the sale of the property. It was held by Addison, J. that the provision of S. 16, Punjab Alienation of Land Act, had no applicability to that case. It was observed by the learned Judge that the mortgage in question was a perfectly valid one and was made by a non-agriculturist. The appellant did not purchase the whole land but only so much interest in the land as remained over after satisfying the mortgage. No question therefore arose as regards selling the land of an agriculturist.

After giving the above-mentioned finding the learned Judge remarked that in any case he agreed with the executing Court that the objection under S. 16, Punjab Alienation of Land Act could not be taken before it as the sale was ordered by the decree and not in execution proceedings. This remark was clearly in the nature of an obiter dictum, and was based on the general principle that a

1. Surjan v. Tegha Bahadur, 1931 Lah 545=131 I C 229.

Court executing a decree cannot go behind the decree in execution proceedings and is bound to execute the decree as it stands.

In 1932 Lah 529 (2) it was held by Tek Chand, J. that in a suit for recovery of money on the basis of a mortgage the plea that the encumbered property is exempt from sale under the provisions of S. 16, Punjab Alienation of Land Act, must be raised during the suit, and cannot be taken for the first time in execution proceedings, for it is not competent to the executing Court to go behind the decree ordering sale of the property. S. 16, Punjab Alienation of Land Act, lays down that no land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any civil or revenue Court whether made before or after the commencement of this Act. This section refers to execution of decrees in specific terms, and it appears to me to be obvious that as soon as the Court finds that land belonging to a member of an agricultural tribe is sought to be sold by a decree-holder, it must hold its hand and refuse to sell the land belonging to a member of an agricultural tribe. The prohibition contained in S. 16 of the Act must be given effect to by the executing Court, as it is laid down in the section that the land of a member of an agricultural tribe shall not be sold in execution of a decree.

The whole question was discussed by a Division Bench of this Court in 1933 Lah 397 (3). The ruling of Addison, J. in 1931 Lah 545 (1) was considered and distinguished by the Division Bench of which Addison, J. was a member. It was held by the Division Bench that under S. 16, Punjab Alienation of Land Act, land belonging to a member of an agricultural tribe could not be sold in execution even though a decree had been obtained by the mortgagee for the sale of such land. It was further held that though in the majority of cases the decree of the Court must be executed as it stands, yet, when that decree would have the effect of nullifying an Act of the legislature the Court must hold its hand, and not put to sale the property which under the Act has been rendered unsaleable. I find myself in respectful agreement with the observations

of the Division Bench in 1933 Lah 397 (3). In 1935 Lah 443 (4), Skemp, J. held that where a decree ordered sale of certain property for the realization of a debt, the objection that the judgment-debtor is an agriculturist and that the property cannot be sold in execution proceedings by virtue of the Alienation of Land Act, cannot be raised for the first time in the execution proceedings. The learned Judge followed 1932 Lah 529 (2) and also referred to certain observations of Addison, J., in 1931 Lah 545 (1). The attention of the learned Judge was not however drawn to 1933 Lah 397 (3). With all respect I dissent from the opinion expressed by Skemp, J. in 1935 Lah 443 (4) as it is not supported by the clear and unambiguous phraseology of S. 16, Punjab Alienation of Land Act.

In my opinion the general principle that an executing Court cannot go behind the decree was deliberately departed from in enacting S. 16, Punjab Alienation of Land Act, and it was for this reason that reference to the execution of decrees was specifically made in S. 16. For the reasons given above, I would dismiss this appeal. Parties will bear their own costs in this Court.

Addison, J.—I agree and have nothing to add.

R.W./R.K.

Appeal dismissed

4. Budhu Ram v. Ali Shah, 1935 Lah 443.

A. I. R. 1936 Lahore 847

JAI LAL AND ABDUL RASHID, JJ.

Puran Singh and others—Appellants.

v.

Raghbir Singh and another—Respondents.

First Appeal No. 67 of 1936, Decided on 16th June 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 4th November 1935.

Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 10, 85 (2)—Tribunal declaring certain institution to be Sikh Gurdwara and certain property to be appended to it—It is not empowered to pass order as to persons by whom institution is to be managed.

After the Gurdwara Tribunal has declared that certain institution is a Sikh Gurdwara within the meaning of the Act and that certain properties are appended to it, it is no part of its function to pass an order, on an application under S. 10 of the Act, as to the persons by whom the Gurdwara or the properties appended to it should be managed. The question of

2. Ganesh Das v. Ganga Singh, 1932 Lah 529=188 I O 60=33 P L R 692.

3. Thakur Das v. Roshan Din, 1933 Lah 397=141 I C 634=34 P L R 523.

management arises only between the applicants and the committee appointed under sub-s. (2) of S. 85. [P 849 C 1,2]

Bhagat Singh and Roop Chand—for Appellants.

Mathra Das and V. N. Sethi—for Respondents.

Jai Lal, J.—In pursuance of a consolidated list published by the Local Government under S. 3, Sikh Gurdwaras Act, the properties in dispute in this litigation which are described as Bunga Sarkarwala and Bunga Mai Mallan were mentioned as properties belonging to Sri Har Mandir Sahib which had been declared to be a Sikh Gurdwara. It seems that this list was published at the instance of the Managing Committee of Gurdwaras in Amritsar and the Sheeromani Gurdwara Prabandhak Committee. Thereupon two applications were made under S. 5, Sikh Gurdwaras Act, one by Sardar Raghbir Singh and the other by Sardar Balwant Singh, claiming to be the owners of the Bunga Sarkarwala and Bunga Mai Mallan respectively. Both these cases were heard by the Sikh Gurdwaras Tribunal and were ultimately compromised between the parties. The effect of the compromise was that portions of the properties claimed by the two Committees as parts of the Bunga Sarkarwala and Bunga Mai Mallan were declared to be the personal properties of Sardar Raghbir Singh and Sardar Balwant Singh respectively and the rest were held to be wakf but were to vest in Sardar Raghbir Singh and Sardar Balwant Singh respectively for management. It was mentioned in the compromises that the wakf properties did not form part of Sri Har Mandir Sahib, but that they were separate wakfs having been created for the residence of persons who went to Amritsar to visit the Sri Har Mandir Sahib. The net result of the compromises was that it was held that the wakf portions of the Bunga Sarkarwala and Bunga Mai Mallan were separate wakfs administered and managed by Sardar Raghbir Singh and Sardar Balwant Singh respectively. I may mention here that the Committee of Management of the Gurdwaras at Amritsar, which was one of the applicants for the publication of the consolidated list under S. 3, Sikh Gurdwaras Act, is the Committee which was subsequently declared under S. 85, sub-s. (2), Sikh Gurdwaras Act, as the Committee in which the management of all

the Gurdwaras situated in Amritsar with the exception mentioned therein vested. Subsequently an application was made under S. 7, Sikh Gurdwaras Act, by the prescribed number of persons to the Local Government asking that the Bunga Sarkarwala and Bunga Mai Mallan be declared to be Sikh Gurdwaras within the meaning of the Sikh Gurdwaras Act. A notification was consequently published and two applications were made under S. 10: one by Sardar Raghbir Singh and the other by Sardar Balwant Singh claiming that the properties mentioned in the notifications were not Sikh Gurdwaras but were owned by them.

The matter came before the Sikh Gurdwaras Tribunal who, by virtue of S. 16, Sikh Gurdwaras Act, was bound first to decide the question whether there was any institution which could fall within the definition of a Sikh Gurdwara, and they came to the conclusion acting under S. 8, Sikh Gurdwaras Act, that the Bunga Sarkarwala and Bunga Mai Mallan were Sikh Gurdwaras within the definition of that expression in the Sikh Gurdwaras Act. After this decision had been given by the Sikh Gurdwaras Tribunal it became necessary for it to dispose of the applications made under S. 10 of the Act by Sardar Raghbir Singh and Sardar Balwant Singh, and in disposing of these two applications the Tribunal, acting upon the statements of the parties, that they relied upon the previous compromises, came to the conclusion that the properties which had been declared to be the personal properties of Sardar Raghbir Singh and Sardar Balwant Singh respectively should be declared to be their personal properties under S. 10 and that the rest of the properties claimed to belong to Bunga Sarkarwala and Bunga Mai Mallan, which had been found to be Sikh Gurdwaras, should be declared appended to these two Gurdwaras. The Gurdwaras Tribunal also added a further provision in their order that the management of the properties declared by them to be appendages to the two Gurdwaras should vest in Sardar Raghbir Singh and Sardar Balwant Singh respectively by virtue of the compromises.

Two appeals have been presented on behalf of the persons at whose instance the notification under S. 7, Sikh Gurdwaras Act was issued by the Local Government and it is claimed on their behalf

that the direction of the Gurdwaras Tribunal, that the management of the Gurdwaras should vest in Sardar Raghbir Singh and Sardar Balwant Singh according to the compromises, is illegal. This is how the case for the appellants was ultimately presented before us. At the commencement various points were taken but they were finally abandoned. The only question therefore that needs decision in these appeals is whether the direction given by the Sikh Gurdwaras Tribunal as to the management by Sardar Raghbir Singh and Sardar Balwant Singh of the two Gurdwaras declared by them to be Sikh Gurdwaras within the meaning of the Sikh Gurdwaras Act and the properties found by them to be appended to them is or is not legal.

Now, an examination of the Act referred to above shows that after the Gurdwaras Tribunal has declared that a certain institution is a Sikh Gurdwara within the meaning of the Act, and that certain properties are appended to it, it is no part of its function to pass an order as to the persons by whom the Gurdwara or the properties appended to it should be managed. That matter appears to be settled by the Act itself. S. 85, sub-s. (2) of the Act provides that :

There shall be one committee for the Gurdwaras known as the Darbar Sahib, Amritsar, and the Baba Atal Sahib, and all other Notified Sikh Gurdwaras situated within the Municipal boundaries of Amritsar other than the Sri Akal Takht Sahib, and it shall consist of: (i) three members elected by the electors of the Municipal area of Amritsar registered under the provisions of S. 92; (ii) four members elected by the electors of the Amritsar District registered under the provisions of S. 92 other than the electors so registered of the Municipal area of Amritsar; (iii) five members elected by the Board in general meeting, one of whom shall be one of the persons nominated to be a member of the Board under the provisions of sub-s. (2), S. 48.

It is however claimed on behalf of the respondents that the committee in whom the management of all the Gurdwaras situated in Amritsar vests by virtue of sub-s. (2), S. 85, compromised the matter with the respondents in pursuance of the proceedings taken on the applications made in 1928, and therefore they are entitled to remain in the management of the Gurdwaras and the properties appended thereto. There may or may not be force in this contention but, in my opinion, it was no function of the Gurdwaras Tribunal to decide on an application

made under S. 10 by the respondents that they shall manage the properties appended to the Gurdwaras by virtue of the compromise. It is true that the appellants were no parties to the compromise, but at the same time it must be remembered that they have nothing to do with the management of the Gurdwaras. The question of management arises only between the two respondents before us and the committee appointed under sub-s. (2), S. 85, and we express no opinion in this case whether the committee constituted under that section can now successfully resist the right of the respondents to manage the Gurdwaras and the properties appended thereto owing to the previous compromises according to which it is claimed the matter must be held to be determined between the committee and the respondents. On these appeals, in my opinion, the order should be that the direction given by the Sikh Gurdwaras Tribunal as to the right of the respondents to manage the two Gurdwaras and the properties appended thereto was not within the competence of the Tribunal and should form no part of their final order. It does not follow from this that the respondents are not entitled to manage the Gurdwaras and their properties. As I have already stated, that is a matter which must be settled, if necessary, between the committee constituted under sub-s. (2), S. 85 and the respondents.

With these observations I would accept the appeals so as to declare that that portion of the decree of the Sikh Gurdwaras Tribunal, which has declared the respondents' right to manage the Gurdwaras and the properties appended thereto is illegal and shall form no part of the decree granted by the Tribunal; the rest of the decree of the Sikh Gurdwaras Tribunal stands, that is to say, the properties which have been declared to be the personal properties of Sardar Raghbir Singh and Sardar Balwant Singh shall remain their properties, and the properties which have been declared to be appended to the two Gurdwaras shall remain the properties of the two Gurdwaras. It may be mentioned here that throughout in this judgment I have mentioned the existence of two Gurdwaras. This is owing to the manner in which the parties presented their respective cases. The real position found by the Tribunal seems to be that there is only one Sikh

Gurdwara, the Bunga Sarkarwala, and that Bunga Mai Mallan has no separate existence as a Gurdwara but is a well-known part of Bunga Sarkarwala. The parties shall bear their own costs of these proceedings in this Court and before the Tribunal.

Abdul Rashid, J.—I agree.

R.M./R.K. Order accordingly.

A. I. R. 1936 Lahore 850

SKEMP, J.

Chiragh and others—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1425 of 1935, Decided on 21st April 1936, from order of Magistrate, First Class, Ferozepore, D/- 5th December 1935.

Penal Code (1860), S. 366-A — Offence under — Resemblance with S. 362—Offence under S. 366-A is continuing offence.

There is a close resemblance in the texts of Ss. 362 and 366-A of the Code and some of the salient ingredients of the two offences are common, and it must be held that an offence under S. 366-A is also a continuing offence: 1931 All 55, Rel. on; 1924 Cal 389; 1916 Lah 361 and 1927 Lah 370, Ref. [P 851 C 1]

R. L. Anand II—for Appellants.

Ghulam Rasul for Govt. Advocate—for the Crown.

Judgment.—Chiragh, Muhammad Shafi and Qamra, appellants, have been convicted under S. 366-A, I. P. C., and each sentenced to five years' rigorous imprisonment. The girl in question is one Mt. Santo, daughter of Jiwan Singh, a goldsmith of Ferozepore City. According to her own statement and that of her father she is 13 years of age; according to the medical evidence about 14 years of age. Mt. Santo's home circumstances were not happy. Her mother was dead and her elder brother was keeping a Mahomedan woman. On 11th September she disappeared from home and her father reported her disappearance to the police. What happened is found in the girl's own statement corroborated by a considerable number of witnesses. She said that in her home they were poor and not always sufficiently fed. Her brother sometimes ill-treated her. She knew Chiragh, appellant, and he promised to keep her as his wife, give her good food and good clothing and keep her comfortably. She

went of her own free will at 3 o'clock one morning, when Chiragh came to her home by appointment and took her to his own house which is quite close. She spent that night and the following night there and next morning at 4 a. m. Mohamad Shafi took her away in a Burqa to his house where she stayed till 9 a. m. Mohammad Shafi and Qamra then took her by train from Ferozepore to Lahore, it having been suggested to the girl by Chiragh that she should be converted to Islam in Lahore. But when the girl and her two escorts reached Lahore they took her on by lorry to a village which she did not know. She was taken along a canal bank and seated near some bushes. Muhammad Shafi remained with her and Qamra was sent to the village to find out whether another Chiragh, an absconder, a notorious dealer in women, was there. Chiragh's daughter came and took her home and she was there called Fatima. After a few days she was sold in marriage to a Hindu named Chandi Ram for a buffalo valued at Rs. 100 and Rs. 50 cash.

One Nur Mahi of District Ferozepore had lost his own daughter and in searching for her found out from Murid Bhatti that another Ferozepore girl, that is, Mt. Santo, was at the house of Chandi Ram in village Rodi. Nur Mahi told the girl's father, the police were informed and she was recovered from Chandi Ram's house a short time after she had gone there. The girl's story is corroborated at every stage by evidence including that of Chandi Ram himself. Its truth is not contested by the appellants' learned counsel. His case is that an offence under S. 366-A is not a continuing offence, that the girl went to Chiragh in pursuance of a previous intrigue and that Chiragh was no party to the subsequent proceedings. The argument is that Chiragh is not guilty because the girl went to him of her own accord; the other two are not guilty because the offence is not a continuing offence. Counsel referred to 1932 Lah 555 (1) in which a learned Judge held in particular circumstances that the offence under S. 366-A, I. P. C., was complete when the young woman in question was induced to leave a passenger shed at a railway station and that what happened afterwards did not constitute a fresh

1. Kesar Mal v. Emperor, 1932 Lah 555=1932 Cr O 719=138 I O 597=33 Cr L J 678=33 P L R 79.

offence under S. 366-A. No general rule was laid down, but the case is at variance with the principle laid down in 53 All 140 (2). The Bench was presided over by the learned Chief Justice of the Allahabad High Court and its finding agreed with that of the referring Judge. The headnote includes:

Unlike the offence of kidnapping from lawful guardianship, abduction is a continuing offence and a girl is being abducted not only when she is first taken from any place but also when she is removed from one place to another . . . There is a close resemblance in the texts of Ss. 362 and 366-A, I. P. C., and some of the salient ingredients of the two offences are common, and it must be held that an offence under S. 366-A is also a continuing offence.

The differences between S. 366 and S. 366-A merely concern the manner of the inducement and the age of the girl and are irrelevant for the question of continuing offence. In view of this resemblance, 50 Cal 1004 (3), a case under S. 366, may also be referred to. The offence was held to be a continuing offence. In our own Court offences under S. 366 have been held to be continuing offences in 17 Cr L J 284 (4) and 28 Cr L J 413 (5), both single Judge decisions. In my opinion all three are guilty. Chiragh induced the girl to go to his house. No doubt she went of her own free will, but she says that he came to her father's house at 3 in the morning to fetch her away. The other two took her at least to Lahore in accordance with his suggestion. No reasonable person can doubt that all three were in a conspiracy in order to make money out of this girl by getting her married. I think they were rightly convicted, and I see no reason to interfere with the sentences, as the crime was cold-blooded and calculated. The appeals are rejected.

B.D./R.K.

Appeals dismissed.

2. Emperor v. Nanhua Dhimar, 1931 All 55=1931 Cr O 127=181 I O 246=82 Or L J 690=53 All 140=1930 A L J 1485.
3. Kushai Mallik v. Emperor, 1924 Cal 989=81 I O 906=25 Cr L J 1082=50 Cal 1004.
4. Bela Singh v. Emperor, 1916 Lah 861=34 I O 1004=17 Or L J 284=54 P L R 1916.
5. Tufail v. Emperor, 1927 Lah 870=101 I O 189=28 Or L J 413.

A. I. R. 1936 Lahore 851

SKEMP, J.

Ghulam and others—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1301 of 1935, Decided on 28th February 1936, from order of Addl. Sess. Judge, Ferozepur, D/- 19th October 1935.

Penal Code (1860), S. 99—Bailiff entering house with party and breaking open kothi of grain to attach grain of judgment-debtor—No right of private defence arises.

Where a bailiff's party enters the hut or house of a judgment-debtor to effect attachment of grain, and breaks open the lock of the kothi, although that act may not be justifiable by law, it being an act done by a public servant or under the direction of the public servant, acting in good faith under colour of his office, the party of the judgment-debtor or people on his behalf have no right of private defence under S. 99. [P 853 C 1]

Abdul Haye—for Appellants.

Jhanda Singh for Govt. Advocate—for the Crown.

Judgment.—The three appellants have been convicted under S. 325, I. P. C., by the Additional Sessions Judge of Ferozepore and sentenced, Bagga to five years' rigorous imprisonment, and Ghulam and Chamba to three years each. Guru Harbans Singh of village Guru Har Sahai had two decrees against one Gumani Singh. The first decree for over Rs. 1,300 was for rent. The second for Rs. 500 and costs was ex parte and was apparently obtained when Gumani Singh was in prison in execution of the first decree. Gumani Singh who had been the Guru's tenant in village Mohneke, left that village for a neighbouring village Pindi Bajoke where he took some land on mortgage and other land on rent. He built a number of huts at his well in village Pindi Bajoke, in which he lived along with his three sons Jawahar Singh, Ganga Singh and Khiwa Singh, his son-in-law Sunder Singh (married to Mt. Jatto), and Hakam Singh, brother of Jawahar Singh's wife. Gumani Singh cultivated some land himself, the rest was cultivated by his sons, by Sunder Singh and by Hakam Singh. Gumani Singh said that his sons gave him a share of the produce, but in the Girdawari for Rabi 1935, the sons of Gumani Singh were entered as tenants under him separately paying Re. 1 per killa as rent. Hakam Singh also was

recorded in the Girdawari for Rabbi 1935, as tenant for 14 killas in village Mohneke and Pindi Bajoke under Gumani Singh, mortgagee. The rent Hakam Singh paid is not stated on this record. The information in the Khasra Girdawari was obtained by the patwari from Gumani Singh and his sons.

On 2nd June 1935 a party came to attach property in the execution of Guru Harbans Singh's second decree against Gumani Singh. The party consisted, according to the prosecution, of a bailiff, Hardwari Lal, and about 15 other persons including Kumhars with donkeys in order to carry away the attached wheat. Ghulam, appellant, a Machhi by caste, is the Mukhtar of the Guru; Bagga appellant, a tenant and Chamba, appellant, a sweeper. During the attachment proceedings a fight took place between the two parties, in which Gumani Singh, his three sons, his daughter and her husband Hakam Singh, all received injuries; and four persons of the attaching party also received injuries. Hakam Singh unfortunately received a fatal blow on the head and died on the spot. The affair took place at noon; it was reported at the police station, distant three miles, by the bailiff at 4-15 p. m., and by Jawahar Singh at 5-30 p. m. The Sub-Inspector reached the spot at 7 p. m. He found the body of Hakam Singh lying on the ground and blood-stains near. He found bags of wheat ready to be taken away; also that Hakam Singh's kothi had been broken open and wheat amounting to a maund or $1\frac{1}{2}$ maunds was lying on the floor. Hardwari Lal, bailiff, was sent up by the police under S. 452, I. P. C., and a charge was framed against him by the Sub-divisional Officer, Fazilka, sometime before 16th October 1935, the date on which the Sub-Inspector gave evidence in the Sessions Court. The result of the proceedings against Hardwari Lal is not known.

Twelve persons of the attaching party were committed to Sessions on a charge of murder. The Sessions Judge acquitted nine of them and convicted the three appellants under S. 325, I. P. C., as aforesaid. The Assessors found that the dispute arose over the attachment of Gumani Singh's grain, that it was sudden and that there was no intention of causing death. With this opinion the learned Sessions Judge agreed. He noted that

the nature of the injuries showed that, apart from the fatal blow, there was no determined fight, as most of the injuries were swellings or bruises. Chamba and Ghulam, appellants, both received injuries and admitted participation in the fight. The Assessors doubted the guilt of the others, but the Sessions Judge found that there was no doubt about the guilt of Bagga, who was prominently mentioned by all the prosecution witnesses to whom the fatal blow was ascribed, and who had produced from his house a lathi stained with human blood. It was not contended before me that the three appellants did not take part in the fight. The argument on their behalf by Mr. Abdul Haye was that the bailiff and his party were employed in a lawful act, namely the execution of a decree, that they were resisted and that the prosecution party was the party substantially to blame. The Sessions Judge apparently did not find that the attaching party entered the hut of Hakam Singh, because in the first information report as well as in the statements made by the prosecution witnesses before the police, this incident was not mentioned. The first report merely stated that the bailiff's party wished to attach some grain lying in Hakam Singh's hut and that there was a dispute which led to the assault. The Sessions Judge also attached importance to the fact that blood-stains were found outside the hut.

Nevertheless, I am of opinion that some members of the bailiff's party did enter the hut. I base this finding on the fact that at 7 p. m., the Sub-Inspector found the lock of Hakam Singh's kothi broken open and a maund of wheat scattered on the floor. It is impossible that the prosecution party should have thought of fabricating this evidence while Hakam Singh was dying or just after he was dead. This does not put the bailiff's party entirely in the wrong. Gumani Singh's tenancy in Pindi Bajoke was so arranged as to defeat possible execution. The rent paid by Hakam Singh is not given; the rent paid to Gumani Singh by his sons was nominal; and if accepted by a civil Court, it would have the result of making the grain harvested by the sons their exclusive property immune from attachment. This is the official record based on information given by Gumani Singh and his sons; but in the Sessions

Court Gumani Singh said that his sons paid batai. There are therefore good reasons for believing that arrangements were made to defeat attachment. It was in these circumstances that the bailiff's party entered Hakam Singh's hut in order to attach his wheat. This was an act done by a public servant or under the direction of a public servant acting in good faith under colour of his office though that act might not be strictly justifiable by law. Therefore under S. 99, I. P. C., Hakam Singh had no right of private defence; and in spite of that act, it is broadly true that the attaching party went to attach Gumani Singh's wheat in execution of the decree, that they were resisted and that the fight took place in consequence of that resistance. In these circumstances I am of opinion that the sentences passed are too severe. While maintaining the convictions, I reduce the sentence of Bagga, who is found to have struck the fatal blow, to one and half years' rigorous imprisonment, and the sentences of Ghulam and Chamba, who were arrested on 4th June 1935 and convicted on 19th October 1935, to the imprisonment already undergone.

V.E./R.K.

*Sentence reduced.***A. I. R. 1936 Lahore 853**

JAI LAL, J.

Ram Das and others — Plaintiffs — Appellants.

v.

Lachhman Das and others — Defendants — Respondents.

First Appeal No. 46 of 1936, Decided on 15th April 1936, from order of Sub-Judge, First Class, Lahore, D/- 17th January 1936.

(a) Jurisdiction — Person residing within jurisdiction of one Court — But occasionally going to another place — Former Court has jurisdiction to try suits — Onus of proof that such Court has no jurisdiction lies on him who alleges it.

Where a person actually and voluntarily retains his residence at X and has not abandoned it, but he occasionally goes to another place for business, the civil Courts at X have jurisdiction to try suits concerning that person. The onus of proving that he has abandoned his residence at X lies on him who so alleges: 2 *Bom L R* 605, *Not Foll.*; 1917 *Lah* 80; 1933 *Lah* 851 and 1921 *All* 193, *Disting.*; 1930 *Cal* 347, *Rel. on.* [P 854 C 1, 2]

(b) Hindu Law — Maintenance — Grandfather in possession of joint family property — He is not personally liable to maintain minor members whose father is alive.

Where the grandfather in joint family is in possession of joint family property, his liability to maintain the minor members of the family whose father is alive arises only owing to possession of joint family property and the liability pertains to the property only and is not personal. [P 854 C 1]

Mehr Chand—for Appellants.*Durga Das and Bishen Nath*—for Respondents 1, 3 and 4.*Thakar Das* (Respondent) in person.

Judgment.—This is an appeal by the plaintiff against an order of the Subordinate Judge of Lahore returning the plaint for presentation to the Court having jurisdiction, the learned Judge having held that he had no jurisdiction to entertain the suit. The suit was for recovery of maintenance and for expenses of certain religious ceremonies. The plaintiffs are the minor grandsons of defendant 1 who is the real contesting defendant in the case. They, the plaintiffs, alleged that they constituted members of a joint Hindu family with defendant 1 and the other defendants who are the descendants of defendant 1, defendant 2 being the own father of the plaintiffs. They alleged that defendant 1 was in possession of joint family property valued at several lacs situated in Lahore and in Karachi where defendant 1 carried on extensive business, presumably, as head of the joint family. They further alleged that according to the Hindu law as modified by local custom they were not entitled to claim partition of the joint family property in the lifetime of defendant 1 but were merely entitled to maintenance and necessary expenses for the religious ceremonies. They did not claim a lien on any joint family property but claimed a personal decree against defendant 1. The case had been heard on the merits but finally the learned Subordinate Judge has disposed of it only on the question of jurisdiction.

On behalf of the appellants it is contended that the view of the learned Subordinate Judge that the suit was not maintainable in Lahore is erroneous. They claim, and this fact is admitted by the respondents, that the original family home of the parties is in Lahore but it also appears that defendant 1 has for 13 years been carrying on business in Karachi and there is no proof that he has in the meantime visited Lahore. At the same time it is not asserted or proved that de-

defendant 1 has no intention of returning to Lahore; in other words that he has abandoned his residence at Lahore and has made Karachi his permanent residence. On behalf of the appellants it is claimed that the civil Courts at Lahore have jurisdiction because under the circumstances defendant 1 must be deemed to voluntarily and actually reside in Lahore as well as at Karachi and therefore under S. 20, sub-s. (1), Civil P. C., the suit would be maintainable in Lahore. It is also claimed that in a suit like the present the cause of action must be deemed to accrue at Lahore where some joint family property is, specially considering that Lahore is the original home of the parties. It is contended that there is no personal liability of the grandfather in a case like the present to pay maintenance but that the liability to pay maintenance arises owing to possession by him of joint family property, and therefore the possession of joint family property is an essential part of the plaintiffs' cause of action in a case like the present. In my opinion this second contention of the appellants has force.

The liability to maintain the minor members of the family, grandsons in this case, in presence of their father, arises only owing to the possession by the grandfather of joint family property, otherwise he is not personally liable to maintain his minor grandsons, and as some part of the joint family property is situated in Lahore therefore it is an essential part of the plaintiffs' cause of action that the joint family property exists in Lahore. Such being the case part of the cause of action must be deemed to arise in Lahore and therefore the suit lies in Lahore. This view receives further strength from the fact that Lahore is the original home of the parties and I am not prepared to hold, as is contended by the learned counsel for the respondents, that it was for the plaintiffs affirmatively to prove that defendant 1 had the intention of returning to Lahore. I consider that in the circumstances the presumption is that defendant 1 still retains his residence in Lahore, and if he alleges that he has abandoned his residence at Lahore and that he has no intention of returning to Lahore it is for him to prove this allegation. As I have already stated he has neither alleged nor proved that he has no intention of returning to Lahore.

I am also inclined to hold that under the circumstances the defendant must be deemed to be voluntarily and actually residing at Lahore. Explanation to S. 20, Civil P. C., makes it quite clear that a person may have two places of residence; he cannot simultaneously be physically present in both the places. 2 Bom L R 605 (1) cited by the counsel for the respondents seems to support his contention, but with great respect I feel hesitation in endorsing the view taken in that case. The judgment of the learned Judges is not detailed and there is no discussion of the question involved. 112 P R 1916 (2) and 1933 Lah 851 (3) have no application to the present case because in both those cases it was found as a fact that the defendant had no intention of returning to the family place and that he had left that place. 1921 All 193 (4) was decided on its own peculiar facts as it does not appear that the defendant had ever resided in the home of the family and it was consequently held that mere fact of the possession of the family house does not give jurisdiction to the Court. In the present case at one time defendant 1 did reside in Lahore and as I have already stated it is not proved that he has abandoned his home and does not intend to return to Lahore.

On the other hand, 1930 Cal 347 (5) seems to indicate that where a person has permanent residence in one place and residence with family for the time in another place he must be deemed to reside in both the places. I consider therefore that in this case defendant 1 must be deemed to actually and voluntarily reside in Lahore. On both these grounds I am of opinion that the view of the learned Subordinate Judge that he had no jurisdiction to entertain the suit is erroneous. I accordingly accept this appeal, set aside his order and send the case back to him with direction to dispose of the suit on its merits. The costs of this appeal shall abide the result. The

1. Ugar Chand Mulchand v. Suraj Mal, (1900) 2 Bom L R 605.
2. Guran Ditta Mal v. Ram Das, 1917 Lah 30=38 I C 62=112 P R 1916.
3. Dhera Shah v. Sant Ram, 1933 Lah 851=145 I C 755=34 P L R 658.
4. Kishore Lal v. Ram Sunder, 1921 All 193=64 I C 688=19 A L J 822.
5. Sitanath Bhadra v. Jatindra Nath, 1930 Cal 347=125 I C 320=57 Cal 65.

parties have been directed to appear before the Subordinate Judge on 18th May 1936.

R.W./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 855

YOUNG, C. J. AND MONROE, J.

Faiz Ahmad—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1381 of 1935, Decided on 24th March 1936, from order of Addl. Sess. Judge, Lyallpur, D/- 6th December 1935.

Criminal P. C. (1898), S. 164—Confession to zaildar—Accused minor and villager—Inducement to accused that he would be let off if he confessed, being minor—Confession under S. 164 after going through necessary formality—Inducement operated to defeat confession.

Where an accused, a Punjabi village boy of 16 makes the confession to zaildar while he was taken by him to the police, and he was told by him: "You are a minor. You will be let off if you tell the truth before the police just as you have done in our presence." Before the Magistrate he made the same confession on the Magistrate telling him that he was not to allow any inducement to operate upon his mind in making the confession:

Held: that merely going through the form was not sufficient to remove the effect of inducement and that the inducement operated to defeat the confession under S. 164. [P 856 C 1]

Khalifa Shuja-ud-Din and M. J. Anghar—for Appellant.

D. R. Sawhney—for the Crown.

Young, C. J.—Faiz Ahmad, a boy of 16 years of age, has been condemned to death by the learned Additional Sessions Judge of Lyallpur. The accused was the youngest son of the lambardar of the village. It is suggested that he has murdered Sardara because of a dispute between Sardara and his father, the lambardar, some six months before the murder. The accused, it is said, bore a grudge from that date against the deceased as he considered his father had been grossly insulted. According to the evidence of the brother of Sardara, the deceased took his evening meal on the 17th June and left about 20 minutes afterwards for his field with a cartload of manure. It is alleged that the accused followed Sardara armed with a hatchet and that when Sardara came to a spot about three to five hundred yards away from his house, the accused climbed up the back of the cart over the manure and killed the deceased with two or three very severe blows on the head.

It is also alleged, and this is taken from an alleged confession by the accused, that the accused was further moved to commit this crime by the fact that the deceased had called his she-buffalo by the name of a niece of his and made some very unseemly remarks on the subject. The deceased was discovered next morning with his body hanging over the cart, his legs having been caught in the railing round the cart.

The medical evidence discloses that the head of the deceased must have been nearly battered to bits. There was a comminuted fracture of most of the bones of the skull and the brain was exuding from the wounds. It appears to us—and this is important—that death must have been immediate or very shortly after the receipt of the wounds. The doctor further in his medical evidence says that death would have taken place from 4 to 8 hours after the last meal of the deceased. The prosecution relies upon the motive which has been indicated by a witness, whom the learned Judge has disbelieved, upon the production of a kulhari by one Muhammad Ali, which was stained with human blood, and on an oral confession made by the accused, and a confession under S. 164, Criminal P. C. The evidence as to the production of the blood-stained kulhari is very unsatisfactory. It is suggested that after killing the deceased the accused lent this kulhari blade, which then had no handle, to Muhammad Ali when it was covered with blood. This seems a little unlikely. It is also said that Muhammad Ali did not use the head of the kulhari as he could not find the handle, and when told that the police had arrived in the village he threw this kulhari blade away in a field. Unless Muhammad Ali knew about the crime, and knew that the axe had been used for this purpose, it seems extraordinarily unlikely that even the arrival of the police in the village would have made him throw the blade away. If he did, the fact is much more consistent with Muhammad Ali having committed the murder than Faiz Ahmad. Faiz Ahmad, in our opinion, would have never handed over the blade of the kulhari stained with blood to anyone else the next morning nor would Muhammad Ali have taken it in that condition.

The evidence of the confessions also is hopeless. The oral confession is very

properly not believed by the learned Judge. As regards the confession under S. 164, Criminal P. C., the evidence of Ladha Ram is important. Ladha Ram, according to the Judge, is hostile to the accused. He had no reason to try and help him. His evidence clearly establishes that when the zaildar Ghulam Nabi took this boy to the police, he told him: "You are a minor. You will be let off if you tell the truth before the police just as you have done in our presence." Counsel for the Crown argues that this inducement would not operate to defeat the confession made under S. 164, as the Magistrate who recorded the confession has given evidence that he told this Punjabi villager, aged 16, that he was not to allow any inducement to operate upon his mind in making the confession. He relies on S. 28, Evidence Act, which reads as follows:

If such a confession, as is referred to in S. 24, is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.

He argues that merely going through the form, which, we believe, the Magistrate did go through on this occasion, ought to satisfy us that the effect of the inducement had been fully removed. We are not convinced in the first place that this Punjabi youth would clearly understand the nature of the words used by the Magistrate. In any event, the parrot-like use of a form like this would have no effect upon the mind of a boy who had been told before going to the Magistrate that if he made a confession, he would be let free. If the authorities or the police make such an inducement to any confessing accused, it is almost certain that they would also tell him that the Magistrate would ask questions of this description but that they really meant nothing. We must believe that the assurance made by Ghulam Nabi to the accused either itself would operate upon his mind when he made the confession or that the inducement would in all probability have been repeated before the confession was made. We are, therefore, of opinion that this confession must be excluded in this case. In any event we are not impressed by the nature of the confession. It is difficult to believe that the deceased would have allowed this boy, whom he knew to be inimical towards him, and whom he had just infuriated by the allu-

sion to his niece, to climb up over the rear of the cart, over the manure, and quietly slaughter him with an axe. Another point, which in our minds makes the confession seem untrue, is that the doctor says death took place from 4 to 8 hours after the deceased had taken his meal. According to the evidence and the confession, death would have taken place within an hour of the deceased having taken his meal.

On the whole we have come to the conclusion that this conviction cannot stand. The conviction and the sentence are both set aside and the accused set at liberty.

V.B./R.K.

Conviction set aside.

A. I. R. 1936 Lahore 856

ADDISON AND ABDUL RASHID, JJ.

Badri Shah-Sohan Lal—Petitioners.

v.

Commissioner of Income-tax—Opposite Party.

Civil Misc. Petn. No. 81 of 1936, Decided on 10th June 1936.

Income-tax—Evidence—Vouchers not produced to enable checking of account books—Value of account books is no greater than assessee's mere word.

Where the assessee does not produce any vouchers or any other material which may enable a detailed check of his account books, the value of the account books produced by the assessee is, therefore, no higher than his mere word. [P 857 C 1]

Kirpa Ram Bajaj—for Petitioners.

J. N. Aggarwal—for Opposite Party.

Abdul Rashid, J.—This is an application under S. 66 (3), Income-tax Act, for the issue of a mandamus to compel the Income-tax Commissioner, Punjab, to state the case of Badri Shah Sohan Lal Saraf of Gujranwala to this Court. The question of law formulated on behalf of the assessee is as follows:

Is there any material on record justifying the rejection of the trading account of the petitioner and for adding the sum of Rs. 6,000 as alleged additional profits?

The assessee is the biggest bullion dealer in Gujranwala. In the year 1931-32 his business amounted to over 13 lacs of rupees, while the turn-over in the year 1932-33 was over 18 lacs of rupees. The present application concerns the assessment for 1934-35 in respect of the accounting period ending on 12th April 1934. The assessee's turn-over was over 24 lacs of rupees. Though the business of the assessee has been rapidly increas-

ing during the last five years, the percentage of the gross profit shown by him has been dwindling. In the year 1930-31, '55 per cent were shown as the gross profits, in the next year '45. In the year 1932-33 the gross profits amounted to '20 per cent., and in the year under consideration to '19 per cent. The Income-tax Officer was of the opinion that as the rate of profit disclosed by the assessee was below the average expectation of gold business during the year, of its steady rise in price, the books of the assessee did not disclose the true state of his business. Keeping in view profits earned by other persons carrying on similar business, the Income-tax Officer added the sum of Rs. 6,000 to the income shown in the books. The assessee was consequently asked to pay income-tax on a sum of Rs. 10,745.

The principal point urged by the learned counsel for the assessee was that as no flaw had been discovered by the income-tax authorities in his trading account, the Income-tax Officer was not justified in adding an additional sum of Rs. 6,000 as estimated profits to Rs. 4,745, which were shown as actual profits in the trading account. The only question which the assessee is entitled to raise in this Court is whether there was any material for making an addition of Rs. 6,000 on account of alleged profits to the returned profits. The assessee's stock figure in 1932-33 was over 2 lacs and against this large capital, he only showed gross profits of Rs 3,747. In the year 1933-34, the stock rose to 2.9 lacs and the gross profits were Rs. 4,745. The gross profits, therefore, were much less than secured interest payable on the best securities. As pointed out by the Commissioner the business requires considerable skill and entails risk, and in spite of this the rate of profit shown was not even equivalent to the insurance payable on the gold transmitted by the assessee to Bombay. The assessee did not produce any vouchers or any other material which may enable a detailed check of his account books. The value of the account books produced by the assessee is, therefore, no higher than his mere word.

We, therefore, hold that there was material justifying the rejection of the trading account of the applicant and for adding the sum of Rs. 6,000 as addi-

tional profits. Even after adding Rupees 6,000 as additional profits the rate of the profit works out at '5 per cent. For the reasons given above we dismiss this application. Parties will bear their own costs.

B.D./R.K. *Application dismissed.*

A. I. R. 1936 Lahore 857

TEK CHAND, J.

(Firm) Jhanda Ram-Wadhawa Ram—
Decree-holder—Petitioner.

v.

Allah Yar—Judgment-debtor—Opposite Party.

Civil Ref. No. 66 of 1935, Decided on 14th May 1936, from reference of Offg. Deputy Commissioner, Jhang, D/- 13th September 1935.

(a) Limitation Act (1908), S. 14—'Care and attention'—Exercise of—Deputy Commissioner without taking proper care filing proceedings in wrong Court—He being in position to know the correct Court on slightest care and attention but not exercising it—His case does not come under S. 14 and no exclusion of time can be granted.

Where the Deputy Commissioner without explaining the reasons moves the Senior Subordinate Court under S. 21-A, Punjab Alienation of Land Act, to set aside the order of the executing Court, whereas had he bestowed the slightest care and attention he would have known that the alleged error of the executing Court would have been set right by the High Court, the proceedings before the Senior Sub-Judge cannot be said to have been prosecuted in 'good faith' and the time spent there cannot be excluded.

[P 858 C 1]

(b) Punjab Alienation of Land Act (13 of 1900), S. 21-A—Provisions mandatory—High Court is not empowered to extend time under them.

The provisions of S. 21-A of the Act are mandatory and do not confer any power on the High Court to extend the time prescribed therein for making the application. [P 858 C 1]

J. L. Kapur—for Petitioner.

Allah Yar in person.

Order.—Counsel for the decree-holder raises a preliminary objection that this petition for revision by the Deputy Commissioner, Jhang, under S. 21-A, the Punjab Alienation of Land Act, is time barred inasmuch as the order of the Subordinate Judge complained of was passed on 1st February 1935; the matter admittedly came to the notice of the Deputy Commissioner on 6th February 1935 and the revision was not submitted to this Court

till 13th September 1935. Under S. 21-A the period prescribed for moving the High Court is two months from the date upon which the Deputy Commissioner is "informed" of the decree or order which has been passed. The provisions of that section are mandatory, and do not confer any power on the High Court to extend the time prescribed therein for making the application: 200 P L R 1911 (1). S. 5, Lim. Act, has not been extended to local and special laws by S. 29 of that Act (as amended in 1922) and is therefore inapplicable. The only question for consideration is whether the time, during which the Deputy Commissioner's application remained pending before the Senior Subordinate Judge can be excluded under S. 14, Lim. Act which has been made applicable to special and local laws by S. 29. That section, however, would apply only if it can be shown that the proceedings in the Senior Subordinate Judge's Court were prosecuted by the applicant in 'good faith.' In S. 2 (7), Lim. Act, it is laid down that:

Nothing shall be deemed to be done in 'good faith,' which is not done with due care and attention.

The Deputy Commissioner in his report has not explained as to why he moved the Senior Subordinate Judge under S. 21-A, Alienation of Land Act, to set aside the order of the executing Court, to which objection is being taken. Obviously no appeal against that order lay to the Senior Subordinate Judge, and if the slightest 'care and attention' had been bestowed on the matter it would have become clear that the only Court which had jurisdiction to set right the alleged error of the executing Court was the High Court. I am, therefore, unable to hold that the proceedings in the Court of the Senior Subordinate Judge had been prosecuted in 'good faith' and the time spent there can be excluded. I sustain the preliminary objection and reject the application as time barred. There will be no order as to costs.

R.W./R.K. *Application rejected.*

1. Katara v. Bhai Arjan Singh, (1911) 200 P L R 1911=11 I C 34.

A. I. R. 1936 Lahore 858

ADDISON AND ABDUL RASHID, JJ.

Mahmud Shah—Defendant—Appellant.

v.

Pir Shah—Plaintiff—Respondent.

Letters Patent Appeal No. 6 of 1936, Decided on 27th May 1936, from order of Jai Lal, J., Lahore, D/- 1st November 1935, reported in 1936 *Lah* 135.

Declaratory suit—Suit for mere declaration that plaintiff is legitimate son of defendant—Plaintiff having no present interest in defendant's property—Suit does not lie: 38 P L R 455=1936 *Lah* 135=161 I C 837, *Reversed*.

A suit for mere declaration that the plaintiff is the legitimate son of the defendant, is not maintainable when the plaintiff has no present interest in the property of his father and father can do whatever he likes with the property during his lifetime: 1930 *Lah* 795 and 35 Cal 777, *Ref.*; 29 *Mad* 48 and 34 *Bom* 676, *Disting.*; 38 P L R 455=1936 *Lah* 135=161 I C 837, *Reversed*. [P 859 C 1, 2]

Arjan Dev Bagai—for Appellant.

Badri Das and Vishnu Datta—for Respondent.

Addison, J.—The plaintiff sued for a declaration that he was the legitimate son of the defendant. His suit was decreed by the first Court. The lower appellate Court accepted the appeal and dismissed the suit on the ground that such a suit did not lie. On appeal to this Court a learned single Judge held that it does lie and has remanded the appeal to the lower appellate Court for decision on the merits. Against this decision this Letters Patent appeal has been preferred.

The plaintiff purchased some property and the defendant instituted a suit to pre-empt that sale. In the course of that suit he denied that the plaintiff was his legitimate son though he admitted that he was his illegitimate son. That suit was never decided but was withdrawn as a person with a superior right of pre-emption also claimed to pre-empt the sale. Thereafter the plaintiff instituted the present suit for a declaration that as he was the legitimate son of the defendant alleging that the denial of the defendant was adversely affecting the interests of the plaintiff. The only question involved in the appeal is whether a suit like the present lies. It was held in 1930 *Lah* 795 (1) that a suit for a mere declaration

1. Akbar Khan v. Farman Ali, 1930 *Lah* 795=121 I C 417=31 P L R 900.

that one person is related to another is not a suit to establish a legal right or any right as to property and is incompetent. Other points were involved in that case but there was a clear finding as mentioned. The parties here are Qureshis and at present the plaintiff has no interest in the property of his father. This being so the father can do what he likes with his property in his lifetime, while the plaintiff may die before he dies. Under S. 42, Specific Relief Act, a person entitled to any legal character or to any right as to any property may institute a suit for a declaration. It is obvious that the plaintiff is not entitled to a declaration as to any right to any property at this stage and as held in 1930 Lah 795 (1) a suit for a declaration that a person is related to another is not a suit to establish a legal right. Again it was held in 35 Cal 777 (2) that a person cannot sue for a declaration of his right to immovable property which may never come into existence and that a mere contingent right which may never ripen into an actual existing right is not always sufficient ground for an action for such a declaration. In 29 Mad 48 (3), a case in which the parties were Hindus, it was held that the setting up of an adoption, alleged to have been made by the plaintiff is such an infringement of his right as sole owner as to entitle him to sue for a declaratory decree under S. 42, Specific Relief Act, that the person alleged to have been adopted is not his adopted son. Amongst Hindus, if a son is born or adopted, the right of the father to all his property is immediately affected and the son becomes entitled as of right to one-half of his ancestral property at least. In such circumstances S. 42 obviously applies and this case does not help the respondent. A similar case to the last is 34 Bom 676 (4).

The learned single Judge has stated that the declaration may be useful to the respondent for the purpose of acquiring land as there are restrictions to the acquisition of land by persons who are not members of agricultural tribes. The parties being Qureshis, however, probably

follow Shia law and an illegitimate son amongst Shias is the son of his mother. That seems to imply that he would be a Qureshi. Besides, at this stage no one has denied that he is a Qureshi. If the Collector refuses to sanction a sale in his favour on the ground that he is not a Qureshi a suit against the Secretary of State will lie. If any other person does so, it will be open for decision in a suit between them, and in such a suit this decision would not be res judicata. The mere fact, therefore, that the defendant stated that the plaintiff was his illegitimate son gives no cause of action to the plaintiff to institute a suit for a mere declaration under S. 42, Specific Relief Act. For the reasons given we accept the appeal and dismiss the suit with costs of this Bench. The parties will bear their own costs in all other Courts.

V.B./R.K.

Appeal allowed.

* A. I. R. 1936 Lahore 859

SKEMP, J.

Mulhe and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 259 of 1936, Decided on 16th April 1936, case reported by Sess. Judge, Delhi, D/- 29th January 1936.

* Criminal Trial—Appeal—Joint appeal by accused with common interests is valid.

A joint appeal by persons with common interests convicted at the same trial is in accordance with law and should be heard. This proposition will have no application where the interests of any of the appellants conflict with each other: 5 Bom L R 704; 1917 Oudh 329 and 13 P R 1890 Cr., Ref. [P 860 O 2, P 861 O 1]

Faqir Chand Mittal—for Petitioners.

Jhanda Singh for Govt. Advocate—for the Crown.

Order.—Four persons were convicted by a 3rd Class Magistrate in the Delhi district under Ss. 341 and 352, I. P. C., and sentenced to pay fines. They appealed and the Additional District Magistrate, Delhi, dismissed their appeal on the ground that:

This is a joint appeal by four accused and it does not lie. Stamps are required on every petition of appeal and a joint appeal is not maintainable.

The accused persons lodged an application for revision in the Court of the learned Sessions Judge, Mr. Beckett.

2. Shamarendra Chandra Deb Barman v. Birendra Khishore, (1908) 35 Cal 777=12 O W N 777=8 O L J 1.

3. Chinnaswami Mudaliar v. Ambalavana Mudaliar, (1906) 29 Mad 48.

4. Bai Sri Vaktuba v. Agarsinghji, (1910) 84 Bom 676=7 I O 945=12 Bom L R 697.

Mr. Beckett forwarded the proceedings for revision on the following grounds:

Although it is said to be the practice that joint appeals are not accepted in criminal cases I am unable to find any legal authority for this practice. There is authority for the proposition that a joint appeal should not be presented when the interests of the accused are inconsistent, but there does not seem to be any particular reason why a joint appeal should not be put in when all the accused are presenting the same defence more particularly as the appeal is invariably argued by the same counsel and the presentation of separate appeals is a mere duplication. The only effect in admitting joint appeals would be on the stamp revenue, and this would be almost negligible. It seems desirable that there should be an authoritative decision on the question whether joint appeals in criminal cases are admissible when the defences of the accused are not inconsistent and the proceedings are accordingly referred to the High Court.

The petition has been supported before me by Mr. Faqir Chand Mittal. Appeals are governed by Ch. 31, Criminal P. C., which is silent on the point whether appeals must be lodged separately or may be lodged jointly. Various sections in that chapter speak of an appeal in the singular, but this is immaterial because under S. 13, General Clauses Act 10 of 1897, the singular includes the plural. The present appeal was lodged under S. 407 and heard by the Additional District Magistrate under S. 407 (2), Criminal P. C. In support of the Sessions Judge's recommendation, Mr. Faqir Chand Mittal has produced three rulings which have a bearing on the subject: one is a direct authority. It appears that in the Bombay Presidency there used to be in force a criminal Circular No. 74 which made it necessary for accused persons to put a separate stamp on each copy of the judgment appealed against but under that circular the District Magistrate could dispense with such separate copies. This is no longer the rule in Bombay. The present rule, Ch. 7, R. 114, Circular Orders issued by the High Court of Bombay, 1931, is as follows:

Several persons complaining of one order of judgment in a criminal case affecting them all may join in one appeal or application for revision, and one copy of the judgment or order complained of shall be sufficient. The appellate Court may, however, require separate petitions to be made by petitioners whose cases are, in its opinion, conflicting. Where a joint petition is allowed one Court-fee and one Vakalatnama shall be sufficient (vide Bombay Government Gazette for 1915, Part 1, p. 2910).

This rule is in force since the year 1915. Under the old rule a case, 5 Bom L R

704 (1), was decided by a Bench of the Bombay High Court in the year 1903. Three co-accused filed a joint appeal to the District Magistrate together with a copy of the judgment appealed against. They subsequently tendered to the District Magistrate the stamps requisite for the additional copies, but the District Magistrate refused to dispense with the separate copies. The Bench held that the District Magistrate would have exercised a sounder discretion if by virtue of the powers given in S. 419, Criminal P. C., he had dispensed with separate copies. In 18 Cr L J 512 (2) a District Magistrate in Oudh refused to hear an appeal of seven persons on the ground that there should have been seven distinct petitions of appeal accompanied by seven copies of judgment. He quoted the Bombay High Court Circular No. 74 previously referred to. The District Magistrate's order was set aside by the learned Judicial Commissioner on the ground that the circular had no effect in Oudh and that the practice of the Judicial Commissioner's Court was to permit persons convicted together to appeal with one petition of appeal and with one copy of the judgment. My attention was also directed to 13 P R 1890 Cr (3). In this case two accused whose interests partially conflicted lodged a joint appeal through a single counsel against their conviction for murder. The appeal was heard by the Chief Court, but they deprecated the act of counsel because of the conflicting interests of the accused. This would indicate that in the view of the Bench there was no objection to the practice if the interests of the accused were identical.

I have enquired from the High Court office and the practice is to accept joint appeals from persons convicted at the same trial in the High Court. My own experience as an appellate Magistrate and as a Sessions Judge in different parts of the Punjab is to the same effect. Therefore I hold that a joint appeal by persons with common interests convicted at the same trial is in accordance with law and should be heard. The foregoing remarks of course apply only to those cases (a great

1. Emperor v. Sitaram Ragho, (1903) 5 Bom L R 704.

2. Mt. Batasha v. Emperor, 1917 Oudh 329 = 99 I C 480 = 18 Cr L J 512 = 4 O L J 82.

3. Hira Singh v. Empress, (1890) 13 P R 1890 (Cr).

majority) in which the interests of the appellants are common, and have no application where the interests of any of the appellants conflict with each other. I accept the recommendation of the learned Sessions Judge, set aside the order of the Additional District Magistrate, dismissing the appeal, and direct him to restore it to his file and dispose of it on the merits.

B.D./R.K.

Reference accepted.

A. I. R. 1936 Lahore 861

TEK CHAND AND DALIP SINGH, JJ.

Wasanda Ram—Plaintiff—Appellant.

v.

Ram Chand and others—Respondents.

Letters Patent Appeal No. 46 of 1936, Decided on 26th June 1936, from decree of Jai Lal, J., D/- 23rd January 1936.

Civil P. C. (1908), O. 32, Rr. 11 and 15—At time of institution defendant of unsound mind represented by his brother defendant as guardian-ad-litem—Suit dismissed—Appeal—Both defendants impleaded as respondents but omission to describe one of them as guardian-ad-litem—Death of guardian-ad-litem pending appeal—No fresh guardian appointed—Decree held was nullity and not binding on defendant of unsound mind: 38 P L R 320=161 I C 987, *Reversed*.

At the time of the institution of a suit the defendant was of unsound mind but was represented by the other defendant, his elder brother, as his guardian-ad-litem. The suit was dismissed and in appeal the memorandum of appeal impleaded both the defendants as respondents and by oversight omitted to describe one of them as guardian-ad-litem. During the pendency of the appeal the guardian-ad-litem died and no steps were taken to substitute another. A decree against the other defendant (of unsound mind) was passed without his being represented by another guardian-ad-litem after the case was argued by counsel appointed by the deceased respondent:

Held: that there was only a misdescription in the heading of the appeal and that the defendant was represented by the guardian-ad-litem and that the appeal having proceeded in the absence of a guardian-ad-litem after his death, the defendant was not represented and the decree passed in the appeal was a nullity and not binding on him: 1936 Oudh 67 and 1919 All 409, *Disting.*; 38 P L R 320=161 I C 987, *Reversed*. [P 862 C 2]

J. L. Kapur—for Appellant.

Iqbal Singh—for Respondents.

Tek Chand, J.—This is an appeal under the Letters Patent from the judgment of a Single Bench of this Court dismissing on second appeal the suit of Wasanda Ram, plaintiff-appellant, for a declaration that a decree for possession of land passed against him by the Additional District Judge, Jhang, at Sargodha, on

18th February 1931, is a nullity and is not binding on him, and for a perpetual injunction restraining the defendants-respondents from executing the aforesaid decree against him. The relevant facts are that on 24th July 1924 Ram Chand and others, the predecessors-in-interest of the present defendants-respondents, brought a suit against Ralia Ram alias Rallu and his brother Wasanda Ram for possession of land. In the plaint Wasanda Ram was described as a "minor" and it was prayed that his elder brother Ralia Ram, the other defendant, be appointed his guardian-ad-litem. The suit remained pending for five years and was eventually dismissed against both defendants on 4th December 1929. Ram Chand and others, the then plaintiffs, appealed to the District Judge on 30th January 1930 (Civil Appeal No. 3 of 1930 of the District Judge's Court). In that appeal both Ralia Ram and Wasanda Ram were impleaded as respondents, but Wasanda Ram was not shown as a "minor" or a person under disability, nor was Ralia Ram described as his guardian-ad-litem. It appears that Ralia Ram had engaged a pleader, Lala Lakhmi Das, to represent the defendants in that appeal. Before the hearing of the appeal, Ralia Ram died on 10th December 1930. On 22nd December 1930, an application under O. 22, R. 4 was made by the then appellants Ram Chand, etc.

In the application Ram Kishan Lal, Sain Ditta and Wasanda Ram, brothers of the deceased, were stated to be his legal representatives. After enquiry the Additional District Judge found that three of these brothers, namely Ram Kishan Lal Sain Ditta [and Wasanda Ram] were separate from Ralia Ram and therefore could not be impleaded as his legal representatives. He accordingly ordered that Wasanda Ram, who alone was joint with the deceased, be made his legal representative. The appeal therefore proceeded against Wasanda Ram as the sole respondent. No steps however appear to have been taken to appoint a guardian-ad-litem for him. Lala Lakhmi Das, Pleader, who, as already stated, had been engaged by Ralia Ram in his life-time to contest the appeal, appeared at the hearing, and argued the case on behalf of the respondent Wasanda Ram, without a fresh vakalatnama from a duly authorised person. On 18th February 1931 the appeal was accepted by the

Additional District Judge, and Ram Chand and others granted a decree against Wasanda Ram for possession of the land in suit. From this decree a second appeal was lodged in this Court by Wasanda Ram through an Advocate, and in the memorandum of appeal he was not described as a minor or a person under any other disability. This appeal was dismissed in limine. It is not clear from the record as to who had given the necessary vakalatnama to the Advocate who presented this appeal, as Part B of the record has been destroyed.

On 14th January 1933, Wasanda Ram, through one Maya Das (who is stated to be a nephew of his) as his next friend, instituted the present suit alleging that he was a person of unsound mind and was not properly represented in the appeal decided by the Additional District Judge on 18th February 1931, and consequently the decree passed against him in that appeal was a nullity and was not binding on him. He also prayed for an injunction restraining the defendants from executing the decree. The trial Judge found that Wasanda Ram was of unsound mind during the previous litigation and was wrongly described as a "minor" in the plaint, and that in the appeal he was not represented by a guardian-ad-litem and therefore the decree passed therein was not binding on him. The defendants appealed to the District Judge, who agreed with the findings of the Court of first instance and dismissed the appeal. On second appeal, the learned Judge in Chambers accepted the findings of the Courts below that Wasanda Ram was a person of unsound mind during the previous litigation and that on the death of Ralia Ram a new guardian-ad-litem should have been appointed. He held however that in the peculiar circumstances of this case the decree could only be set aside if prejudice had been caused to Wasanda Ram, and as there was no proof of any prejudice, he accepted the appeal and dismissed the suit.

In this appeal under the Letters Patent before us, counsel for the defendants-respondents attempted to argue that Wasanda Ram was in fact not of unsound mind during the previous litigation. This however, is a question of fact, on which a clear finding had been recorded by the learned District Judge and it appears from the judgment of the learned Judge in

Chambers that both counsel had accepted this position before him and arguments had proceeded on that basis. It is therefore not open to counsel for the defendants-respondents to agitate this matter again before us in this appeal. It is admitted that Wasanda Ram is an elderly person and was not a minor when the previous suit was instituted. It appears therefore that in the plaint of that suit the word 'na baligh' (minor) was loosely used for a person of unsound mind (fatir-ul-aqal), and his brother Ralia Ram was appointed his guardian-ad-litem. On the dismissal of the suit, the then appellants impleaded both Wasanda Ram and Ralia Ram as respondents, but by an oversight omitted to describe Wasanda Ram as a 'na baligh' (minor) or a person of unsound mind and Ralia Ram as his guardian-ad-litem. There is little doubt that their real intention was to implead Wasanda Ram as a respondent under the guardianship of Ralia Ram, who had been duly appointed his guardian-ad-litem in the trial Court. It was merely a case of misdescription of one of the parties. It must therefore be held that at the institution of the appeal, and up to the date of Ralia Ram's death, Wasanda Ram was effectively represented by Ralia Ram as his guardian-ad-litem. On Ralia Ram's death, on 10th December 1930, however Wasanda Ram ceased to be properly represented, and it was the duty of the then appellants to apply for the appointment of another guardian-ad-litem. This they failed to do, either by oversight or for some other reason.

It is no doubt true that at the hearing of the appeal, Lala Lakhmi Das, Pleader, appeared for Wasanda Ram and argued his case without objection by the opposite party or the Court. But, as already stated, Lala Lakhmi Das had been engaged by Ralia Ram, who had since died. His authority therefore had terminated on Ralia Ram's death, and he could not represent Wasanda Ram any longer in those proceedings. The position therefore is that the sole respondent in the previous appeal, namely Wasanda Ram, was a person under disability, whose guardian-ad-litem had died during the pendency of the appeal and no fresh guardian had been appointed. In these circumstances the decree passed against him was clearly a nullity and is not binding on him. The learned Judge in Cham.

bers has relied upon 1936 Oudh 67 (1) and 17 A L J 257 (2). In those cases the party concerned was not under any disability at the commencement of the litigation. He was of sound mind at the time, but insanity had supervened during the pendente lite. This fact had proceeded to decide the case on the merits. It was held that, in those circumstances, the decree could not be set aside without proof of fraud or prejudice. Assuming that the law is correctly laid down in these cases (a matter on which I need express no opinion here), they appear to me to be clearly distinguishable from the case before us. As already stated, in this case the finding of the Courts below, which was accepted by both counsel before the learned Judge in Chambers, was that Wasanda Ram was a person of unsound mind from the very commencement of the previous litigation. It is therefore not a case of insanity of a party supervening pendente lite.

No other grounds were urged by counsel for the respondents in support of the decree of the learned Judge. I must therefore hold that the decree passed by the Additional District Judge on 18th February 1931 against the present plaintiff Wasanda Ram is a nullity and is not binding on him, and he is entitled to a declaration to that effect. The result of this declaration is that the parties must be relegated to the position in which they were in Civil Appeal No. 3 of 1930, when the plaintiff's guardian-ad-litem died on 10th December 1930. I have already held above that there was a misdescription in the heading of that appeal, that the appeal must be taken to have been properly instituted against Wasanda Ram (a person of unsound mind) with Ralia Ram as his guardian ad litem, and that on Ralia Ram's death a new guardian-ad-litem should have been appointed. That appeal must therefore be re-tried from the stage at which it was on 10th December 1930. I would accordingly accept this appeal, set aside the judgment and decree of the learned Judge in Chambers, and pass a decree in favour of the plaintiff granting him the declaration asked for, and directing that Civil Appeal No. 3 of 1930 (of the

file of the Additional District Judge, Jhang, at Sargodha) be restored at its original number and re-heard in accordance with law. Having regard to all the circumstances of the case, I would leave the parties to bear their own costs throughout. Mr. Iqbal Singh, counsel for the respondents, has been directed to cause his clients to appear before the District Judge, Sargodha, on Monday, the 27th July 1936, and make a proper application for the appointment of a guardian-ad-litem of Wasanda Ram.

Dalip Singh, J.—I agree.

D.S./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 863

ADDISON AND ABDUL RASHID, JJ.

Rup Lal and others—Appellants.

v.

Manohar Lal and others—Respondents.

Letters Patent Appeal No. 15 of 1936, Decided on 19th May 1936, against order of Jai Lal, J., D/- 17th December 1935, as reported in 1936 *Lah* 712.

Civil P. C. (1908), S. 141, O. 9, R. 9 and O. 43, R. 1 (c)—Provisions of O. 9, R. 9 are applicable to probate proceedings—Application for grant of probate dismissed on default—Order is appealable under O. 43, R. 1 (c) or under S. 299, Succession Act.

The proceedings referred to in S. 141, Civil P. C., include original matters in the nature of suits, such as proceedings in probates, guardianships and so forth and do not include executions. The provisions of O. 9, R. 9 are therefore applicable to probate proceedings and an application for grant of probate can be dismissed in default and restored and an order dismissing such application under O. 9, R. 9 is appealable under O. 43, R. 1 (c) and certainly under S. 299 of Succession Act: 17 *All* 106; 1919 *Mad* 112 and 20 *I C* 281, *Rel. on*; 1936 *Lah* 712, *Affirmed*.

(P 864 C 1, 2)

*Mehr Chand Mahajan and Yash Pal Gandhi—*for Appellants.

*Shamair Chand—*for Respondents.

Addison, J.—Three minors applied to the District Judge through their next friend for grant of probate of a will. On the date of hearing most of the respondents appeared. Some however had not been served. Out of the applicants only one, a minor, was present, their next friend and their counsel being absent, the first because it is stated he was ill and the second because he had to go to the cremation ground. The District Judge then proceeded to dismiss the application in default. An application was made for its restoration which was summarily

1. Fariduddin Ahmed v. Murtaza Ali Khan, 1936 Oudh 67=153 I C 888=1935 O W N 1071.

2. Sundar Rai v. Basdeo Singh, 1919 All 409=50 I C 109=17 A L J 257.

dismissed. Against this decision there was an appeal to this Court which was heard by a single Judge. He accepted the appeal, set aside the order of the District Judge and sent the case back to him with directions to proceed with the application for grant of probate in accordance with law. Against the decision this Letters Patent appeal has been preferred. The principal contention on behalf of the appellants is that the provisions of O. 9, R. 9, Civil P. C., do not apply to probate proceedings. S. 295, Succession Act, enacts that :

In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of regular suit according to the provisions of the Civil Procedure Code, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

Section 299, Succession Act enacts as follows :

Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Civil Procedure, 1908, applicable to appeals, and lastly, S. 141, Civil P. C., is to the effect :

The procedure provided in the Code in regard to suits shall be followed, as far it can be made applicable, in all proceedings in any Court of civil jurisdiction.

There are two Calcutta cases 7 I C 126 (1) and 1926 Cal 1057 (2), which support the view pressed on behalf of the appellants, while 52 I C 639 (3) and 20 I C 281 (4) take the opposite view. There is also an observation of their Lordships of the Privy Council in 17 All 106 (5) at p. 111 to the effect that the proceedings spoken of in S. 647 of the old Civil P. C., (that is S. 141 of the present Code) include original matters in the nature of suits, such as proceedings in probates, guardianships and so forth, and do not include executions. In view of this remark and of the provisions of S. 141, Civil P. C. and S. 295, Succession Act we are of opinion that an application for grant of probate can be dismissed in de-

fault and restored. An appeal would thus lie under O. 43, R. 1 (c), Civil P. C., or under S. 299, Succession Act, and certainly under the latter section. We are therefore in agreement with the learned single Judge on this point. As regards the merits we see no sufficient reason to set aside his decision. We accordingly dismiss this appeal but make no order as to costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 864

BHIDE, J.

Mt. Atri—Plaintiff—Appellant.

v.

Rodhal and others—Defendants—Respondents.

Second Appeal No. 1325 of 1935, Decided on 11th December 1935, from decree of Dist. Judge, Ambala, D/- 30th May 1935. (Affirmed on Letters Patent Appeal No. 14 of 1936, Decided on 17th March 1936, by Addison and Abdul Rashid, JJ.)

Second Appeal—Finding of fact — Lower Court failing to take into consideration effect of certain mutation proceedings—Evidence not sufficient to rebut presumption arising from mutation proceeding — Finding can be challenged in second appeal.

Where the lower Court, in arriving at a finding of fact, fails to take into consideration the effect of certain mutation proceedings because the Revenue Officer was not examined as a witness and there is not sufficient evidence to rebut the presumption arising from the mutation proceedings, the finding can be challenged in second appeal: 1934 P C 40, *Rel. on*; 1934 P C 5, *Disting.* [P 865 C 1]

Shamair Chand—for Appellant.

Jhanda Singh—for Respondents.

Judgment. — The plaintiff Mt. Atri sued in this case for possession of 63 bighas 14 biswas of land. The suit was decreed by the trial Court was dismissed on appeal by the learned District Judge. The plaintiff has preferred a second appeal. The sole point for decision in appeal is whether the learned District Judge was right in holding that Mt. Jatan's re-marriage, on which the plaintiff's claim was founded, had not been proved. The learned counsel for the respondents contended that this was a question of fact and could not be challenged in second appeal. The learned counsel for the appellant, however, urged that the learned District Judge had failed to take into consideration the effect of the

1. Ramani Debi v. Kumud Bdhanu, (1910) 7 I C 126=14 C W N 924=12 C L J 185.

2. Surjya Kumar Deb v. Jaynarayan Deb, 1926 Cal 1057=98 I C 374=53 Cal 578.

3. Veeramma v. Subba Rao, 1919 Mad 112=52 I C 639.

4. Ngwe Hmon v. Ma Po, (1913) 7 L B R 24=20 I C 281.

5. Thakur Prasad v. Fakir Ullah, (1895) 17 All 106=22 I A 44=6 Sar 526 (P C).

mutation proceedings relating to the re-marriage of Mt. Jatan.

The learned Judge was apparently of opinion that these proceedings should have been duly proved by producing the Revenue Officer who sanctioned them as a witness. This view, it was contended, was erroneous and 1934 P C 40 (1) was cited as an authority. The learned counsel for the respondents referred to 1934 P C 5 (2), but in that case the Court had apparently considered the entries in the 'Khatian' along with the other evidence. In my opinion the contention of the learned counsel for the appellant is sound. The mutation proceedings should have been taken into consideration. They were effected as long ago as the year 1911 and they show that Mt. Jatan herself admitted at the time that she had re-married. The mutation was sanctioned at first in favour of her minor daughter Mt. Parmeshri and I can see no reason why any such mutation should have been sanctioned at the time if as a matter of fact Mt. Jatan had not re-married. The learned District Judge relied on some oral evidence including that of Dayal Singh to whom Mt. Jatan was re-married but who has now denied the re-marriage. Dayal Singh is one of the defendants and is evidently interested in denying the re-marriage. In my opinion the oral evidence produced is worthless and in any case not sufficient to rebut the presumption arising from the mutation proceedings referred to above. I accordingly accept the appeal and restore the decree of the trial Court in the plaintiff's favour. The plaintiff will get her costs throughout.

R.M./R.K.

Appeal allowed.

1. Nizam Din v. Godar, 1934 P C 40 = 146 I O 506.
2. Anup Mahto v. Mita Dusadh, 1934 P C 5 = 147 I C 977 = 61 I A 93 = 13 Pat 254.

A. I. R. 1936 Lahore 865

ABDUL RASHID AND ADDISON, JJ.

Damodar Das & Sons, Ltd.—Appellants.

v.

L. Bashesha Nath and others—Respondents.

First Appeal No. 2154 of 1934, Decided on 19th November 1935, from order of Senior Sub-Judge, Delhi, D/- 16th June 1934.

1936 L/109 & 110

(a) Arbitration Act (9 of 1899), S. 13—Award — Question remitted by Court for consideration—Arbitrator giving final award—Directions included in award to carry out provisions—Directions incidental and consequential—Award is valid.

A Judge remitted an award to the arbitrator and indicated particular matters which had to be dealt with by the arbitrator. In the final award the arbitrator submitted that he dealt specifically with these points and also gave certain directions for carrying out his decision on these matters into effect:

Held: the other changes introduced in the final award were merely incidental or consequential. The charges fell within the scope of the questions remitted to him for re-consideration and the award was not vitiated.

[P 869 C 1]

(b) Res judicata—Objections to award—Objections decided in arbitration proceedings—No separate suit lies to set aside award.

Where objections have been preferred during the arbitration proceedings and disallowed, the principle of finality applies and the same matter cannot be agitated in a separate civil suit: 1925 Sind 42; 1930 Sind 195 and 1932 Sind 20, *Rel. on*; 1922 P C 374; 1935 Lah 602 and 76, *Disting.*

[P 870 C 1]

(c) Award—It extinguishes claims in submission—Award submitted — Award alone basis of right of parties.

A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made the submission and the award furnish the only basis by which the rights of the parties can be determined.

[P 870 C 2]

Achhru Ram and Asa Ram Aggarwal—for Appellant.

Ram Kishore and Nawal Kishore—for Respondents.

R. B. Lala Damodar Das in person.

Abdul Rashid, J.—In May 1924, R. B. Damodar Das and his two sons, Bashesha Nath and Hari Nath, formed a private limited liability company known as R. B. Damodar Das and Sons, Limited. R. B. Damodar Das and his two sons were the only share-holders in the company and each of them held ninety fully paid up shares of the value of Rs. 1,000 per share. Early in 1926 disputes arose between Bashesha Nath on one side and R. B. Damodar Das and Hari Nath on the other. On 22nd November 1926, a notice of an extraordinary meeting of the company, to be held on the 7th December, was issued by Hari Nath, the Managing Director, in order to pass a resolution that the company should go into voluntary liquidation. This resolution however was not passed as the parties mutually agreed that Bashesha Nath should retire from the company and that all disputes should be referred to the arbitration of L. Ganga

Sahai, a cousin of R. B. Damodar Das. On 5th December 1926 two documents, marked Exs. A and B, were executed. By means of Ex. A the accounts of Basheshar Nath with R. B. Damodar Das and Sons, Limited, were referred to the sole arbitration of L. Ganga Sahai, while by means of Ex. B, the arbitrator was authorized to value the ninety shares held by Basheshar Nath in the company which Basheshar Nath had to transfer to R. B. Damodar Das or his nominee within three months at the valuation fixed by the arbitrator. R. B. Damodar Das was to pay off the debt due from Basheshar Nath to the company in part payment of the value of his shares, and he had to buy from the company one or more properties and transfer the same to Basheshar Nath at the value determined by the arbitrator.

This property was to be approximately equal in value to the balance of the value of Basheshar Nath's share in the company. Thereafter Basheshar Nath was to have no further concern or share in the company. The company, R. B. Damodar Das, Hari Nath and Basheshar Nath, were all parties to the first submission to arbitration, while only R. B. Damodar and Basheshar Nath were parties to the second submission. While the arbitrator was proceeding with his work further disputes arose between Basheshar Nath and R. B. Damodar Das and Hari Nath. Basheshar Nath was afraid that the company might repudiate one of the two awards which were to be made by the arbitrator under the references dated 5th December 1926. On 29th April 1927 another agreement (Ex. P. W. 1/1) was executed to which the company, R. B. Damodar Das, Hari Nath and Basheshar Nath, were all made parties. Therein it was specifically stated that the agreement will in no way abrogate from but shall be in furtherance of the two agreements dated 5th December 1926. The Indian Arbitration Act was also mentioned in this agreement, and the arbitrator was also authorized to decide the mode as to the execution of and carrying out of his awards under that submission and the previous agreements. All the parties, including the company, undertook to carry out the transfers of shares and possession of the property in accordance with the decision of the arbitrator.

On 6th June 1927 the arbitrator made two awards. By means of the award

Ex. P. B. the arbitrator decided that the debt due by Basheshar Nath to the company upto 31st March 1927 was Rupees 32,966. This debt was payable by Basheshar Nath together with interest at 6 per cent per annum from 1st April 1927 until payment. Basheshar Nath was also made liable to pay the rent of the shop in Kashmiri Gate at Rs. 200 per mensem and the rent of Damodar Bhawan at Rs. 60 p. m. from 1st April 1927 until possession was delivered by him to the company. The award Ex. P-A fixed the value of Basheshar Nath's share at Rs. 64,966 from which the sum of Rs. 32,966, was to be deducted and for the balance of Rs. 32,000 due to Basheshar Nath he was to get bungalow No. 9 in the Commissioner's Lane, Delhi. The price of this bungalow was fixed at Rs. 42,000 and Basheshar Nath was ordered to pay the Rs. 10,000, together with the interest and rent mentioned above before taking possession of the bungalow in the Commissioner's Lane. Thereafter Basheshar Nath was not to have any connexion with the company. The two awards were filed in the Court of the learned District Judge, Delhi, on 29th June 1927, on the request of the company. R. B. Damodar Das and Hari Nath accepted these awards, but Basheshar Nath raised a number of objections. These objections were disposed of by the learned District Judge by his order dated 31st January 1928. The District Judge remitted the awards to the arbitrator with the following directions :

(1) That the arbitrator should select a property in the Civil Lines or the Kashmiri Gate of approximately Rs. 32,000 as the share of Basheshar Nath; (2) that the arbitrator should adjust the decrees of Messrs. R. B. Damodar Das and Basheshar Nath. The arbitrator submitted a fresh award on 18th March 1928. This award provided that the company should transfer a shop in Kashmiri Gate to Basheshar Nath without any incumbrance the value of which was fixed at Rs. 32,500. The company was to pay interest at 6 per cent p. a. on Rs. 32,000 from 1st April 1927 till the delivery of possession of the property in dispute if possession of the shop was not transferred by a certain date. As the shop allotted to Basheshar Nath formed part of a building consisting of three shops with a common balcony and a common water tank, the arbitrator gave certain directions for the separation of the

balcony, sanitary fittings and water connexion. The decrees of Messrs. Basheshar Nath and R. B. Damodar Das were also adjusted. Basheshar Nath accepted the amended award, but R. B. Damodar Das and the company raised a number of objections. Only two of these objections were however pressed before the learned District Judge, one regarding the property allotted to Basheshar Nath, and the second regarding interest awarded to him.

The learned District Judge considered these objections in great detail and held that the arbitrator had carried out the direction of the Court given to him at the time of the remitting of the awards and that he had not exceeded his power in any manner. It was further held by the learned District Judge that the arbitrator in giving one of the shops to Basheshar Nath had made suitable provision for the settlement of all disputes and that the other orders given by the arbitrator were necessary consequences flowing from the charge made in the selection of the property assigned to Basheshar Nath. As a result of these findings the awards as amended were made 'decrees of Court.' R. B. Damodar Das preferred a petition for revision to this Court against the order of the learned District Judge making the awards decrees of Court. This revision was rejected on the merits and the only amendment made by the High Court in the order of the learned District Judge was that the words "be filed" were substituted in place of the words "are made decrees of the Court."

When Basheshar Nath took out execution of the awards a number of objections were again raised by the company and R. B. Damodar Das, the most important of them being that there was no decree of which execution could be taken out and that the company was not bound to convey the properties. While these objections were still pending in the Court of the District Judge two suits were filed: one by the company against Basheshar Nath and R. B. Damodar Das, and the other by R. B. Damodar Das against Basheshar Nath and the company. At the conclusion of the first hearing R. B. Damodar Das withdrew his suit which was dismissed with costs. The suit of the company against Basheshar Nath and R. B. Damodar Das, was continued and has given rise to the present appeal. In this suit Basheshar Nath is the only con-

testing defendant, and R. B. Damodar Das is identifying himself with the company. It was alleged by the company in the plaint that the arbitrator had no jurisdiction to make the award dated 18th March 1928, that he was not an arbitrator but only a valuer for the purposes of valuing the ninety shares of Basheshar Nath, and for selecting the property which had to be given to him, that after the remand of the award for re-consideration the arbitrator could not go beyond the two points mentioned by the District Judge, and that in making the alterations and additions in the final award he had exceeded his powers. It was further pleaded that the company was entitled under the articles of association to decline to register the transfer of the said ninety shares by Basheshar Nath, in favour of R. B. Damodar Das, until the debt due by Basheshar Nath, and secured by the first lien on the said shares was paid to the company. It was prayed that the award may be set aside and Basheshar Nath be restrained from transferring his shares and calling upon the company to deliver the property owned by it to him until the debt due by him to the company had been paid.

It was pleaded on behalf of the defendant, inter alia, that the suit was not maintainable in view of the provisions of S. 11, Civil P. C., and the general principles of res judicata, and that as no relief was claimed in respect of the awards dated 6th June 1927, on which the final award, dated 18th March 1928, was based the plaintiff was not entitled to any relief in the present suit. It was also pleaded that as the company was a party to the agreement P. W. 1/1, the company was bound by the final award and it had no subsisting lien on the shares, which it was bound to transfer in the name of R. B. Damodar Das. The learned District Judge held that L. Ganga Sahai was an arbitrator and not a mere valuer, that the present suit for declaration and setting aside of the award, dated 18th March 1928, was barred by the principle of res judicata. It was further held that the company by being a party to the final award had relinquished its lien, if any, on the shares held by Basheshar Nath and that the company could not get one award cancelled without suing for the cancellation of all the three awards. On these findings the plaintiff's suit was dis-

missed. The plaintiff has therefore preferred an appeal to this Court. It was contended by the learned counsel for the appellant that L. Ganga Sahai was merely a valuer and his function was to calculate the value of the shares belonging to Basheshar Nath, and also the amount of debt due to the company by him on one side and to value the properties of the company on the other and then to assign one of the houses to Basheshar Nath for the balance due to him. It was suggested that Lala Ganga Sahai was not called upon to exercise any judicial or quasi judicial function and that he could not therefore be regarded as an arbitrator and must be held to be a mere valuer. In our opinion this contention is wholly devoid of force. It is clearly stated in the agreement dated 29th April 1927 (Ex. P. W. 1/1) that Lala Ganga Sahai, will also decide

the mode as to the execution of and carrying out of his awards under this and the previous agreement, original of appendix A, which will have to be carried out simultaneously and will be binding on all the parties.

R. B. Damodar Das had a decree against Basheshar Nath while Mr. Basheshar Nath had a decree against the company. R. B. Damodar Das wrote a letter to the arbitrator which was also signed by Hari Nath authorising the arbitrator to adjust the two decrees in the award. Mr. Basheshar Nath also gave authority to the arbitrator to adjust the decrees. The adjustment of the decrees was one of the points that the arbitrator had to take into account when giving his award and this point was specifically remitted to the arbitrator for decision by the order of the District Judge dated 31st January 1928. It is amply established on the record that a number of disputes had arisen between R. B. Damodar Das and the company on one side and Basheshar Nath on the other, between November 1926 and April 1927. These disputes have been referred to in detail in the judgment of the learned District Judge. All these matters had also to be adjusted by means of the award of the arbitrator. In these circumstances it cannot be said that Lala Ganga Sahai was merely a valuer and that he had no judicial or quasi judicial functions to perform. Reference may be made in this connection to 2 Q B 367 (1). In that case a lease of a

farm for a term stipulated that, in the event of a sale of the premises during the term, the tenant upon notice should quit and deliver up possession to the landlord, and in such case each party should appoint a valuer to estimate the compensation to be given to the tenant for so quitting. The premises having been sold, the amount of compensation to be paid to the tenant was, by deed between the parties, submitted to the award of A and B, or such third person as they should appoint umpire under their hands to be endorsed on the submission before proceeding to value, with power to examine witnesses, etc.

It was held that the reference was not merely to ascertain the amount of compensation or value to be paid to the tenant in the nature of an appraisement, but was an arbitration within S. 17 Common Law Procedure Act, 1854. In final agreement as well as in one of the agreements dated 5th December 1926, the Indian Arbitration Act was specifically referred to. The evidence of the parties was recorded by the arbitrator and the account books were also examined. We therefore, hold that Lala Ganga Sahai was an arbitrator and that his awards are not open to any objection on the score that he was merely a valuer. It was next contended by Mr. Achhru Ram, on behalf of the appellant, that when a Court orders an award to be filed, it is merely exercising ministerial functions and that the Courts can remit the award under S. 13, Arbitration Act, merely for correction of arithmetical or accidental errors. It was maintained that the District Judge had no jurisdiction to remit the first two awards for reconsideration. It was further maintained that, in any case, the arbitrator could only deal with the matters remitted to him by the learned District Judge and that he had no jurisdiction to go into other matters. S. 13, Arbitration Act, lays down in the clearest terms that the Court may from time to time remit the award to the re-consideration of the arbitrator or umpire. It is further provided that where an award is remitted the arbitrator or umpire shall, unless the Court otherwise directs, make a fresh award within three months after the date of the order remitting the award. In the present case the learned District Judge remitted the awards to the arbitrator and

1. John Mason Hopper v. William Barningham, (1867) 2 Q B 367.

indicated two particular matters which had to be dealt with by the arbitrator: (1) that he should select a property in the Civil Lines or Kashmiri Gate, of approximately Rs. 32,000, and (2) that he should adjust the decrees of R. B. Damodar Das and Mr. Basheshar Nath. In the final award that he submitted on 18th March 1928, he dealt specifically with these points and also gave certain directions for carrying out his decision on these two matters into effect. The other changes introduced in the final award are merely incidental or consequential, and the learned District Judge, while deciding the objections, was right in holding that these changes fell within the scope of the two questions remitted by him for re-consideration. We agree with the conclusion of the learned District Judge in this matter.

It was next contended by the learned counsel for the appellant that the trial Court had erred in holding that the present suit was barred by the doctrine of constructive *res judicata*. R. B. Damodar Das and the company in preferring objections against the award dated 18th March 1928, had stated that the arbitrator had exceeded his powers and had decided some points which he was not competent nor called upon to decide. It was also objected that the arbitrator had been guilty of legal misconduct and that the allotment of the shop in Kashmiri Gate had been improperly procured by Basheshar Nath. Each one of these objections was considered by the learned District Judge, who came to the conclusion that the arbitrator had not exceeded his powers, that he had not been guilty of legal misconduct and that all the changes made by him fell within the purview of the two points remitted to him for re-consideration. It is obvious therefore that all the objections that were preferred against the award in the present suit were actually considered and decided by the learned District Judge in the proceedings under the Indian Arbitration Act. Reference was made by the learned counsel for the appellant to 1935 Lah 76 (2), where it was held that, even after an award is enforced under the Arbitration Act, it is open to the party affected by it to sue for its being set aside on the ground that the arbitrator had acted wholly without jurisdiction.

2. *Echhlz, German Merchant v. Amar Nath Sriram*, 1935 Lah 76=157 I O 796.

In that case certain objections were preferred against the awards, one of them being that the arbitrator had acted wholly without jurisdiction. These objections had not been decided in the proceedings under the Indian Arbitration Act when a separate suit was filed to establish that the arbitrator had acted wholly without jurisdiction. It was held that such a suit was competent. That case is clearly distinguishable, as in the present case all the objections raised during the arbitration proceedings were decided by the District Judge. In this ruling it was also observed that all that could be reasonably urged was that, if any issue arising in the suit was already decided in the proceedings under the Arbitration Act, it may operate as *res judicata*. In 1935 Lah 602 (3) it was held that one of the parties to an arbitration is entitled to apply under S. 14 of the Act to have the award set aside on the ground that it had been improperly procured on account of want of jurisdiction in the arbitration, and no appeal lies from the order on such application. This ruling does not deal with the question of *res judicata* and is, therefore, of no assistance to the appellant. In 50 Cal 1 (4) it was held that a suit would lie to establish that an award under the Indian Arbitration Act was not binding on a party on the ground that the arbitrator had acted wholly without jurisdiction, and that the remedy under S. 14 of the Act to set aside the award was not the only remedy open to the respondent. In that case one of the parties to the arbitration had never appeared and had never raised any objection. The following observations from the judgment of their Lordships may be quoted in extenso:

On the argument before their Lordships, it was argued, as a preliminary point, that a suit would not lie, as the only remedy open to the plaintiffs was to move to set aside the awards under S. 14, Arbitration Act, and this could not be done after the awards had been enforced by execution. In their Lordships' opinion, there is no substance in this point. Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought, no doubt, to be taken by motion to set aside the award; but where (as here) it is alleged that an arbitrator has acted wholly without

3. *Peoples Bank of Northern India v. Kanhya Lal Gauba*, 1935 Lah 602=161 I O 197=16 Lah 1090=88 P L R 115.

4. *E. D. Sassoon & Co. v. Ram Dutt Ram Kissen Das*, 1922 P O 874=70 I O 777=49 I A 366=50 Cal 1 (P O).

jurisdiction, his award can be questioned in a suit brought for that purpose. Nor is the fact that the award has been enforced by execution under S. 15 a bar to a suit to have it declared void and for consequential relief. S. 15 does not enact that the award, when filed, is to be deemed to be a decree of the Court, but only that it is to be enforceable as if it were a decree.

We are, therefore, of opinion that none of the rulings relied upon, on behalf of the appellant, is of any assistance in determining the question under consideration. As pointed out above, all possible objections were taken during the arbitration proceedings in the present case and were decided against the company and R. B. Damodar Das by the learned District Judge. In 76 I C 953 (5) it was held that when objections to an award falling within the purview of S. 14, Arbitration Act, have been raised and disallowed, or when they are partly reserved for a separate suit, a suit seeking to set aside an award on those very grounds is barred on principles of *res judicata* as enunciated in S. 11, Civil P. C. The contentions raised on behalf of the appellant have been fully dealt with in this ruling at pp. 955 and 956. In 121 I C 164 (6) it was held by the Sind Judicial Commissioner's Court that

though when an objection to an award goes to the root of it, that is the jurisdiction of the arbitrator to make the award, a suit to set aside the award is competent, yet where objections are filed, *inter alia*, with regard to the jurisdiction of the arbitrator to act, on the ground that there was no valid submission in his favour and the objections are withdrawn and dismissed, a subsequent suit on the same grounds is barred by reason of *res judicata*.

To the same effect is 1932 Sind 20 (7). We are of opinion that where objections have been preferred during the arbitration proceedings and disallowed, the principle of finality applies and the same matter cannot be agitated in a separate civil suit. It was next contended by Mr. Achhru Ram that, under the articles of association, the company could not be compelled to transfer the shares of Basheshar Nath to R. B. Damodar Das and that the arbitrator had no power to direct the company to do so. This argument overlooks the fact that the company as well as all the members thereof were parties to the reference dated 29th April

1927, and that the company is, therefore, bound by the decision of the arbitrator. In this connexion reference may be made to the resolution of the company dated 29th May 1927, which is signed by R. B. Damodar Das, Hari Nath and Basheshar Nath. It runs in the following terms :

Resolved unanimously that the two agreements of reference dated 5th December 1926 (copies whereof are annexed hereto and marked A and B) are approved and affirmed, and the Managing Director of the company (Lala Hari Nath) be and is hereby authorized to sign the submission in the agreement hereto annexed and marked "C" on behalf of the company and to put the common seal thereon and also carry out the awards on the said agreement of reference marked "A" and the agreement copy whereof is annexed and marked "C" when made.

The second agreement, dated 5th December 1926, contains a clause to the effect that R. B. Damodar Das will pay off the debt due from L. Basheshar Nath to the company in part payment of the value of the said share and also that R. B. Damodar Das will purchase from the company one or more properties awarded by Lala Ganga Sahai and transfer the same to Basheshar Nath at the value determined by L. Ganga Sahai. This agreement became part and parcel of the agreement dated 29th April 1927, and is, therefore, that the company accepted R. B. Damodar Das as a debtor in place of Basheshar Nath and agreed to abide by the awards which were to be made by L. Ganga Sahai under all the three agreements. It was held in 33 Cal 881 (8) that a valid award operates to merge and extinguish all claims embraced in the submission and after it has been made the submission and the award furnish the only basis by which the rights of the parties can be determined. We, therefore, hold that it is not open to the company to refuse to carry out the provisions of the award simply because they may be in conflict with some of the provisions of the articles of association. For the reasons given above we hold that there is no force in any of the contentions raised on behalf of the appellant and we, therefore, dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

5. Khimji v. Nathi Bai, 1925 Sind 42=76 I C 953.

6. Isri Bai v. Peru Bai, 1930 Sind 195=121 I C 164.

7. Rochan Bai Udhomal v. Motumal, 1932 Sind 20=136 I C 806.

8. Bhajahari Saha v. Behari Lal, (1906) 33 Cal 881=4 C L J 162.

A. I. R. 1936 Lahore 871

TEK CHAND, J.

Harchand Rai—Creditor—Petitioner.
v.*Khairuddin* — Debtor-Insolvent —
Opposite Party.Civil Revn. No. 133 of 1936, Decided
on 24th April 1936, from order of Dist.
Judge, Karnal, D/- 22nd October 1935.(a) Provincial Insolvency Act (1920), S. 75
—Enquiry under S. 69 of offence committed
by insolvent—Order recording finding passed
under S. 70 is appealable.Section 75 is very general and clearly covers
an order passed by the insolvency Judge under
S. 70 recording the finding that there are prima
facie grounds for an enquiry into the offence
referred to under S. 69 and appearing to have
been committed by the insolvent, and making a
complaint of the offence in writing to a Magis-
trate of competent jurisdiction. Such order
made under S. 70 is appealable. [P 871 C 2](b) Provincial Insolvency Act (1920) (as
amended by Act 9 of 1926), S. 70 — Enquiry
under S. 69—Notice to insolvent is not neces-
sary.Under S. 70, as amended by Act 9 of 1926, it
is not obligatory on the insolvency Judge to
give notice to the insolvent before holding that
there are prima facie grounds for enquiry into
an offence under S. 69 against the insolvent.
Indeed the amended section leaves it to the
discretion of the Judge even to hold a preli-
minary enquiry into the matter: 1928 Cal 211,
Rel. on. [P 872 C 1]*Faqir Chand Mital*—for Petitioner.*Shamair Chand and Parkash Chandra
Mahajan*—for Opposite Party.**Order.**—The petitioner Kherud Din
was adjudicated an insolvent by order of
the insolvency Court at Rohtak on 16th
June 1930. On 12th June 1934, some of
the creditors applied for an order for his
prosecution under S. 69, Provincial Insol-
vency Act. The Insolvency Judge granted
the application on 8th April 1935, and on
13th May 1935 drew up a complaint,
which was instituted in the Court of the
District Magistrate. On 22nd May 1935
the insolvent filed an appeal in the Court
of the District Judge against "the insti-
tution of the complaint by the Senior
Subordinate Judge on 13th May 1935
pursuant to the order passed by him on
8th April 1935." The learned District
Judge accepted the appeal and set aside
the order of the lower Court directing the
prosecution of the petitioner under S. 69,
Provincial Insolvency Act. Harchand Rai,
who is one of the creditors, has come in
revision, and the first contention raised
on his behalf is that no appeal lay againstthe "institution of the complaint" by the
Senior Subordinate Judge on 13th May
1935 and that even if the appeal to the
District Judge were to be treated as one
against the order of 8th April 1935, which
had been passed by the Senior Subordi-
nate Judge under S. 70, Provincial Insol-
vency Act, it was equally incompetent.The second of these contentions is
obviously without force. S. 75 of the Act
is very general in its terms and allows an
appeal by the debtor, any creditor, re-
ceiver, or any other person aggrieved by a
decision come to, or an order made, in the
exercise of insolvency jurisdiction by a
Court subordinate to a District Court.
This section clearly covers an order
passed by the Insolvency Judge under
S. 70 recording the finding that there are
prima facie grounds for an inquiry into
the offence referred to under S. 69 and
appearing to have been committed by the
insolvent, and making a complaint of the
offence in writing to a Magistrate of com-
petent jurisdiction. The learned counsel
for the petitioner has not cited any
authority to the contrary. I am, there-
fore, unable to uphold this contention.No doubt the memorandum of appeal
presented in the District Court purported
to be against the "institution of the com-
plaint by the Insolvency Judge on 13th
May 1935," but the order of 8th April
1935 was also clearly mentioned. It is
obvious that the insolvent in appealing to
the District Judge was really objecting to
the order of 8th April 1935 and the conse-
quential institution of the complaint on
13th May 1935. The learned counsel
however contends that if the appeal was
actually against the order of 8th April
1935, it having been instituted on 22nd
May 1935, was clearly time-barred. This
objection was not taken before the
learned District Judge and it is quite
likely that if it had been so taken the
learned Judge might have condoned the
delay under S. 5, Lim. Act. I am there-
fore unable to set aside in revision the
proceedings before the District Judge on
this objection, which was not raised at
the proper time when the defect might
have been cured.On the merits, the learned District
Judge was clearly in error in observing
that the insolvent had been prejudiced by
proper opportunity not having been given
to him by the Insolvency Judge before
passing the order of 8th April 1935.

Under S. 70, as amended by Act 9 of 1926, it is not obligatory on the Insolvency Judge to give notice to the insolvent before holding that there are prima facie grounds for enquiry into an offence under S. 69 against the insolvent. Indeed the amended section leaves it to the discretion of the Judge even to hold a preliminary enquiry into the matter. In this connexion reference may be made to 55 Cal 783 (1) where the question is discussed at considerable length. Further, in the present case it appears that the Insolvency Judge had examined the insolvent and made some preliminary enquiry into the matter. The reason given by the learned Judge was, therefore, erroneous.

The learned District Judge expressed his disagreement with the grounds given by the Insolvency Judge for the prosecution of the insolvent. I agree with the petitioner's counsel that some of the reasons given by the District Judge are not convincing, but at the same time I do not think that this is a fit case in which I should interfere on the revision side. The debts of the insolvent are very small in number and do not amount to a large sum in the aggregate, and all the property which he is alleged to have attempted to conceal has been seized by the receiver and made available for distribution among the creditors. I, therefore, dismiss the petition for revision, but having regard to all the circumstances leave the parties to bear their own costs throughout.

B.D./R.K. *Revision dismissed.*

1. Jewraj Khariwal v. Dayal Chand, 1928 Cal 211=111 I C 372=55 Cal 783.

A. I. R. 1936 Lahore 872

ADDISON AND ABDUL RASHID, JJ.

Messrs. Badri Shah-Sohan Lal—Petitioners.

v.

Commissioner of Income-tax—Opposite Party.

Civil Ref. No. 4 of 1936, Decided on 11th June 1936, from Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, Lahore.

Income-tax Act (1922), S. 24 — Loss in business — Loss incurred in transaction not part of business—Such loss cannot be taken into account.

B owed a sum of Rs. 8,000 odd to *A*, a money lender. *A* purchased some land belonging to *B* for Rs. 18,000 odd, and while paying the cash consideration it was found that *B* had gone into

insolvency. The insolvency Court converted the sale into a mortgage for the charge of the original debt of Rs. 8,000 odd and for the other part of the consideration *A* was ranked as an ordinary unsecured debtor. The Official Receiver paid back Rs. 8,000 odd to *A* on account of the mortgage and other money advanced to *B*. During the assessment for income-tax of *A*, he asked that the loss suffered by him in this transaction should be taken into account:

Held: that as this sale was not a part of the business of the assessee, he could not claim that loss as expenditure under S. 10 (2) (ix) read with S. 13 or as loss of profits for the purposes of assessment. [P 873 C 1]

Kripa Ram Bajaj—for Petitioners.

J. N. Aggarwal and *M. M. Aslam Khan*—for Opposite Party.

Abdul Rashid, J.—The Commissioner of Income-tax, Punjab, has referred the following question of law for the decision of this Court under S. 66 (2), Income-tax Act :

The assessee having purchased from his debtor a piece of land for the amount of debt, plus further Rs. 9,497, a deficit of Rs. 6,403 having subsequently materialised in respect of that Rs. 9,497 by reason of a decree which converted the purchase into mortgage for the original debt, and ranked the above balance with unsecured debts of the debtor declared insolvent, is the deficit to be set off against the assessed profits, whether as expenditure under S. (10) (2) (ix) read with S. 13, or as loss of profits under S. 24 of the Act?

The assessee is a bullion dealer and money lender of Gujranwala. In 1934-35 he was assessed on a total income of Rs. 20,549 out of which Rs. 14,673 represented his profits in business. Rs. 8,503 were due from Messrs. Shiv Dayal-Amin-Chand to the assessee in May 1928. The debtors sold their land for a sum of Rs. 18,000 to the assessee on 28th May 1928. This sum of Rs. 18,000 was made up of Rs. 8,503 due from the vendors to the vendee, and an advance of Rs. 9,497 made by the vendee to the vendors. The assessee paid this sum in cash to Messrs. Shiv Dayal-Amin Chand. At the time of this sale however insolvency proceedings were pending against Shiv Dayal-Amin Chand. On 5th October 1931, the learned District Judge passed an order converting the above mentioned sale into a mortgage without possession for Rs. 8,500. As regards the balance of Rs. 9,497 the learned District Judge ordered that the assessee shall rank as unsecured creditor and shall have to prove his claim. Up to May 1933, the assessee received from the Official Receiver the amount of the original debt amounting to Rs. 8,503 and

interest thereon and a further sum of Rs. 3,097 leaving a deficit of Rs. 6,403. This is the sum which the assessee seeks to deduct from the profits earned by him during the year of assessment.

The learned counsel for the assessee contended that the assessee had bought the land belonging to Shiv Dayal-Amin Chand for Rs. 18,000 in order to secure payment of his debt amounting to Rs. 8,503 and that the whole transaction of sale must, therefore, be regarded as a transaction arising out of the money lending business carried on by the assessee. In our opinion this contention is wholly devoid of force. Purchase of lands was not the business of the assessee. If he merely wanted to obtain payment of the debt due to him from the vendors he could have purchased a part of the land belonging to the vendors for a sum of Rs. 8,503. It was not necessary for him in order to realise his loan to purchase a large area of land for a sum of Rs. 18,000. The transaction of the purchase of land is really divisible into two transactions, that is, a purchase of a part of the land for Rs. 8,503, in order to secure the payment of the loan due to the assessee, and a purchase of another part of the land for Rs. 9,497 as an independent purchase of landed property. The entire sum of Rs. 8,503, due to the assessee in respect of money lending, has been paid by the Official Receiver to the assessee. The purchase of a part of the land for Rs. 9,497 did not arise out of the money lending business and any loss suffered by the assessee in respect of this purchase cannot be regarded as expenditure incurred solely for the purposes of earning profits or gain in money lending business. S. 24, Income-tax Act, has also no applicability to the facts of the present case. For the reasons given above we hold that the loss of Rs. 6,403, incurred by the assessee as a result of the purchase of land by him, was not deductible from profits under any provision of the Income-tax Act. We consequently answer the question referred to us in the negative. The assessee shall pay the costs of the Commissioner.

B.D./R.K.

*Reference answered
in the negative.*

A. I. R. 1936 Lahore 873

TEK CHAND, J.

Mangal Singh and others — Decree-holders—Appellants.

v.

Sagar and others—Judgment-debtors—Respondents.

Misc. First Appeal No. 195 of 1935, Decided on 23rd March 1936, from order of Senior Sub-Judge, Sheikhpura, D/- 10th November 1934.

Civil P. C. (1908), O. 21, R. 57 — Death of decree-holder pending execution — Application by some of representatives for substitution—Application not amended by including other heirs—Court consigning execution to record room—Order held though erroneous not tantamount to dismissal, nor did it terminate prior attachment.

In execution proceedings the lower Court, finding that all the representatives of the deceased decree-holder were not included in the application for substitution, passed an order consigning the application to the record room, though the attachment in that execution was to remain in force :

Held : that the order of the lower Court was erroneous to the extent that instead of consigning the proceedings to the record room, it should have got the application for substitution amended. But the order was not tantamount to dismissal of the application for execution, nor did it have the effect of terminating the prior attachment. All that the order meant was that execution proceedings should stand adjourned sine die : 1922 All 62 and 1926 All 734, Rel. on. [P 874 C 2]

Parkash Chandra for Shamair Chand —for Appellants.

V. N. Sethi—for Respondents.

Judgment.—On 28th November 1930, one Makhan Singh obtained a money-decree against the respondents from the Court of the Senior Subordinate Judge, Sheikhpura. On 8th January 1931 the decree-holder applied for execution of the decree by attachment of certain land belonging to the judgment-debtors and its lease for the period allowed by law. On 4th June 1931 an order attaching the land was passed. The judgment-debtors raised objections that under the law their land could not be attached or leased. The Court however held that the land could be leased, and sent the case to the Collector for making suggestions as to the period for, and the terms on which the lease should be granted. While these proceedings were going on, the decree-holder Makhan Singh died.

On 2nd December 1932 an application was made by Mangal Singh, Shanghara

Singh and Hazara Singh, sons of Makhan Singh, stating that they were the heirs and legal representatives of Makhan Singh and praying that they be allowed to carry on the execution proceedings. Notice was issued to the judgment-debtors to show cause against this application on 1st April 1933. On that date the judgment-debtors appeared and stated that the applicants were not the only heirs and legal representatives of Makhan Singh deceased but that he had three grandsons, named Girja Singh, Sham Singh and Man Singh, minor sons of a predeceased son Piara Singh, and that they also should have been brought on the record as representatives of the deceased decree-holder along with the applicants. Mangal Singh was examined and admitted that the three minors aforesaid were also the heirs of the deceased. Instead of having the application amended and then proceeding with the execution on behalf of the three sons and three grandsons of Makhan Singh, the learned Senior Subordinate Judge, Sheikh Muhammad Akbar, passed the following order :

Application for the appointment of representatives was presented on 3rd December 1932. It was not prayed therein that Girja Singh, Sham Singh and Man Singh also might be made representatives. The statement of Mangal Singh shows that the first application is incomplete. Accordingly a correct application shall be presented. The attachment in this execution case shall remain in force, but the record shall be consigned to the record room for the present (filhal).

On 19th April 1933 a fresh application was presented by Mangal Singh, Shangara Singh and Hazara Singh, sons of Makhan Singh, and Girja Singh, Sham Singh and Man Singh, sons of Piara Singh, through Mangal Singh, their next friend, as representatives of Makhan Singh for execution of the decree by lease of the land already attached. This application has been dismissed by the Senior Subordinate Judge, Lala Ram Rang, by his order, dated 10th November 1934. Mangal Singh and others have appealed. The order of the learned Judge is couched in highly involved language and it is not easy to understand what he really means. So far as it is possible to follow it, it appears that what the learned Judge meant to say was that the order of his predecessor, Mr. Muhammad Akbar, consigning the application to the record room, was tantamount to dismissal of the application for execution, that on the dismissal of the application the

attachment automatically ceased, and therefore the remark in the order, that the attachment shall remain in force, was ultra vires. In this view of the case the learned Judge thought that he could not proceed to lease the land, as it was not under attachment. He accordingly dismissed the application to have the land attached.

If this is the correct meaning of the order, and both counsel are agreed that this is so, there seems little doubt that his conclusion is incorrect. I agree with the appellants' counsel that on the facts as stated above Mr. Muhammad Akbar should not have consigned the proceedings to the record room but should have got the application for substitution amended by adding the names of the minor grandsons of Makhan Singh. To this extent therefore the order was erroneous. But the order as actually passed was not tantamount to a dismissal of the application for execution, nor could it have the effect of terminating the prior attachment. Mr. Sethi for the respondents relies on O. 21, R. 57, Civil P. C., which lays down that :

Where any property has been attached in execution of a decree but, by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

I do not see how this rule applies to the present case. As already stated, Mr. Muhammad Akbar did not dismiss the application for execution. He merely consigned it to the record room for the present (filhal) which meant that the case was adjourned sine die. A case, very similar to the one before us, will be found in 44 All 274 (1). There, by reason of the default of the decree-holder, the executing Court, finding that it was unable to proceed with the execution of the decree, passed the following order:

The execution case should for the time being (filhal) be dismissed and that the attachment shall remain in force.

The question arose whether under O. 21, R. 57, the effect of this order was to terminate the attachment which had been effected before it was passed. The learned Judges answered the question in the negative, holding that the order was

1. Mahomed Mubarak Hussain v. Bimal Prasad, 1922 All 62=65 I C 91=44 All 274=20 A L J 113.

in substance and effect "an order that the execution proceedings do stand adjourned sine die." This ruling was affirmed in 48 All 698 (2). In the case before me Mr. Muhammad Akbar had expressly made it clear that the "attachment shall remain in force." I hold that it was not necessary for the appellant to take fresh proceedings for the attachment of the land, and the order of the learned Subordinate Judge dated 10th November 1934, dismissing the application for execution, was erroneous and cannot be maintained.

I accept the appeal, set aside the order of the Court below and remand the case, with the direction that the execution application be restored at its original number, and proceeded with in accordance with law. The respondents shall pay the appellants' costs of this appeal.

V.B.B./R.K.

Appeal allowed.

2. Bijai Saran Sahai v. Deo Kishen Prasad, 1926 All 734=97 I C 102 = 48 All 698 = 24 A L J 901.

A. I. R. 1936 Lahore 875

JAI LAL, J.

Kirpal Singh and others—Plaintiffs—Appellants.

v.

Dalip Singh and others—Defendants—Respondents.

Second Appeal No. 2121 of 1935, Decided on 28th February 1936, from decree of Dist. Judge, Ludhiana, D/- 9th August 1935.

(a) Preliminary Decree—Subsequent order dismissing suit in default is illegal—But such order once passed cannot be ignored unless set aside.

Once a preliminary decree has been passed the suit cannot be dismissed in default, but if an illegal order dismissing a suit in default has been passed by a Court, it cannot be ignored either by that Court or by any other Court unless it is set aside in due course of law; that is to say, either by review or by an application to set aside the dismissal in default or by an appeal or revision: 1924 P C 198, *Foll.* [P 876 C 1]

(b) Preliminary Decree—Order dismissing suit in default—Order though illegal must be set aside expressly—Order appointing commissioner and for final decree does not amount to order setting aside order for dismissal in default.

Where an order dismissing the suit in default is passed after a preliminary decree, the order though illegal cannot be ignored unless expressly set aside or revoked. Nor can an order under O. 26, R. 18, Civil P. C., be deemed to be tantamount to an order setting aside the dismissal of

the suit in default: 1925 All 622; 1927 All 439; 47 P R 1906 and 1928 Mad 963, *Ref.*

[P 876 C 1, 2]

Jhanda Sahib—for Appellants.

Achhru Ram—for Respondents.

Judgment.—A preliminary decree for partition of joint property was passed on 16th May 1929, and a Commissioner was appointed to submit proposals for the partition of the property with a view to pass a final decree. Several attempts were made by the Commissioner to secure the attendance of the parties but were unsuccessful. Consequently, on a report to this effect having been made by the Commissioner to the Court on 18th December 1929, the suit was dismissed in default. An application to restore the suit, made on 13th January 1930, was dismissed on 6th March 1930, and an application for review of the order dismissing the application to restore the suit was dismissed on 8th May 1930. Another application was made on 10th June 1930 to restore the suit. That also was dismissed. Then the appellants made an application under O. 26, R. 13, Civil P. C., for the appointment of a Commissioner and a final decree on 18th May 1932. This application also was dismissed in default and an application to restore that application also was dismissed. Finally, the appellants made an application on 2nd October 1933, for review of the order dismissing the application for restoration of the suit. A notice was issued to the respondents on this application and on 8th November 1934 the trial Judge, without any order setting aside the previous order dismissing the application for restoration of the suit or even without any formal order restoring the suit to the pending file, made an order appointing a Commissioner to effect partition. The respondents appealed against this order to the District Judge who has set aside the order of the first Court, holding that the suit having been dismissed in default, and not having been restored, the trial Court had become *functus officio* and was not competent to take any proceedings in this suit.

On this appeal two questions are raised. One is that the trial Court could ignore the order dismissing the suit in default as such an order could not legally be passed. The second is that the order of the District Judge holding that the suit had abated only on the death of one of

the defendants is erroneous. I have not stated the facts on which the second ground is based because in my opinion it is not necessary to give any decision on it in this case. The point is a difficult one, and there is a controversy on it between the various High Courts. I have in another case referred this point to a Division Bench. In my opinion, this appeal must fail on the first point. No doubt the Privy Council has held in 4 Pat 61 (1), that once a preliminary decree has been passed the suit cannot be dismissed in default, but if an illegal order has been passed by a Court, it cannot be ignored either by that Court or by any other Court unless it is set aside in due course of law, that is to say, either by review or by an application to set aside the dismissal in default or by an appeal or revision. The order dismissing the suit in this case was not set aside by the trial Court by any order expressly or impliedly passed. The learned Counsel for the appellants contends that the order appointing a Commissioner must be deemed to be tantamount to an order setting aside the dismissal of the suit in default. I do not agree with this contention. An express order in this case should have been passed having regard to its previous history. It appears that the Court failed to notice the previous order dismissing the applications for restoration of the suit and the fact that the suit had been dismissed.

The learned Counsel for the appellants relies on 47 All 546 (2), 49 All 592 (3) and 47 P R 1906 (4). The respondents' Counsel on the other hand relies on 112 I C 19 (5), a judgment of the Madras High Court. In my opinion, there is nearly no conflict between the view taken by the Allahabad High Court and by the Chief Court of the Punjab on the one hand and the Madras High Court on the other hand. One proposition must be taken to be settled, that an order dismissing a suit in default after a preliminary decree has been passed is illegal. In the

Allahabad cases the dismissal had been set aside before the Court proceeded to take further steps and the view taken by the Madras High Court expressly is that the dismissal must be set aside before the Court can proceed further. In the Punjab case a decree for partition had been passed and applications for execution were made after the preliminary decree for partition. The suit was not dismissed, but the applications for execution were dismissed, and it was held that subsequent applications could be made for either executing the decree or for passing a final decree. In 49 All 592 (3) some remarks are made which it is contended support the appellants. The remarks are that so long as there is limitation, any number of applications can be made but these remarks merely relate to applications to restore the suit which has been illegally dismissed. The remarks do not authorise application being made for passing a final decree when the suit has been dismissed. The judgment on the other hand contemplates that the order of dismissal must be revoked before further proceedings can be taken. I dismiss this appeal with costs.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1936 Lahore 876**

BHIDE, J.

Sh. Nanki Devi—Plaintiff—Appellant.
v.

Habib Ullah and others—Defendants—Respondents.

Appeal No. 823 of 1935, Decided on 12th February 1936, from order of Dist. Judge, Ambala, D/- 26th January 1935.

Mahomedan Law — Wakf — Platform reserved as private place of worship for Mahomedan tenants of ahata is not public place of worship.

Where a platform is reserved for the use of the Mahomedan tenants of an ahata it is not intended for the use of the public or any section of the public, but is merely a private place of worship, intended only for the Mahomedan inhabitants of the ahata : 1920 Lah 384 and 1933 Lah 80, *Disting.* [P 877 C 1]

J. N. Aggarwal—for Appellant.

Barkat Ali—for Respondents.

Judgment.—This order will be read in continuation of my remand order dated 11th October 1935, in which the facts of the case are given. The learned District Judge has found that there was no evidence of use or dedication of the platform in dispute for purposes of prayers by the

1. Lachmi Narain Marwari v. Balmakund Marwari, 1924 P C 198=81 I C 747=51 I A 321=4 Pat 61 (P C).

2. Jodha Singh v. Pandey Gokaran Das, 1925 All 622=87 I C 225=47 All 546=23 A L J 405.

3. Chandra Shekhar v. Amir Begam, 1927 All 439=101 I C 676=25 A L J 437=49 All 592.

4. Durgadas v. Faqir Chand, (1906) 47 P R 1906=86 P L R 1907.

5. Sreeramulu v. Naghabhushanam, 1928 Mad 963=112 I C 19.

public in general. This is a finding of fact and must be taken as final. The learned counsel for the respondent has however raised a point of law that there can be no dedication of a place for use by a section of the public and has relied on Tyabaji's Mahomedan Law, para. 516 at p. 640, 1 Lah 317 (1) and 34 P L R 24 (2). In para. 516, Tyabaji's Mahomedan Law, however, it is remarked that the point is not free from doubt in British India. The cases reported in 1 Lah 317 (1) and 34 P L R 24 (2) relate to mosques proper, and all that was held therein was that there can be no dedication of such a mosque for the use of a particular sect only. In the present instance, we are only concerned with a platform which was reserved for the use of the Mahomedan tenants of the 'ahata.' This clearly shows that the platform was not intended for the use of the 'public' or any section of the public, but was merely a private place of worship, intended only for the use of the Mahomedan inhabitants of an 'ahata.' The learned counsel for the respondent conceded that if an apartment on a verandah in a private building was set apart for saying prayer by the servants of the family it would not constitute a public place of worship. It seems to me that the present case stands on a similar footing.

I accept the appeal to the extent of declaring that the platform in dispute is only reserved for saying prayers by the Mahomedan tenants of the 'ahata' and that the general public have no right to use it. I also grant an injunction restraining the defendants from converting the said platform into a mosque for the use of the public in general. The plaintiff will get half her costs throughout.

V.B.B./R.K. *Order accordingly.*

1. Maula Bakhsh v. Amiruddin, 1920 Lah 384 = 57 I O 1000 = 1 Lah 317.
2. Iqbal Begam v. Syed Begam, 1933 Lah 80 = 140 I C 829 = 34 P L R 24.

A. I. R. 1936 Lahore 877

AGHA HAIDAR, J.

Official Receiver, Gujranwala, and others—Appellants.

v.

Abdul Wahid and another—Objectors and another—Insolvent—Respondents.

First Appeal No. 74 of 1936, Decided on 4th June 1936, from order of Dist. Judge, Gujranwala, D/- 20th February 1936.

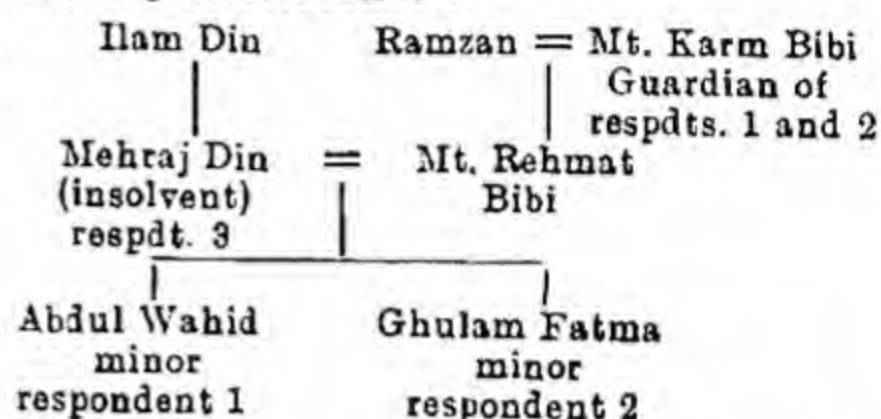
Award—Unregistered — Admissibility in evidence.

An award though unregistered is still admissible in evidence: 1914 Lah 238 and 1929 All 365, Rel. on. [P 878 C 1,2]

Shamair Chand and Parkash Chandra—for Appellants.

Barkat Ali—for Respondents.

Judgment.—This appeal is against the order of the Insolvency Judge who allowed certain objections under the provisions of S. 4, Provincial Insolvency Act. The following pedigree table is subjoined for facility of reference :



The property admittedly belonged to Mt. Rehmat Bibi who had inherited it from her father. Mt. Rehmat Bibi was the wife of Mehraj Din, insolvent. On 7th October 1926, Mehraj Din and Mt. Rehmat Bibi executed a mortgage of the Gujranwala property in favour of one Sardari Lal for a sum of Rs. 2,000. It may be mentioned in passing that at this date Mehraj Din had no right whatsoever in the property which had been mortgaged, as Mt. Rehmat Bibi was alive. Mt. Rehmat Bibi died on 18th May 1927, leaving her surviving Abdul Wahid, respondent 1, and Ghulam Fatma, respondent 2, her minor children, her husband Mehraj Din, respondent 3, and Mt. Karm Bibi, her mother. Under the Mohamadan law the husband, Mehraj Din, would inherit one-fourth share in the property left by Mt. Rehmat Bibi. It appears that Mehraj Din at one time contemplated a second marriage and had lost in business too. Mt. Karm Bibi, the mother of Rehmat Bibi and the grandmother of the two minors, Abdul Wahid and Ghulam Fatma, naturally became apprehensive about the property of the minors. On 2nd April 1928, Mt. Karm Bibi and Mehraj Din referred their disputes and differences to the arbitration of a pleader Mir Hussain Bakhsh. The reference is Ex. O. A. In pursuance of this reference, the arbitrator delivered his award Ex. O. B. on 17th April 1928. Under this award Mt. Karm Bibi was

directed to pay the amount due under the mortgage dated 7th October 1926. It may be observed here that the mortgagee could proceed against Mehraj Din and claim the mortgage money from him at any rate under the personal covenant. As a result of the award Mehraj Din was protected from any possible claim by the mortgagee and the amount due under the mortgage was paid by Mt. Karm Bibi from her own pocket without any recourse to the minors' property. On his side Mehraj Din relinquished all his rights of inheritance in his wife's property. Mehraj Din was declared an insolvent on 9th March 1934, and the Official Receiver proceeded to take possession of the property in dispute treating it as the assets of Mehraj Din. The minors filed objections claiming that the property was theirs and could not, therefore, be treated as the assets of Mehraj Din. This objection prevailed and the Official Receiver has come up to this Court in appeal.

It was suggested by Mr. Shamair Chand counsel for the appellant, that all proceedings relating to the reference to arbitration and the award were collusive and fraudulent. Counsel even went to the length of arguing that Mir Hussain Bakhsh Pleader, was also involved in it and that there was evidence that he was not a man of good and reliable character. I do not think there is the slightest justification for imputing any improper conduct to the pleader. The evidence in the case has been read to me. Mir Hussain Bakhsh himself went into the witness box and not a single question was put to him, throwing any doubt upon his bona fides and honesty. The remarks of the counsel therefore casting aspersions upon the honour and character of Mir Hussain Bakhsh in his absence were wholly uncalled for and reminded me of the advocate immortalised by Macaulay. I therefore consider that the arbitration proceedings were regular in every way and under the award Mehraj Din relinquished for consideration all his claims in the property in suit in favour of the objectors.

It is further to be noted that a number of documents have been produced showing that for a long series of years the minors had been realising the rent and profits of the property in suit. An objection was raised by Mr. Shamair Chand for the appellants that the award was inadmis-

sible in evidence because it was unregistered. I do not think there is any force in this contention. The point is fully covered by 10 P R 1917 (1) which was followed by a Division Bench of the Allahabad High Court in 51 All 659 (2). In my opinion the Court below was fully justified in accepting the objections of the minors, respondents, namely Abdul Wahid and Mt. Ghulam Fatma, and in holding that the Official Receiver could not proceed against the property in dispute. The appeal therefore fails and is dismissed with costs.

B.D./R.K.

Appeal dismissed.

1. Wazir Ali Khan v. Mahbub Ali, 1914 Lah 238=22 I C 412=10 P R 1917=134 P L R 1914.
2. Mangali Prasad v. Babu Ram, 1929 All 365=116 I C 875=1929 A L J 393=51 All 659.

A. I. R. 1936 Lahore 878

JAI LAL, J.

Faiz Mohammad and another—Plaintiffs—Appellants.

v.

Allah Ditta and others—Defendants—Respondents.

Second Appeal No. 344 of 1936, Decided on 29th May 1936, from decree of Senior Sub-Judge, Jullundur, D/- 15th January 1936.

Custom (Punjab) — Custom cannot be proved by analogy.

The existence or otherwise of a custom cannot be decided merely by analogy of another case and as there is no such thing as a general custom that also cannot be relied upon.

[P 879 C 2]

Achhru Ram—for Appellants.

Mehr Chand Mahajan and Yashpal Gandhi—for Respondents.

Judgment.—The appellants are proprietors of the site of a house in Jullundur City. The respondent Allah Ditta is the owner of the materials of the house. He has mortgaged his right of residence to the respondent Faqir Chand with possession. The appellants instituted a suit for possession of the site and one-third of the courtyard on the ground that there was a denial of their title, and by the custom prevailing in the town and attaching to the land in dispute, the tenant Allah Ditta had no right to mortgage his right of residence, and if he did so he incurred forfeiture of his tenancy. The learned Senior Subordinate Judge on appeal has held that there has been no denial of the

title of the appellants so as to incur liability to forfeiture of tenancy of Allah Ditta. This is a finding of fact and cannot be attacked on this second appeal. Moreover, this finding is, in my opinion, correct on the evidence produced. The next question is whether there is a custom prohibiting tenants of the character of Allah Ditta from mortgaging their rights, and if there is such a custom, whether the result is forfeiture of the tenancy, or in any case whether the landlords are entitled to eject the alienee. The learned Senior Subordinate Judge held firstly that the case was not governed by the agricultural custom as is mentioned in para. 236 of Rattigan's Digest of Customary Law. He subsequently makes a remark that the judgments produced by the plaintiffs do not establish their case and then proceeded to discuss the question of forfeiture. An application was made by the appellants for a certificate under S. 41, Punjab Courts Act. It was refused on the ground that the Senior Subordinate Judge did not decide any question of custom but that he decided only the question of forfeiture by denial.

A preliminary objection is taken that this appeal is not competent without a certificate because, in spite of the refusal of the Senior Subordinate Judge to grant a certificate, he did decide the question of custom. An examination of the copies of judgments produced by the appellants shows that the judgments relate to the question of custom, and the Judge held that the fact that a landlord is entitled to succeed in the case of a sale did not necessarily mean that he also had the same rights in the case of a mortgage. On the face of it, it was a decision on the question of custom, but it may be that the Senior Subordinate Judge has misunderstood the whole case especially in view of the defective frame of issue 2. In order, therefore, to avoid the necessity of a remand, counsel agreed to argue the question of custom before me and I have heard them. So far as the material placed before the Senior Subordinate Judge is concerned it was not sufficient to establish any custom, whereby in the case of a mortgage with possession the landlords are entitled to eject the mortgagee or to forfeit the tenancy; but Mr. Achhru Ram has cited 75 P R 1897 (1), a judgment of

1. Bug v. Asad Ali, (1897) 75 P R 1897.

a Division Bench of the Chief Court of the Punjab, from the town of Jullundur, in which on a mortgage of his rights by a tenant, the mortgagee was ejected though it was held that it did not necessarily mean that the tenancy was forfeited. In the first instance this judgment does not appear to have been cited before the Senior Subordinate Judge and secondly the judgment proceeds mainly on the analogy of the so-called general custom prevailing in the villages. In my opinion the existence or otherwise of a custom cannot be decided merely by analogy and it has now been held that there is no such thing as a general custom. The main ground therefore, on which the decision of 1897 was based does not hold good any longer. I have already stated that this judgment does not appear to have been cited before the learned Senior Subordinate Judge.

In a recent judgment relating to a suburb of Jullundur City the custom propounded by the appellants has been negatived. This judgment was cited before the Senior Subordinate Judge. It is reported as 1934 Lah 289 (2). It is probable that this judgment is also of no material help because it does not relate to Jullundur town, but it was for the appellants to establish the custom affirmatively and, in my opinion, they have not succeeded in doing so. I therefore dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

2. Mahomed Mahmud Khan v. Laja Mal, 1934 Lah 289=151 I C 209=36 P L R 495=15 Lah 633.

* A. I. R. 1936 Lahore 879

JAI LAL AND DALIP SINGH, JJ.

Mt. Shahzadi Bi—Defendant—Appellant.

v.

Mt. Rahmat Bi and others—Plaintiffs and *others*—Defendants—Respondents.

First Appeal No. 1844 of 1934, Decided on 19th May 1936, from order of Senior Sub-Judge, Delhi, D/. 24th July 1934.

(a) Court-fee—Appeal—Suit for administration and accounts of estate—Suit valid at certain figure—Parties agreeing to such valuation—Appeal in such suit should be valued at that figure.

Where in a suit for accounts and administration, the plaintiff fixes the value of the suit for the purposes of Court-fee and jurisdiction which was admitted by all the parties at a certain

figure, in an appeal from a decree in such a suit a plaintiff or an appellant is entitled to value his relief for the purposes of Court-fee at such figure as he has fixed. [P 881 C 2]

* (b) Civil P. C. (1908), O. 20, R. 13—Suit for administration—Court after preliminary decree making order determining dispute but refusing to frame final decree—Such order amounts to final decree to that extent and is appealable—Contents of final decree in such suit are nowhere stated—Form in Civil Procedure Code can be varied and adopted.

The Code of Civil Procedure nowhere lays down what are to be the contents of a final decree in an administration suit. The contents must depend upon the nature of dispute in each case. [P 883 C 1]

Where after passing of a preliminary decree in an administration suit the Court passed an order which determined all the matters in dispute between the parties but refused to frame a final decree sheet, such order must be construed as a final decree to that extent, and is appealable: 35 *All* 159; 1915 *Cal* 272; 1921 *Oudh* 224; 1924 *Cal* 160; 1930 *Mad* 528; 1919 *Lah* 53 and 1932 *Lah* 214, *Ref.* [P 883 C 1, 2]

The forms prescribed in the Code are merely to be used in framing decrees; they can be varied and adapted to the circumstances of each case. [P 882 C 2]

Abdul Rahman and Bishen Narain—for Appellant.

Kirpa Narain and Bhagwat Dial—for Respondents.

Jai Lal, J.—The dispute in this case relates to the estate of Khan Sahib Haji Baksh Ilahi, C. I. E., a big cigarette merchant of Calcutta, Delhi and other places whose original home was in Delhi, and who died at Delhi in October 1926. He had three wives: by the first he had two sons, Muhammad Rafi and Muhammad Taqi, and by the second he had one son, Abdur Rahim. The third wife is Mt. Shahzadi Bi whom he married in 1901 when he was of a comparatively advanced age. He left no issue by her. He had a brother named Haji Karam Ilahi who has left three sons, Muhammad Shafi, Khan Sahib Abdul Rahman and Ata-ur-Rahman. It appears that after her marriage with Khan Sahib Haji Baksh Ilahi, Mt. Shahzadi Bi became his favourite wife and he resided with her most of the time till his death. It also appears that he was known to be a very rich man and did flourishing business in cigarettes, but the important question to be decided by us is whether in 1920 his financial condition had or had not undergone a change. On behalf of Mt. Shahzadi Bi it is contended that up to the end of 1921 at any rate he was in affluent circumstances as before.

On behalf of Muhammad Rafi, on the other hand, it is urged that in 1920 he was heavily involved in debt and was almost an insolvent. It is admitted that before 1919 Haji Baksh Ilahi was a man of wealth. The bearing of this question on the present litigation will appear presently, but it may be stated at once that the evidence on the record tends to show that after a decree for fourteen lacs of rupees was passed against him in September 1919 in favour of his partners Karam Ilahi and Ata-ur-Rahman the financial condition of Haji Baksh Ilahi became shaky and he had to borrow money from various sources to satisfy the decree and to meet his financial commitments. In 1920 more than one lakh and fifty thousand rupees borrowed from Sukh Lal had not been paid and it appears from the statement of Abdur Rahim that in 1920 and after that Haji Baksh Ilahi was generally indebted and short of funds and further that in 1920 he knew that his cigarette agency would not be renewed by the Imperial Tobacco Company.

After his death two suits for the administration of his estate by the Court were instituted. One was by his son Muhammad Rafi, who claimed to be a creditor of his estate for Rs. 1,74,099-0-5 and alleged that inter alia the immoveable properties described as Nos. 1 to 15 in a list attached to the plaint formed part of his estate and prayed that they should be administered as such. He also claimed as appears from the case developed at the trial that Mt. Shahzadi Bi was in possession of or had misappropriated jewellery and moveable property of the value of about one lac of rupees, which belonged to Haji Baksh Ilahi, and should be made to account for the same. The other suit was by Mt. Shazadi Bi whose claim was that 11 out of the 15 properties mentioned by Muhammad Rafi, that is to say, Nos. 5 to 15, were her own properties and not those of Haji Baksh Ilahi and that Rs. 11,000 was payable to her out of the estate of the deceased as her dower. She denied that she had in her possession any jewellery or moveable property belonging to Haji Baksh Ilahi. The other heirs of Haji Baksh Ilahi were impleaded as defendants in the suits and also the Punjab National Bank on the ground that it was a secured creditor of the deceased.

Preliminary issues were raised: whether the suit lay, whether the value for

the purposes of court-fee and jurisdiction was correct and whether the Punjab National Bank was a necessary party. These issues were framed in the administration suit filed by Muhammad Rafi. The other suit was subsequently transferred to the same Court and the two suits were consolidated and tried together.

When the suits came up for hearing the parties agreed that a preliminary decree may be passed for the administration of the estate and that the details of the properties be determined before the final decree is passed. They also agreed that the proper valuation of the suits was Rs. 130. The Punjab National Bank was allowed to remain a party to the suits but is not now interested in this litigation because it appears that its claim has since been satisfied. On 26th October 1927 the Senior Subordinate Judge passed an order which concludes as follows:

A preliminary decree shall be passed in both the suits (Nos. 20 and 71) in the terms of form No. 17, Sch. 1, Civil P. C. The shares of the parties in the estate will be as noted at the outset of this judgment. The parties shall appear before me on 2nd November 1927 for some reliable man to be selected as a Receiver. The costs of the suit shall be apportioned in the final decree.

The learned Judge noted that the heirs of Haji Bakhsh Ilahi were:

His widow Mt. Shahzadi Bi ... 3/24th share.

His sons Haji Muhammad Rafi, Mr. Abdur Rahim and Sheikh Muhammad Taqi ... 7/24th share each.

No preliminary decree was, however, prepared in pursuance of the above order, but the Court appointed Lala Kashmiri Lal, a retired Subordinate Judge, as the Receiver and directed him

first to determine the assets and liabilities of the estate and report on what lines he proposed to work.

It seems that Lala Kashmiri Lal recorded the statements of the parties and framed 20 issues which comprised the points in dispute between them, but the cases were subsequently taken up by the Senior Subordinate Judge of Delhi personally who framed 19 issues covering the several disputes between the parties and re-appointed Lala Kashmiri Lal as the Receiver of the disputed properties, because the previous appointment of this gentleman as a Receiver was considered

to have terminated. After recording the evidence of the parties the learned Senior Subordinate Judge passed an order which is printed at pp. 237 to 267 of Vol. 1 of the printed paper-book. This order is described by him as his judgment and by it the 19 issues which were framed by the learned Judge were disposed of by him. For the purposes of this appeal it is sufficient to say that he held that out of the 11 properties which were claimed by Mt. Shahzadi Bi, three were hers and the remaining eight belonged to the estate of Haji Bakhsh Ilahi. The claim of Muhammad Rafi that Mt. Shahzadi Bi had misappropriated jewellery and moveable property worth about one lac of rupees was found not established except that property worth about Rs. 5,000 found in her possession was held to belong to Haji Bakhsh Ilahi and her claim that Rs. 11,000 was due to her as her dower from the estate of her husband was disallowed. From this order an appeal has been preferred by Mt. Shahzadi Bi and cross-objections have been filed on behalf of the legal representatives of Haji Muhammad Rafi, who, it may be mentioned, has in the meantime died and is represented by his widows, sons and daughters before us. The Taxing Officer of this Court raised a question as to the sufficiency of the court-fee of Rs. 130 paid on the cross-objections by Muhammad Rafi's legal representatives, and on the matter being referred to us, we decided by a separate order that the cross-objections were sufficiently stamped.

A preliminary objection was then raised before us on behalf of the legal representatives of Muhammad Rafi that the memorandum of appeal by Mt. Shahzadi Bi was not properly stamped. It has been valued for the purposes of court-fee stamp at Rs. 130. As I have already stated the value of the suit for the purposes of court-fee, and jurisdiction was admitted by all the parties to be Rs. 130 in the trial Court, and as in a suit for accounts including an administration suit, and in an appeal from a decree in such a suit a plaintiff or an appellant is entitled to value his relief for the purposes of court-fee at such figure as he may fix, a matter which was conceded by all the parties before us, we overruled this preliminary objection. Another preliminary objection, however, was raised by the respondents that no appeal lay from the order

of 24th July 1934, the purport of which has already been described by me. It was contended that it was an interlocutory order, that it did not fall within the definition of a decree and that, therefore, it was neither a preliminary decree nor a final decree. I have already stated that by the order in question the Senior Subordinate Judge disposed of all the 19 issues framed by him and that these issues embraced all the disputes between the parties; but it is contended that before a final decree can be passed in this case the properties must be disposed of and the debts payable out of the estate determined and, therefore, the order in question cannot be held to be a final decree and that it could not be a preliminary decree as a preliminary decree had already been passed, and an enquiry had been made in pursuance thereof which had resulted in the passing of the order under appeal.

It was denied before us on behalf of the appellant that there are any other debts due from the estate which have to be ascertained, and it was urged that the whole dispute having been settled the Court should have passed a final decree as a result of its order under appeal. Indeed the appellant made an application to the trial Judge praying that a final decree be framed but the learned Judge declined to do so by his order of 28th August 1934 and directed the Receiver to take possession of the properties which he declared to have belonged to the deceased, to collect their rents and to submit a scheme as to the manner in which the properties could be disposed of for the purpose of the administration of the estate. The question whether an appeal lies from the order of the Senior Subordinate Judge passed on 24th July 1934 is not free from difficulty, but after giving my careful consideration to it I am of opinion that an appeal lies. In all probability it is not a preliminary decree because a preliminary decree must be deemed to have been passed and one had to be framed in pursuance of the order of 26th October 1927. Subsequently an enquiry was held as directed by and as a result of that order. It is true that no preliminary decree was actually drawn up, but the enquiry which led to the order under appeal was held with a view to pass a final decree, and in deciding this question it must be remembered that there were two administration

suits: one was by a person who claimed to be a creditor and also a next of kin and the other was by a person who claimed to be a next of kin. All the matters in controversy between the two plaintiffs in the two suits have been disposed of by the order under appeal, and nothing more is to be done in order to wind up the estate in a suit between the two next of kin.

The respondents' contention is that an appeal would be competent only when a formal decree is drawn up according to the form prescribed in the schedule of the Civil Procedure Code, and he refers to form No. 20 in App. D, Sch. 1, Civil P. C. That form however seems to contemplate division of cash proceeds of the estate of a deceased person who has died intestate. The contention of the counsel is that before a final decree in that form can be passed the whole property must be sold, the debts paid out of the sale proceeds and then the balance if any divided among the heirs of the deceased according to their respective shares, and after this has been done a final decree should be framed and then alone would the appellant be entitled to present an appeal in this Court. Now, in the first instance, the forms prescribed are merely to be used as a guide in framing decrees; they can be varied and adapted according to the circumstances in each case. Moreover, if the only decree, which would be appealable in a case like this, is the final decree framed by the Court after the sale of the property, then it is obvious that irreparable loss would result to the appellant, who, if subsequently found to be entitled to the property in dispute which would in the meantime have been sold as part of the estate of Haji Bakhsh Ilahi, might find it difficult to recover it and may have to be content with the sale proceeds thereof realised by the Receiver. The real difficulty has been created by the manner in which the learned Subordinate Judge has dealt with this case piece-meal. He should have made all the enquiry which was necessary for passing a comprehensive final decree and should then have passed an order which would have been the final adjudication of all the disputes not only between the parties but between the parties and third persons e. g., creditors—an order which would have necessarily led to the framing of a decree which admittedly would have been

appealable to this Court. O. 20, R. 13, Civil P. C., provides that:

Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts and enquiries to be taken and made, and giving such other direction as it thinks fit.

But no provision is made as to when a final decree is to be passed and what should be the contents of that decree. A provision is made for a final decree in other cases: as for instance in mortgage suits and in suits for possession and for rent or mesne profits. The Code therefore nowhere lays down what are to be the contents of a final decree in an administration suit. I consider that this must depend upon the nature of the dispute in each case. I am of opinion that, as in the present case, the order in question has determined all the matters in controversy between the two disputing parties, it must be construed as a final decree to that extent. It is however contended that there can be only one preliminary decree and one final decree, and that the law does not contemplate the existence of more than one preliminary decree or more than one final decree. Some cases were cited in support of this contention: as for instance 35 All 159 (1), 19 C W N 755 (2) and 65 I C 983 (3). The Calcutta case related to a suit for accounts, and it was held that there could be only one preliminary decree. The two other cases related to suits for partition. In 1924 Cal 160 (4) however it was held that there can be more than one decree, and the same view was expressed in 1930 Mad 528 (5). In 66 P R 1919 (6) it was held that where an order passed falls within the definition of a decree, an appeal lies even if no decree sheet has been prepared. In 1932 Lah 214 (7) an appeal

was entertained where the trial Court had refused to draw a final decree. In my opinion therefore in the present case the order appealed against amounts to a decree and is appealable in spite of the fact that the Senior Subordinate Judge has declined to frame a formal decree sheet. I overrule the preliminary objection. (His Lordship after discussing the evidence in detail proceeded.) I would therefore dismiss the cross-objections with costs both as barred by time and on the merits. I would accept the appeal of Mt. Shahzadi Bi and declare that the following properties, No. 14 House in Katra Hijrad, No. 11 House in Rodgaran, No. 16 Katra in Gali Mir Jumla, and No. 13 House and plot in Mahrauli, which have been held by the learned Senior Subordinate Judge to have belonged to Haji Bakhsh Ilahi at the time of his death, belong to Mt. Shahzadi Bi, and reverse the decree of the learned trial Judge to that extent. The appeal with regard to the four following properties, No. 10 Shops in Dehli (Rodgaran), No. 8 Shops in Chauri Bazar, and No. 12 Shops in Rodgaran Ihata Hajan, No. 7 Kothi, known as Dunlop property, is dismissed. Under the circumstances I would leave the parties to bear their own costs of the appeal.

Dalip Singh, J.—I agree.

B.D./R.K.

Order accordingly.

A. I. R. 1936 Lahore 883

COLDSTREAM, J.

Ram Parkash — Judgment-debtor—
Petitioner.

v.

(Firm) Hukam Chand-Raj Kumar—
Decree-holder and another—Judgment-
debtor—Opposite Parties.

Civil Revn. No. 830 of 1935, Decided
on 21st March 1936, from order of Senior
Sub-Judge, Jullundur, D/- 19th August
1935.

Provincial Small Cause Courts Act (1887),
S. 25—Transfer by District Judge under S. 24
(4), Civil P. C., from Court invested with
Small Cause Court powers but succeeded by
Court not vested with Small Cause Court
powers to another similar Court—Transfer
does not give jurisdiction to try such case as
Small Cause case—Order passed on transfer
is appealable.

Section 24 (4), Civil P. C., presupposes a
transfer by a Court of Small Causes to another
and where a Court invested with powers of a
Small Cause Court and trying the case as one

1. Bharat Indu v. Yakub Hussain, (1918) 35 All 159=18 I C 701=11 A L J 120.
2. Kamini Debi v. Promotha Nath, 1915 Cal 272=27 I C 317=19 C W N 755=20 O L J 476.
3. Jagmohan Das v. Indar Prasad, 1921 Oudh 224=65 I C 983=24 O O 866.
4. Peary Mohan Mukerji v. Manohar Mukerji, 1924 Cal 160=74 I C 978=27 C W N 989=38 O L J 255.
5. Ramanathan Chetty v. Alagappa Chetty, 1930 Mad 528=191 I C 160=59 M L J 102=53 Mad 878.
6. Manohar Lal v. Nanakchand, 1919 Lah 53=52 I C 479=66 P R 1919.
7. Nathu Mal v. Uderam, 1932 Lah 214=137 I C 278=93 P L R 56.

of Small Cause Court, is transferred and succeeded by another who was not vested with powers of a Court of Small Causes, and he transfers the case to another Court under orders of the District Judge and that Court also is not a Court of Small Causes which though it had jurisdiction to deal with a case under the provisions of S. 35 could do so only on the regular side, such a Court cannot be invested with Small Cause Court powers by the mere transfer of the case to it, and any order passed by such a Court must be regarded as having been passed by it in the exercise of its regular jurisdiction and is appealable as such: 1931 All 574 (F B), *Foll.* [P 884 C 2; P 835 C 1]

D. N. Aggarwal—for Petitioner.

Mohammad Sharif — for Opposite Party (Decree-holder).

Order.—On 20th July 1932 an ex parte decree for Rs. 50 was passed in favour of the firm Hukam Chand-Raj Kumar against the firm Gujar Mal-Ram Parkash by Mr. Ishwar Das, Subordinate Judge, Jullundur, in exercise of his powers as a Small Cause Court.

Mr. Ishwar Das was vested with the powers of a Small Cause Court and passed the decree as one in a case triable by a Court of Small Causes. Ram Parkash applied to have the ex parte decree set aside and Mr. Ishwar Dass's successor, Pandit Indar Kishan, who also exercised the powers of a Small Cause Court, accepted the application and set the decree aside. The same Judge then proceeded to deal with Ram Parkash's objection that he was not liable as a partner of the judgment-debtor firm. His decision was that this question was one to be determined by the executing Court on an application under O. 21, R. 50, Civil P. C. and with this decision he "closed" the proceedings. It is to be presumed that he intended that the decree against the firm should remain unaffected.

The decree-holders proceeded to execute the decree against Ram Parkash and Gujar Mal and in the course of the proceedings put in an application under O. 21, R. 50 to be allowed to execute it personally against them but before this application was decided Pandit Indar Kishan was transferred. He was succeeded by Mr. Narang. When the application came before Mr. Narang, he recorded an order that as he was not vested with the powers of a Court of Small Causes the record should be sent, in accordance with an order of the District Judge, to the Court of the Subordinate Judge, Sudder Sani, the presiding officer of which, a Subordinate Judge, also did not exercise

Small Cause Court powers. The application was ultimately dealt with by Sheikh Mohammad Akbar who granted the decree-holder's application passing an order that the decree could be executed against Ram Parkash. Ram Parkash appealed to the Senior Subordinate Judge, who dismissed the appeal, holding that the order appealed against must be deemed in view of the provisions of S. 24 (4), Civil P. C., to be one passed by a Court of Small Causes and was not appealable. Ram Parkash has come to this Court praying for a revision of this decision. It is contended that S. 24 (4), Civil P. C., does not apply, as the Court from which the proceedings were transferred under the orders of the District Judge to the Sudder Sani Court was not a Court of Small Causes, but a Court which (and this is admitted), though it had jurisdiction to deal with a case under the provisions of S. 35, Provincial Small Cause Courts Act could do so only on the regular side, and could not be invested with Small Cause Court powers by the mere transfer of this case to it.

It is also contended that in any case Sheikh Mohammad Akbar erred in passing the order objected to because the question of Ram Parkash's liability was *res judicata*, the setting aside of the ex parte decree against him having absolved him from all liability under it. In view of my decision on this petition it is unnecessary to consider the second contention. In my opinion there is force in the first contention. S. 24, Civil P. C., contemplates the transfer of a case from one existing Court to another. It is admitted that at the time of the transfer there was no Court of Small Causes in Jullundur and no Subordinate Judge vested with the powers of a Small Cause Court. The Court presided over by Pandit Indar Kishan was not a Court of Small Causes established under the Provincial Small Cause Courts Act and therefore when he was transferred, there ceased to exist in Jullundur any Court of Small Causes in which the proceedings could remain pending, or to which they would automatically go under the provisions of S. 35, Small Cause Courts Act, although, no doubt the Court of Pandit Indar Kishan, while he was presiding over it and dealing with Small Causes was a Small Cause Court for the purpose of S. 24 (4), Civil P. C. When Pandit Indar Kishan

was transferred the case came automatically into the file of regular suits pending in the Court of the Subordinate Judge who succeeded him. That Court admittedly had jurisdiction to try the case as a Subordinate Judge's Court, there being at that time no Court in Jullundur having jurisdiction to deal with it as a Small Cause Court. Thereafter its transfer could not be a transfer from a Court of Small Causes, such as is contemplated by S. 24 (4), Civil P. C. This view is consistent with the Full Bench decision of the Allahabad Court in 54 All 171 (1), the correctness of which does not appear to have been questioned by this Court. It follows that the order passed by Sheikh Mohammad Akbar was not one which must be deemed to have been passed by a Court of Small Causes but must be regarded as having been passed in the exercise of his regular jurisdiction as a Subordinate Judge.

The learned Senior Subordinate Judge therefore erred, in my opinion, in the exercise of his jurisdiction when he refused to entertain the appeal. Accepting the petition I set aside the Senior Subordinate Judge's order and remand the case to him for disposal according to law.

V.B./R.K.

Petition accepted.

1. Bhagwati Pande v. Badri Pande, 1931 All 574=136 I C 357=54 All 171=1931 A L J 953 (F B).

A. I. R. 1936 Lahore 885

JAI LAL, J.

Agar Chand—Decree-holder — Appellant.

v.

Prithvi Singh and others — Respondents.

Misc. Second Appeal No. 2325 of 1935, Decided on 24th March 1936, from order of Dist. Judge, Hissar, D/- 2nd November 1935.

(a) Insolvency—Date of admission of insolvency petition is date on which applicant was asked to furnish security.

The insolvency law nowhere states as to which is the date of the admission of the insolvency petition. But there are certain sections in the Provincial Insolvency Act, that afford guidance in determining the date of admission. From a consideration of Ss. 18, 21 and 51, Provincial Insolvency Act, the date on which an applicant is asked to furnish security

for his regular attendance in Court can be regarded as a date of admission of the insolvency petition: 1925 Mad 248, *Rel. on.*

[P 886 C 2]

(b) Provincial Insolvency Act (1920), S. 19—Date of hearing is to be fixed after date of admission and not necessarily on same date.

Section 19 provides that the date is to be fixed after the petition; it does not follow that it is necessary to be fixed at the same time or on the same date.

[P 887 C 1]

Chiranjiva Lal Aggarwal and Fakir Chand Mital—for Appellant.

Shamair Chand—for Respondents.

Judgment.—In execution of a decree against Mamraj passed in favour of Agar Chand, his assets were realized on the 2nd May 1934. This is the case of both sides before me. Mamraj then made an application for his adjudication as an insolvent on 17th April 1934. This application was presented in the Court of the District Judge. The Office of the District Judge scrutinized the application and reported that no previous application had been made. It also stated what the amounts of assets and debits respectively were. This report was made on 17th April 1934. On 18th April 1934 the District Judge passed an order that the case be sent to the Senior Subordinate Judge of Hissar for disposal in accordance with law. On 21st April 1934 in the presence of counsel for the petitioner the Senior Subordinate Judge passed an order that after the application had been entered in the register the petitioner should deposit Rs. 35 as expenses and give security for Rs. 700 by 12th May 1934. This order was complied with and on 12th May in the presence of the petitioner an order was passed by the Senior Subordinate Judge noting that the expenses had been paid and security had been given and directing that notice be issued to the creditors for 16th June 1934.

Now the question that has arisen in this case is whether the application for insolvency was admitted on or before 2nd May 1934 or after that date. The case has arisen on account of a dispute between Agar Chand and other creditors of the insolvent who claimed that by virtue of S. 51, Provincial Insolvency Act, the amount realized must be distributed rateably among all the scheduled creditors of Mamraj. Agar Chand on the other hand claimed that as the assets were realized before the admission of the insolvency petition, therefore the whole amount

should be paid over to him. The District Judge has held that the assets were realized after the admission of the application for insolvency and, therefore, were distributable among all the scheduled creditors of the insolvent. He has held that the insolvency petition must be deemed to have been admitted on 18th or 21st April 1934. The appellant's case on the other hand is that it must be deemed to have been admitted on 12th May 1924. Now, S. 51 (1), Provincial Insolvency Act, provides that :

Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition.

The law nowhere says what is deemed to be the date of admission of the petition, but there are some sections of the Provincial Insolvency Act which afford guidance in the matter. The sections before S. 18 of the Act, relate to the presentation of the petition, but S. 18 provides that :

The procedure laid down in the Code of Civil Procedure, 1908, with respect to the admission of plaints, shall so far as it is applicable, be followed in the case of insolvency petitions.

The only provisions of the Civil Procedure Code that have been relied upon by counsel on both sides are O. 4, R. 2 which provides that :

The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

This is the first time that the word "admitted" is used in the order. O. 7, R. 9 says that the plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the plaintiff's claim. O. 7, Rr. 10 and 11 were also mentioned before me, but they only relate to the return of plaints and rejection of plaints under certain circumstances. They do not deal with the question whether the return and the rejection should take place before

or after the admission of the plaint. Apparently it can be done both before or after the admission of the plaint. In any case in the present case no question of return or rejection of the petition has arisen.

Another section which has to be considered is S. 21, Provincial Insolvency Act, which provides that at the time of making an order admitting the petition or at any subsequent time before adjudication the Court may order the debtor to give reasonable security for his appearance until final orders are passed. I have already stated that in the present case an order was passed by the Senior Subordinate Judge on 21st April 1934, directing that the petition be entered in the register and the petitioner should give security for his appearance in the sum of Rs. 700 on or before 12th May 1934. This in my opinion is an indication of the intention of the Court to admit the petition and in this view I am supported by what was done by the Madras High Court in 1925 Mad 248 (1). In that case also the question was when the petition for insolvency was admitted and the learned Judges were of opinion that as an order appointing an ad interim receiver can be passed at the time of admitting the petition and as in the case before them an order appointing an ad interim receiver was made by the insolvency Court the date of such an order might be taken as the date of the admission of the petition.

Section 18, Provincial Insolvency Act, in my opinion makes it quite clear that in the present case the date on which the petition was entered in the register was the date of its admission. As I have already stated, S. 18, Provincial Insolvency Act, makes O. 4, R. 2, Civil P. C., applicable to the insolvency petitions and the implication of R. 2 is that the plaint is to be entered in the register only if it is admitted. Otherwise it cannot be numbered. Therefore, in my opinion, it is quite clear from what has happened that the insolvency petition was admitted by the learned Senior Subordinate Judge on 21st April 1934, but the learned counsel for the appellant contends that there may be cases in which after entering the petition in the register the Judge finds it

1. Ramanathan Chettiar v. Subramaniam Chettiar, 1928 Mad 248=85 I C 216=47 M-L J 759=48 Mad 656. ▀

necessary to reject it for want of compliance with some order or for any other reason apparent on the face of the application. That may be so, but that does not show that the petition was not originally admitted as S. 21 itself provides that an order for security is to be given at the time when the order for admission has been passed. If such an order is not complied with then the Court can reject the petition or decline to proceed with it till it is complied with. Another argument of the learned counsel was that under S. 19, Provincial Insolvency Act, a date for the hearing of the petition must be fixed at the time of its admission. In my opinion it does not necessarily follow from the phraseology of the section, which says :

Where an insolvency petition is admitted, the Court shall make an order fixing a date for hearing the petition.

The section merely provides that the date is to be fixed after the admission, of the petition; it does not follow that it is necessary to be fixed at the same time or on the same date. In my opinion, the view of the learned District Judge is correct and I dismiss this appeal with costs.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 887

AGHA HAIDAR, J.

Mt. Khadija Begum — Plaintiff — Appellant.

v.

Nisar Ahmad — Defendant — Respondent.

Second Appeal No. 65 of 1936, Decided on 25th March 1936, from Dist. Judge, Ambala, D/- 12th October 1935.

(a) Practice — Procedure — Judge raising point against plaintiff neither pleaded nor proved—Procedure is unjustifiable.

The Judge has no jurisdiction whatever under the law to raise a point against a plaintiff which is never pleaded nor proved, and which is a mere probability and not a fact as established by legal evidence. [P 889 C 2]

(b) Mahomedan Law—Dower—Dower deed stipulating condition against relinquishment of any portion to safeguard wife's interests and to avoid underhand dealings—Condition is valid and relinquishment without compliance with such condition is not binding.

Where the dower deed contained a stipulation, introduced to safeguard the interests of the wife and to avoid underhand dealings, according to which the husband could not get any amount of dower relinquished without the written consent of the wife's relations:

Held : that the condition was perfectly valid and the relinquishment without compliance with the condition was not binding upon the wife. [P 889 C 1]

(c) Practice—Procedure—Court is entitled to examine and cross-examine witnesses to get at truth.

Although a Judge would not be acting strictly according to the rules of judicial practice if he were to take the work of examining and cross-examining witnesses in his own hand, yet certainly it is his duty and privilege to put questions to witnesses in order get at the truth. This is the reason why the powers of the Court in this respect are much wider than those of the counsel. [P 890 C 1]

Ghulam Jilani—for Appellant.

Tek Chand and Rattan Lal Gupta—for Respondent.

Judgment.—This appeal arises out of a suit brought by the plaintiff for cancellation of a deed of relinquishment dated 17th August 1932. The plaintiff is a young woman aged about 19. It appears that the plaintiff was an orphan with no other near relations except her mother who had been looking after her until she was married. On 11th January 1932 the plaintiff was married to the defendant and Rs. 1,600 was fixed as her prompt dower (mo'ajjal). A formal document was executed by the defendant on 11th January 1932 and registered on 19th January 1932. It is marked as Ex. P-1. In this document there is a condition that, if the executant desired to have the fixed dower released, the release would be invalid in the absence of the consent and signatures of the relations of the bride. The parties continued to live amicably for a short time but troubles arose and, in view of the condition already quoted from Ex. P-1, one Pandit Jagan Nath, Pleader, who does not appear to have been personally known to the plaintiff, sent a notice Ex. D-4 under a registered cover to Mt. Khair-ul-Nisa, the mother, and Mt. Fatima, the maternal aunt of the plaintiff. This notice purports to have been sent by the pleader, Pandit Jagan Nath, under the instructions of the plaintiff. In this notice it is stated that the plaintiff Mt. Khadija Begum was entitled to relinquish her dower debt and that no one could have any objection to her exercising this right. Then the following interesting passage occurs in the notice :

As you have by the exercise of undue pressure obtained from the husband of my client an agreement in which you have attempted to nullify the valid rights of my client contrary

to law, therefore, you are informed that my client was not a party to that agreement, nor is she bound by the terms thereof.

The notice was sent under a registered cover and bears the writing "refused to take." It is signed by some one whose signatures are illegible and is dated 9th August 1932. Across the address the word 'refused' is written in red ink. On 17th August 1932 the defendant obtained the deed of relinquishment (Ex. D-1) from the plaintiff in which she is alleged to have relinquished a sum of Rs. 1,568 out of Rs. 1,600, the amount of the prompt dower fixed under Ex. P-1. This document also recites that the plaintiff had full right to relinquish her dower in favour of her husband and that the executant had communicated her intention to release the dower to her mother Mt. Khair-ul-Nisa and her aunt Mt. Fatima by means of a registered notice through Pandit Jagan Nath, Pleader, on 8th August 1932. This document was registered with startling promptitude on the date that it was executed. On the same day a document (Ex. D-2) was executed in which the plaintiff is alleged to have relinquished the sum of Rs. 1,568 with her free consent and pleasure out of her dower debt, in favour of the defendant and limited her claim to Rs. 32 only. This extraordinary document (Ex. D-2) is described in the context as an affidavit. It does not appear to have been sworn before anybody and was also registered on the same day. The lady was not identified before the Sub-Registrar by any relation who knew her personally and who was in a position to identify her but by one Mr. Sri Ram, Advocate. On 30th September 1932 the defendant obtained a receipt of Rs. 32 also from the plaintiff in full satisfaction of the dower that had remained outstanding after the deed of relinquishment (Ex. D-1).

The case for the plaintiff is that, after obtaining the documents mentioned above from her, the defendant turned the plaintiff out of his house and that Ex. D-1 was obtained by the defendant by assuring the plaintiff that he would transfer certain houses to her so that she might be able to maintain herself properly out of their rent and that she had never understood the contents of Ex. D-1 nor had she any opportunity to consult any relation of hers, nor at the time of the registration was she accompanied by any

such relation. She relied upon the condition embodied in Ex. P-1 under which the defendant could not obtain a release of the dower debt in his favour without the consent and signatures of her relations. In his written statement, excepting para. 1 of the plaint, the defendant denied the allegations contained in the plaint and, while admitting Ex. P-1, had the impudence to say that he had no knowledge of the conditions contained in it. The trial Court decreed the plaintiff's suit, but the District Judge in an extremely unsatisfactory judgment has reversed the decision of the trial Court and dismissed the plaintiff's suit. The plaintiff has come up to this Court in second appeal.

The judgment of the District Judge is based upon conjectures; for instance, it is stated therein that the plaintiff knows a little Urdu and has signed the documents Exs. D-1 and D-2 and she could have read these documents before putting her signatures on them. The point is not what a party could have done or could not have done but what the party actually did in a particular case. Again, the District Judge has noted that the plaintiff lived in her husband's house for two or three months after execution of these documents according to her own statement in Court, and, as her mother and aunt lived in the Cantonment, she could very well have informed them that she had executed some such documents. This again is not the right way to discredit the plaintiff. Then the learned Judge has remarked that:

It is very probable that her husband prevailed upon her to relinquish this heavy sum of dower and she consented to it out of natural love and affection.

This was not the case of anybody. In fact, in answer to a question put by the Court, the defendant in his evidence stated that he did not know why the plaintiff relinquished her claim for dower. The Judge had no justification whatever under the law to raise a point against the plaintiff which was never pleaded and proved and which, according to him, was a mere probability and not a fact established by legal evidence. The District Judge refers to the condition in Ex. P-1, according to which the defendant could not get any amount of dower relinquished, without the written consent of the plaintiff's relations. He has observed that, in order to

comply with this condition, the defendant sent a registered notice (Ex. D-4) to the plaintiff's mother but it was returned to the defendant by the Post Office as "refused." In the opinion of the District Judge however this condition in the dower deed was not binding inasmuch as it derogated from the plaintiff's rights to give up her dower debt or any portion thereof. I do not agree with the District Judge in this observation. It is customary for parties while entering into a contract of marriage and executing a deed of dower to lay down conditions to which the parties may agree for regulating the future marital relations of the spouses. For instance, a stipulation may be made that the husband shall not contract a second marriage during the existence or continuance of the first. Mahomedan law recognizes polygamy in a very restricted form, but no one has ever seriously challenged the legality of such condition on the ground that, as a Mahomedan was allowed to marry more than one wife, the condition was not valid and binding upon him. The condition embodied in Ex. P-1 was perfectly valid inasmuch as it was intended to safeguard the interests of the wife and, as the District Judge himself points out, to avoid "underhand dealings." There is no evidence whatsoever that the notice which was served by Pandit Jagan Nath upon the ladies was ever communicated to them or that they ever refused to have anything to do with the matter. The sequence of events already narrated clearly shows that the defendant had taken every precaution which low cunning could suggest in order to deprive the plaintiff of all her remedies in respect of the release of her fixed dower debt, which the defendant had obtained from her somehow. Apparently the friends and relations of the plaintiff at the time of her marriage had some misgivings as to the honesty of the defendant who is a money lender by profession and had therefore provided safeguards so that the plaintiff might not be left entirely at the mercy of her husband.

I therefore hold that the condition was valid and that the relinquishment in the absence of the consent in writing of the mother and other relations of the plaintiff was not binding upon her. In this connection I cannot help noticing the shady part played by Pandit Jagan Nath, pleader, in this case. According to the defendant,

Pandit Jagan Nath had appeared in five or seven cases for him as a pleader. He sent the notice Ex. D-4 to the mother and maternal aunt of the plaintiff on 8th August 1932 purporting to act under the instructions of the plaintiff. This notice was undoubtedly meant to be a step preparatory to obtaining the deed of relinquishment from the plaintiff (Ex. D-1). The plaintiff appeared in the witness box and Pandit Jagan Nath, pleader, appeared for the defendant. He cross-examined the plaintiff and succeeded in eliciting from her the important statement that she had not had any notice served through Pandit Jagan Nath. If Pandit Jagan Nath had even the remotest conception of the rules of etiquette which prevailed in the legal profession, and he was really acting under instructions from the plaintiff when he served the notice (Ex. D-4) upon the plaintiff's mother and maternal aunt, he should not have accepted the case for the defendant. Again, after the plaintiff had given answer to his question that she never instructed him to serve any notice his clear duty as an advocate was to retire from the case and offer himself to the Court as a witness in order that he might vindicate his character as a legal practitioner and not allow such a damaging statement as the plaintiff made under his own cross-examination to go unchallenged. This however he did not do and I record my thorough disapproval of the part which he has played in the whole affair. I have not the slightest doubt in my mind that Pandit Jagan Nath had sent the notice on the instructions of the defendant. The Subordinate Judge had put the point very mildly for Pandit Jagan Nath in the following words:

The notice, Ex. P. 4, appears to me to have been sent by Pandit Jagan Nath, pleader, who now represents the defendant for the purpose of creating evidence in favour of his client, whom he has represented in several cases. I cannot believe that it was sent under the plaintiff's instructions.

But curiously enough the District Judge has added a rider in his judgment by observing that the Sub-Judge's criticism of the conduct of Pandit Jagan Nath and L. Sri Ram, advocates, and the Sub-Registrar is wholly unsupported by evidence or circumstances, and he would have done well to refrain from such criticism. I have already expressed my views as regards Pandit Jagan Nath's conduct.

I asked repeatedly the learned counsel for the respondent in this Court as to what criticism, damaging or otherwise, the Sub-Judge had made against L. Sri Ram, advocate, and the Sub-Registrar, but they have not been able to point out to me any passage in the judgment where this has been done.

Again the District Judge has criticised the Sub-Judge because in his opinion he (the Sub-Judge) "had put questions to witnesses to fill up the lacunas in plaintiff's case," when she was represented by counsel. I find that only two questions were put by the Subordinate Judge: one to P. W. 3 and the other to no less a person than the defendant himself. The question put to the defendant was a very proper question and I may point out for the information of the District Judge, that, although a Judge would not be acting strictly according to the rules of judicial practice, if he were to take the work of examining and cross-examining witnesses in his own hand, yet certainly it is his duty and privilege to put questions to witnesses in order to get at the truth. This is the reason why the powers of the Court in this respect are much wider than those of the counsel. In my opinion, the judgment of the District Judge is wholly erroneous. I therefore allow the appeal and, setting aside the decree of the lower appellate Court, restore that of the trial Court with costs throughout.

V.B.B./R.K. *Appeal allowed.*

A. I. R. 1936 Lahore 890

TEK CHAND, J.

Ram Chand Manchanda—Plaintiff —
Petitioner.

v.

H. G. Lush — Defendant — Opposite
Party.

Civil Revn. No. 7 of 1936, Decided on 15th April 1936, from decree of Judge, Sm. C. C., Lahore, D/- 9th December 1935.

Lease—Validity—Term of lease—Tenancy, for period during which tenant is to remain in station, is not bad for uncertainty — Term need not be for fixed period so long it is definite.

A tenancy for the period during which a tenant remained in the station, where the rented premises are situate, is not bad for uncertainty. It is not necessary that the term should be for a fixed period, so long as it is definite. The term is definite, if it is defined either by express limitation, or by reference to

some event which will afterwards fix its exact length: 7 Bom L R 772 and 1931 Bom 466, Rel. on. [P 891 C 1]

Ram Chand Manchanda in person
and *Din Dayal Khanna*—for Petitioner.

Ishwar Das Khanna and *Mehr Chand Shukla* for *Ishwar Das Khanna*—for Opposite Party.

Order.—The plaintiff petitioner is the owner of a house in Lahore which he had let to the defendant with effect from 1st February 1931. The defendant paid the rent up to 15th March 1935 and there is no dispute between the parties for the period prior to that date. He vacated the house on 15th March 1935. In a suit previously brought a decree was passed in favour of the plaintiff for the rent for the latter half of March 1935.

In May 1935 the plaintiff brought a suit for recovery of rent for April and May 1935, alleging that the tenancy was not for a period of three years as alleged by the defendant but for so long as the defendant remained in Lahore. He alleged that the defendant, who is an employee of the Burmah Shell Company, is still in Lahore, that he had vacated the house on 15th March 1935 without any justification, and that in accordance with the conditions of the tenancy he was bound to pay rent so long as he was not transferred from Lahore. The defendant pleaded that the tenancy was for a period of three years only, which had expired on 31st January 1934, and that there was no modification of the duration of the lease from three years to the period for which he was in Lahore, as alleged by the plaintiff. He also pleaded that he had left the house at the suggestion of the plaintiff and, further, that the suit for rent was not competent in view of the fact that on the vacation of the house by the defendant the plaintiff had taken possession of it.

The trial Judge found that the defendant's plea that he had vacated the house at the suggestion, or with the consent, of the plaintiff was unproved. On the main point, as to the duration of the tenancy, the learned Judge, without coming to a definite finding as to whether there was a modification of the original terms of the tenancy extending its duration from three years to the period for which the defendant remained in Lahore, held that such modified lease, even if proved, would be invalid, firstly, because it was not for a

definite period and therefore was bad for uncertainty; and, secondly, that there was no consideration for the alleged modification. In this view of the case he dismissed the suit.

The plaintiff has preferred a petition for revision in this Court, and it has been contended on his behalf that the reasons given by the learned Judge for the dismissal of the suit are erroneous in law. Counsel for the defendant has frankly admitted that he could not support the judgment of the lower Court on the grounds on which it proceeded. It is beyond dispute that a tenancy for the period, during which a tenant remained in the station where the rented premises are situate, is not bad for uncertainty. It is not necessary that the term should be for a fixed period so long as it is definite. It is settled law that the term is definite, if it is defined either by express limitation or by reference to some event which will afterwards fix its exact length. In this connexion reference may be made to Mulla's Transfer of Property Act, p. 523, Gour's Law of Transfer, Edn. 6, Vol. 3, para. 3462, 7 Bom L R 772 (1), and 133 I C 839 (2).

The other ground taken by the learned Judge, that the alleged novation of contract was invalid for want of consideration, is equally untenable. If the facts as alleged by the plaintiff are proved, there can be no doubt that the alleged novation was for consideration. It is not necessary to labour these points further, as the learned counsel for the defendant frankly admitted that they could not be sustained. The learned counsel, however, contended that the alleged novation of the contract extending the duration of the tenancy from three years to the period during which defendant remained in Lahore has not been proved on the record. After hearing both counsel it seems to me that there has not been a proper enquiry into this point, and the materials on the record are not sufficient to come to a definite finding thereon. The plaintiff, though he went into the witness box, was not questioned in detail as to the circumstances in which the alleged modification took place. He contented himself by referring to certain letters and

statements made in another case. The defendant did not go into the witness box in the present case at all, and his statement in the previous case, a copy of which has been placed on this record by the plaintiff, was not put to him. Moreover, the statements in the previous case are very brief and do not give all the necessary details from which it would be possible to come to a definite finding as to whether or not there was a completed contract extending the term of the tenancy from three years to the period during which the defendant remained in Lahore.

The other questions raised by the defendant also cannot be properly decided without further examination of both the parties as to the circumstances in which the defendant vacated the premises on 15th March 1935 and the plaintiff took possession. The defendant's plea that he vacated the house at the suggestion of the plaintiff has been held to be unproved, and I agree with the lower Court in its finding; but with what intention the plaintiff took possession of the house is a matter on which further enquiry is necessary. The lower Court appears to have missed the real points in the case. I am, therefore, constrained to remit it for re-decision. I accordingly accept the petition, set aside the judgment and decree of the Court below and remit the case to it for disposal in accordance with law. Both the plaintiff and the defendant should be examined, and they should be allowed to lead further evidence if they desire to do so. Court-fee on this petition will be refunded, other costs will be costs in the cause.

R.M./R.K.

Case remanded.

A. I. R. 1936 Lahore 891

AGHA HAIDAR, J.

Mohan Lal and others—Plaintiffs—Appellants.

v.

Shib Charan Das and others—Defendants—Respondents.

Second Appeal No. 889 of 1935, Decided on 11th March 1936, from decree of Dist. Judge, Delhi, D/- 14th March 1935.

(a) Jurisdiction—Waiver—Court having jurisdiction over subject matter—Irregularity in commencement of proceedings—Objection not taken at proper stage—Defect of jurisdiction is waived.

Where there is jurisdiction over the subject matter but non-compliance with the procedure

1. Mahomed v. Ezekiel, (1905) 7 Bom L R 772.

2. Ramchandra Balvant v. Narsinha Ohintaman, 1931 Bom 466 = 133 I O 839 = 33 Bom L R 590.

prescribed as essential for the exercise of jurisdiction, the defect might be waived. Defects of jurisdiction arising from irregularities in the commencement of the proceedings may be waived by the failure to take objection at the proper stage of the proceedings: 1919 *Lah* 27 and *Pisani v. Attorney-General of Gibraltar*, (1874) 5 P C 515, *Foll.* [P 894 C 1]

(b) **Rateable Distribution—Order allowing claim to rateable distribution not challenged by way of appeal or any other proceeding—Order is final and cannot be attacked in subsequent suit.**

Where an order allowing a claim to rateable distribution is not challenged by way of appeal or any other proceeding and it becomes final, the general doctrine of *res judicata* applies and it cannot be attacked in a subsequent suit.

[P 894 C 2]

Jagan Nath Aggarwal, Mehr Chand Mahajan and Yashpal Gandhi—for Appellants.

Badri Das and Inder Dev—for Respondents 1 and 2.

M. L. Sethi—for *Jagan Narain* (Respondent).

Judgment.—On 13th February 1928, Shib Charan, defendant 1, and Har Charan defendant 2, obtained a decree against the plaintiffs and Sham Sundar, defendant 3, and Madan Gopal defendant 4, in the Court of the Subordinate Judge, Saharanpur. The decree was *ex parte* against defendant 3 and 4. It may be mentioned here that the plaintiffs in the present suit, who were judgment-debtors in the decree obtained by Shib Charan and Har Charan in the Court of the Subordinate Judge, Saharanpur, appealed to the High Court of Judicature at Allahabad and obtained an order for stay of execution against them. The execution was, however, to continue against Sham Sundar and Madan Gopal, defendants 3 and 4. Mohan Lal and others, plaintiffs in the present suit, on 22nd May 1928, obtained a money decree for a sum of Rs. 47,000 odd against defendants 3 and 4 in the Court of Lala Munshi Ram, Subordinate Judge, Delhi. Another decree-holder Jagat Narain, defendant 5 also got a decree against defendant 4 in the Court of Lala Munshi Ram and applied for rateable distribution. On 17th February 1928 on the application of Shib Charan and Har Charan, defendants 1 and 2, the Court of the Subordinate Judge at Saharanpur issued a certificate of the transfer of the decree for execution to the Court of the Senior Subordinate Judge, Delhi. On 15th March 1928 defendants 1 and 2 presented an application and the transfer certificate be-

fore the Senior Subordinate Judge, Delhi. On 17th March 1928 the Senior Subordinate Judge transferred the decree for execution to Mr. Daswandha Singh, Subordinate Judge, 1st Class, Delhi. On 19th October 1928 defendants 1 and 2 made an application to Mr. Daswandha Singh, asking for transfer of the decree to the Court of Lala Munshi Ram for execution.

The application remained pending in the Court of Mr. Daswandha Singh up to 19th November 1928 on which date Mr. Daswandha Singh, transferred the decree to the Court of Lala Munshi Ram, Subordinate Judge, Delhi, for execution. On the same date, defendants 1 and 2 made an application to Lala Munshi Ram. This application was of a composite character purporting to have been made under O. 21, R. 11, and S. 73, Civil P. C., inasmuch as it contained a prayer for rateable distribution. In the Court of Lala Munshi Ram, the present plaintiffs, decree-holders, and defendants 1 and 2, also decree-holders, appeared *vis-a-vis* and the plaintiffs raised objections against the claim of defendants 1 and 2 to share in rateable distribution on the ground that there were no proper proceedings before Lala Munshi Ram, for execution of the decree in favour of defendants 1 and 2. It was pleaded that the certificate transferring the execution of the decree to the Court of Lala Munshi Ram by Mr. Daswandha Singh was irregular and therefore the Court of Lala Munshi Ram could not entertain the application of defendants 1 and 2. In other words, their plea was that the transfer certificate obtained by defendants 1 and 2 from the Court of the Subordinate Judge at Saharanpur should have been to the District Judge of Delhi and not to the Senior Subordinate Judge. On 8th July 1929 Lala Munshi Ram dealt with this objection in a full and exhaustive order. He realised that there was an irregularity because the record was not transmitted to the District Judge, Delhi, but he was of opinion that the irregularity was not so material as to deprive him of jurisdiction of entertaining the proceedings in execution. In the end he came to the conclusion that defendants 1 and 2, Shib Charan and Har Charan, were entitled to rateable distribution. This order, I may observe in passing, was never appealed against and was allowed to become final. On 20th July 1929 the plaintiffs instituted the present

suit for a declaration that defendants 1 and 2 are not entitled to claim any rateable distribution and for a perpetual injunction restraining them from receiving a rateable share as ordered by Lala Munshi Ram, Subordinate Judge, 1st Class.

The plaintiffs alleged that the decree obtained by Shib Charan and Har Charan against Madan Gopal, defendant 4, and Sham Sunder, defendant 3, was a collusive and fictitious one. They further raised the plea that Mr. Daswandha Singh had no jurisdiction to transfer the decree for execution to Lala Munshi Ram since the decree had been transferred to him by the Senior Subordinate Judge and he ought to have executed it himself instead of sending it on for execution to Lala Munshi Ram. Defendant 5 admitted the plaintiffs' claim. It will be seen that the plaintiffs' suit has hardly anything to do with the merits of the real controversy between the parties and is based on mere technicalities. The contesting defendants 1 and 2 naturally meet the plaintiffs' technicalities by raising pleas, equally technical. They pleaded that the plaintiffs in the Court of Lala Munshi Ram had waived the objection of jurisdiction until the money had been realised, that the suit was barred under S. 47, Civil P. C., and that the order of Lala Munshi Ram, dated 8th July 1927, operated as *res judicata*. The Subordinate Judge allowed the plaintiffs at the time of hearing to raise the further plea that the transfer of the decree for the purpose of execution to the Court of the Senior Subordinate Judge, Delhi, was erroneous and that the transfer should have been made to the District Judge who alone could send it for execution to any competent Subordinate Judge. He further held that in any event the Subordinate Judge to whom the decree had been sent for execution, could not transfer the decree to another Subordinate Judge. He also held that S. 47 was no bar to the present suit.

On the question of the collusive nature of the decree obtained by defendants 1 and 2 against defendants 3 and 4 the trial Court decided against the plaintiffs. He observed that the decree was transferred by the Saharanpur Court to the Delhi Court and after passing through the two Courts successively at Delhi it ultimately reached the Court of Lala Munshi Ram. He came to the conclusion that all these

proceedings were irregular and contrary to law and therefore Lala Munshi Ram had no jurisdiction to allow defendants 1 and 2 rateable distribution. He accordingly decreed the plaintiffs' claim. Defendants 1 and 2 went up in appeal to the District Judge who allowed the appeal and dismissed the plaintiffs' claim. The plaintiffs have come to this Court in second appeal. The appeal was argued by counsel for the parties at considerable length and numerous authorities were cited on both sides. The order passed by Lala Munshi Ram on 8th July 1929 cannot be treated as a nullity on the ground of want of jurisdiction. Undoubtedly he had jurisdiction to execute the decree and the only ground on which his order is attacked is that the application for execution on behalf of defendants 1 and 2 did not reach his Court through the proper channel.

In the course of arguments in the Courts below as well as in this Court the plaintiffs also relied upon the irregularities in the action of the Subordinate Judge, Saharanpur, who instead of transferring the decree for execution to the District Judge, Delhi, sent it to the Senior Subordinate Judge, and also the Senior Subordinate Judge's (Delhi) action in sending it to Mr. Daswandha Singh. But the learned District Judge, in my opinion, was justified in confining the objection of the plaintiffs to the original allegation that Mr. Daswandha Singh had no power to send the decree to Lala Munshi Ram. This would not however make any difference so far as the result of the present suit is concerned. After the application for execution had reached the Court of Lala Munshi Ram, there were no less than seven hearings and yet no objection was raised by the plaintiffs challenging the jurisdiction of Lala Munshi Ram to take any action on the application of defendants 1 and 2. It was only when the assets were realised that the objection was raised in the limited form, namely that Mr. Daswandha Singh could not transfer the decree for execution to Lala Munshi Ram. No objection was raised to the transfer of the execution from the Court of the Subordinate Judge, Saharanpur, to the Court of the Senior Subordinate Judge, Delhi, and from that Court to that of Mr. Daswandha Singh. If the objection had been raised without delay, it would have been possible for defendants 1 and 2 to put matters right by

obtaining a proper transfer certificate from the Court of the Subordinate Judge, Saharanpur. This was not done and in my opinion it was not competent to the plaintiffs to challenge the order of Lala Munshi Ram merely because the strict procedure for the transfer of execution proceedings to his Court had not been followed. In this connexion I would refer to 1 Lah 158 (1).

This was a revision before a learned Single Judge of this Court following a Privy Council judgment and two judgments of the Queen's Bench Division. In (1874) 5 P C 515 (2), their Lordships of the Privy Council held that where there is jurisdiction over the subject matter but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived. It was also pointed out that defects of jurisdiction arising from irregularities in the commencement of the proceeding may be waived by the failure to take objection at the proper stage of the proceedings. I respectfully follow this proposition of law which bears the imprimatur of the highest authority. It fully covers the point raised by the appellants in this Court. The result therefore is that the plaintiffs must be taken to have waived their objection to the jurisdiction of Lala Munshi Ram for a considerable time and waited till the assets had been realised and it was too late for the contesting defendants 1 and 2 to retrieve the position by obtaining a proper certificate from the Saharanpur Court. I agree with the lower appellate Court in its finding on the question of waiver which is a finding of fact, though, as a matter of abundant caution, I have satisfied myself by referring to the proceedings that the finding was correct. This being so, in my opinion Lala Munshi Ram could entertain the applications of defendants 1 and 2 and his order dated 8th July 1929 was a good and valid order. This at once leads to the consideration of the question of *res judicata*. The order that he made on the application of defendants 1 and 2 holding that they are entitled to rateable distribution was not challenged in appeal. It is a full-bodied order dealing with the question of his jurisdiction and the rights

of defendants 1 and 2 to claim the rateable distribution.

This order, as already pointed out, was never challenged by way of appeal or any other proceeding. It had become final and the general doctrine of *res judicata* therefore applies and it is not open to the plaintiffs to attack that order in the present suit. This being my view, it is not necessary to go into the question whether the present suit was barred by the provisions of S. 47, Civil P. C. After a careful consideration of the case I find myself in general agreement with the judgment of the lower appellate Court. I therefore affirm the same and dismiss the appeal with costs.

V.B.B./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 894

AGHA HAIDAR, J.

Bindra Ban—Plaintiff—Appellant.

v.

Jaidayal and others — Defendants — Respondents.

Second Appeal No. 84 of 1936, Decided on 15th April 1936, from decree of Addl. Dist. Judge, Lyallpur, D/- 4th January 1936.

Civil P. C. (1908), O. 3, Rr. 1 and 2 and Punjab Courts Act, (1918, as amended by Act 4 of 1919), S. 46-A — Rules under, R. 26 — Rule cannot be construed to override provisions of O. 3, Rr. 1 and 2, Civil P. C.

Rules framed under S. 46-A, Punjab Courts Act, cannot in any way abrogate, modify or alter the rules contained in O. 3, Rr. 1 and 2, Civil P. C. [P 895 C 1, 2]

Where a plaint was presented by a petitioner acting under the special power-of-attorney conferred on him by his son :

Held : though the petitioner acting as a special agent might have made himself liable to penalty under R. 35 made under S. 46-B, Punjab Courts Act, the presentation of the plaint by him could not be vitiated by any rules framed under S. 46-A, Punjab Courts Act, and therefore the presentation was proper. [P 895 C 2]

Achhru Ram—for Appellant.

I. K. Kaul—for Respondents.

Judgment.—This appeal arises out of a suit for possession by partition of certain residential property. The plaintiff gave a special power-of-attorney to his father Jagan Nath authorizing him to act on his behalf in connexion with the suit which *Bindra Ban* was contemplating to institute. Jagan Nath, armed with this power-of-attorney, presented the plaint in the suit in the Court of the Subordinate Judge at Jaranwala. A number of de-

1. *Kishen Lal v. Jai Lal*, 1919 Lah 27=52 I C 352=1 Lah 158=95 P L R 1919.

2. *Pisani v. Attorney-General of Gibraltar*, (1874) 5 P C 515=80 L T 729=22 W R 900.

fences were raised but the one with which we are concerned was that the presentation of the plaint by Jagan Nath, who was a petition writer, was not a proper presentation. This contention prevailed with the two Courts below who accordingly dismissed the plaintiff's suit. The plaintiff has come up to this Court in second appeal, and Mr. Achhru Ram, the learned Counsel for the appellant, has put the point very clearly before the Court. The Courts below have purported to act under R. 26, Ch. 17-B, Vol. 1, High Court Rules and Orders. Ch. 17-B deals with :

Rules made by the High Court under the powers conferred by S. 46-A, Punjab Courts Act, 1918, as amended by Act 9 of 1922, declaring what persons shall be permitted to practise as petition writers in the Courts and offices in the Punjab, regulating the conduct of persons as practising, and determining the authority by which breaches of rules shall be tried.

Now R. 26 says that :

A licensed petition writer shall not act as a recognized agent in any case in a civil Court or in a Revenue Court or Office, except in a case in which he is himself a party.

At p. 15 of this Ch. 17-B, Vol. 1, there is a schedule of rules, the breach of which renders the offender liable to fine under S. 46-A, Punjab Courts Act, 1918, as amended by Act 4 of 1919. Reference is made under "B — Licensed Petition Writers" to R. 26. R. 35 prescribes the penalty which is to be exacted from the offending petition writer who is guilty of breach of R. 26 of these rules. These rules seem to have been framed under the provisions of S. 46-A for the purpose of regulating the appointment and the conduct of petition writers as the heading at p. 5 clearly indicates. These rules cannot be construed to override the provisions of O. 3, Rr. 1 and 2, Civil P. C. O. 3, R. 1, deals with "appearances" in Court by recognized agents and O. 3, R. 2 (a) provides that the recognized agents of parties by whom such appearances, applications and acts (as described in R. 1) may be made or done are persons holding power-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties. S. 46-A, Punjab Courts Act, clearly lays down that :

The High Court may from time to time make rules consistent with this Act and any other enactment for the time being in force.

It cannot be argued that the rules framed under S. 46-A could in any way abrogate, modify or alter the rules con-

tained in O. 3, Rr. 1 and 2, Civil P. C. Jagan Nath acting as a special agent may have made himself liable to penalty under R. 35, Ch. 17-B, High Court Rules and Orders, Vol. 1 ; but in my opinion the presentation of the plaint by him cannot be vitiated by any rules which might have been framed under S. 46-A, Punjab Courts Act. Under these circumstances, I do not agree with the view of law taken by the Courts below. I therefore allow the appeal, set aside the order of the Court below and remand the case to that Court under O. 41, R. 23, Civil P. C., for disposal of the appeal according to law. The court-fee paid on the memorandum of appeal shall be refunded to the appellant. Under all the circumstances I think the parties shall bear their own costs of this appeal. Other costs shall follow the event.

D.S./R.K.

Appeal allowed.

* A. I. R. 1936 Lahore 895

JAI LAL, J.

(Lala) Hirda Ram — Decree-holder — Appellant.

v.

Mohammad Din — Objector — Respondent.

Execution Second-Appeal No. 362 of 1936, Decided on 15th July 1936, from Addl. Dist. Judge, Lahore, D/- 9th December 1935.

* Civil P. C. (1908), S. 60, Cl. (c) — Non-ancestral house of judgment-debtor attached in his lifetime — Judgment-debtor not an agriculturist — His heir inheriting same — He cannot claim exemption from attachment on ground that he is an agriculturist.

A decree for money was executed against the deceased debtor during his lifetime and his non-ancestral house was attached. The judgment-debtor was not an agriculturist. Subsequently his legal representative inherited it and occupied it as an agriculturist and claimed exemption from attachment:

Held: that the question whether the house is or is not exempt from sale under S. 60 was not the profession of the legal representative but that of the deceased debtor against whom the decree was and against whom it was being executed. Therefore, the house could not be released on the finding that the heir occupied it as an agriculturist. [P 896 C 2]

Mehr Chand Mahajan — for Appellant.

Ghulam Mohy-ud-Din Khan — for Respondent.

Judgment. — This appeal is by the decree-holder who obtained a decree for money against one Allah Bakhsh and in execution of that decree attached the house of the judgment-debtor, who subse-

quently died and was succeeded by his son, the respondent before me. After the death of Allah Bakhsh objections were raised by his widow and his daughter claiming the house to be theirs; the respondent was also a party to that litigation. The objections having been dismissed suits were instituted by them in which they were unsuccessful. Now, after the attachment had continued for about three years, the respondent has raised an objection that the house is not saleable in execution of the decree because it was the ancestral property of Allah Bakhsh. He did not expressly raise the objection that the house was occupied by Allah Bakhsh or by himself as an agriculturist and therefore by virtue of S. 60, Civil P. C., it could not be attached. A vague statement made in his application was, however, considered to include this objection and both the Courts below have considered it on the merits.

It is contended on behalf of the appellant that his objection should not have been investigated by the Courts below. In my opinion there is no force in this contention. The question was considered by both the Courts below and apparently without any objection by the decree-holder. In any case on the facts being brought to the notice of the Court it was bound to consider the matter. The executing Court held that the house was not ancestral and the objection of the respondent on that score was, therefore, dismissed. The Court, however, held that the objector was a cultivator and the house was required by him as such. The decree-holder appealed to the District Judge before whom the determination of the question whether the house was or was not exempt from attachment and sale under S. 60, Civil P. C., turned upon whether Allah Bakhsh was an agriculturist within the meaning of S. 60 and secondly whether the respondent, his son, was an agriculturist. The learned District Judge has held that Allah Bakhsh was not an agriculturist for he did not cultivate the land himself, he had no implements of husbandry, nor did he have any cattle and that he merely rented out the land to tenants. He, however, further held that the respondent was an agriculturist and, therefore, he has released the house on that ground alone. In my opinion, in view of the peculiar circumstances of this case, the learned

District Judge was not competent to release the house on a finding that the respondent is an agriculturist. The decree was against Allah Bakhsh and was executed against him during his lifetime and the house now attached in his lifetime. In his lifetime, therefore, an objection was not open to the judgment-debtor that the house could not be sold as it was exempt from sale under S. 60 Civil P. C. It having been found that the house was not ancestral the respondent took it by inheritance from Allah Bakhsh and not by reversion. That being so he took it subject to the right of the creditors of Allah Bakhsh to realize their debts out of his estate, that is to say, the house. Therefore, the matter that should be taken into consideration in deciding the question whether the house is or is not exempt from sale under S. 60, Civil P. C., is not the profession of the legal representative Allah Bakhsh but that of Allah Bakhsh himself against whom the decree was and against whom it was being executed.

The contention of the learned counsel for the respondent that the learned Judge below was not competent to decide whether Allah Bakhsh himself was or was not an agriculturist is devoid of force. The question was raised by an objection by the respondent himself, and all the subsidiary matters which had to be decided in order to dispose of that objection were before the Court. It does not appear that any objection was taken before the learned District Judge that he was not competent to decide whether Allah Bakhsh was or was not an agriculturist. The respondent could not succeed except on bringing his case within the four corners of the exemption and, therefore, it was necessary to determine whether Allah Bakhsh was an agriculturist. This appeal must, in my opinion, be accepted and the house held to be saleable in execution of the decree. I accept the appeal, set aside the order of the Courts below and send the case back to the executing Court with direction to proceed with the sale of the house in execution of the appellant's decree. The respondent shall pay the costs of the appellant throughout. The parties have been directed to appear before the executing Court on 17th August 1936.

P.R./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 897

ADDISON AND ABDUL RASHID, JJ.

Nawal Kishore-Kharaiti Lal—Petitioners.

v.

Commissioner of Income-tax—Opposite Party.

Civil Ref. No. 19 of 1935, Decided on 16th March 1936, from Commissioner of Income-tax, Punjab, N. W. F. and Delhi Provinces, Lahore, D/- 27th March 1935.

(a) Income-tax Act (1922), S. 34—Order of assessment by Income-tax Officer relying upon accounts of assessee firm—Commissioner is not entitled to enhance income without issue of notice within one year—Difference between two estimates is income which has escaped assessment.

The Income-tax Officer relying upon the accounts submitted by the assessee firm passed an order of assessment, but the Commissioner of Income-tax estimating the income for himself enhanced it without issuing notice within the period of one year:

Held: that the difference in the estimates of income of the Income-tax Officer and Commissioner was income that had escaped assessment within the meaning of S. 34 and the Commissioner was not entitled to enhance the income without notice to the assessee within the time mentioned in S. 34: 1935 *Lah* 742 (FB), *Rel. on;* and 1934 *P C* 30, *Expl.* [P 899 C 2]

(b) Income-tax Act (1922), Ss. 32, 33 and 34—Order of assessment—Appeal by assessee—Commissioner disposing of appeal under S. 32 can enhance assessment but only subject to limitation of S. 34.

Where the assessee files an appeal from the order of assessment by the Income-tax Officer the Commissioner can take action under S. 33 and proceed to enhance the assessment after having disposed of the assessee's appeal under S. 32 but the exercise of the powers of review under S. 33 would, however, be subject to the limitation provided in S. 34: 1927 *Lah* 421, *Rel. on.* [P 901 C 1]

(c) Income-tax Act (1922), Ss. 32 (3), 33—Appeal under S. 32—Commissioner can pass orders only with respect to subject matter of appeal—He cannot *suo motu* enhance assessment which he has power to do under S. 33.

The Commissioner when dealing with the appeal under S. 32 can pass orders only with respect to the subject matter of the appeal, and cannot, *suo motu*, proceed to enhance an assessment which he has the power to do under S. 33 of the Act. If the Commissioner calls for the record of a case after disposing of the appeal preferred to him against the order of an Assistant Commissioner he would be exercising powers of review in respect of proceedings which have been taken by an authority subordinate to him and not in respect of proceedings taken by himself as a Court of appeal. [P 901 C 1]

Mehr Chand Mahajan and *Bhagwat Dayal*—for Petitioners.

J. N. Aggarwal and *S. M. Sikri*—for Opposite Party.

1936 L/118 & 114

Abdul Rashid, J.—Under S. 66 (2), Income-tax Act, the Commissioner of Income-tax, Punjab, has referred the following questions of law, arising out of the assessment for the year 1932-33 on Messrs. Nawal Kishore-Kharaiti Lal to this Court: (1) Was there any material upon which the Commissioner could determine as fact that the assessee's Agra Jewellery accounts were not true and complete, that his Delhi Jewellery accounts were not a complete account of the relevant sales, and that the Income-tax Officer's estimate of the profits of the said Delhi Jewellery business was below the actual profits? (2) Was the Commissioner's determination in respect of 1932-33 assessment barred by time at the date of order, 8th October 1934, by the provisions of S. 34? By its order dated 11th June 1935, this Court directed the Commissioner of Income-tax, Punjab, to state the case on the following further question of law: (3) Whether the Commissioner could take action under S. 33 and proceed to enhance the assessment, after having disposed of the assessee's appeal under S. 32, Income-tax Act.

The assessee is known as the leading wholesale jeweller in Delhi running a business that has been in existence for over a hundred years. For the year 1932-33 the assessee was assessed on a total income of Rs. 18,494 under S. 23 (3) of the Act. The assessment order was passed by the Income-tax Officer on 22nd July 1933. In his return the assessee had shown his gross income from the sales of jewellery at Rs. 26,553. He had also shown an income of Rs. 4,724 from the sales of precious stones. The Income-tax Officer accepted these figures so far as the sales of jewellery and precious stones were concerned. He was, however, of the opinion that the flat rates of 10 per cent and 5 per cent profits respectively applied by the assesses were too low, and as there was no proof in support of these rates, he applied the rates of 20 per cent and 15 per cent profits respectively regarding jewellery sales and sales of precious stones. The Income-tax Officer thus accepted the correctness of the assessee's accounts so far as sales were concerned but enhanced the rates of profit applicable to the sales. Against this assessment the assessee preferred an appeal to the Assistant Commissioner of Income-tax. The Assistant Commissioner

served on the assessee a notice under S. 31 of the Act to show cause why certain items of expenditure which had been allowed by the Income-tax Officer should not be disallowed, and the income enhanced by this amount. By means of his order dated 31st October 1933, the Assistant Commissioner of Income-tax dismissed the assessee's appeal, and then enhanced the assessment by a sum of Rs. 4,512. The Income-tax Officer had allowed the assessee Rs. 1,099 on account of motor car expenses relating to the Agra branch and Rs. 1,588 as motor car expenses relating to the Delhi shop. Both these items were disallowed by the Assistant Commissioner of Income-tax. Rs. 1,825 had been allowed by the Income-tax Officer as expenses of litigation with respect to certain suits. This sum was also disallowed by the Assistant Commissioner. The enhancement thus consisted of the disallowance of certain expense items which had been allowed by the Income-tax Officer.

Against the order enhancing the assessment, the assessee preferred an appeal to the Commissioner of Income-tax under S. 32 of the Act. The Commissioner partially accepted this appeal in so far as to allow Rs. 200 as motor car expenses for the Agra branch and Rs. 500 for the Delhi shop. In other respects this appeal was dismissed by the Commissioner by his order, dated 3rd September 1934. It appears that on the same date the Commissioner of Income-tax issued a notice to the assessee under S. 33 of the Act to show cause against enhancement so far as his income from sales of jewellery was concerned. On 8th October 1934, the Commissioner of Income-tax passed an order, in exercise of his powers of review under S. 33, and enhanced the income from sales of jewellery to Rupees 50,000 from Rs. 26,553. This reference is mainly concerned with the questions of law arising out of the enhancement alluded to above. As mentioned above the books of the assessee show Rs. 26,553 as income from sales of jewellery. The Income-tax Officer had accepted this figure as correctly representing "sales of jewellery" by his order dated 22nd July 1933. The Commissioner of Income-tax, by his order, dated 8th October 1934, raised this figure to Rs. 50,000.

The first question for determination is whether the sum of Rs. 23,447 (being the

difference between Rs. 50,000 and Rupees 26,553) can be regarded as income which had "escaped assessment" within the purview of S. 34 of the Act. The Commissioner was of the opinion that the sales were greatly understated at both the Agra and the Delhi shops and that the sales total was not, therefore, complete and true in fact. The meaning of the Commissioner appears to be that a number of sales were not entered in the account books of the assessee and thus the sum of Rs. 26,553 did not represent the total amount realized by the assessee. It was contended by the learned counsel for the assessee that in the circumstances alluded to above, the sum of Rs. 23,447 must be regarded as income which had "escaped assessment" during the year 1932-33 and that as no notice was served on the assessee within one year of the end of the assessment year the Commissioner could not proceed to re-assess such income in view of the provisions of S. 34 of the Act. Reference may be made in this connexion to a Full Bench ruling of this Court reported in 16 Lah 937 (1). The facts of that case were as follows: The assessee M. M. L. had to be assessed both as an individual and as a karta of a joint Hindu family. He made a return in his personal capacity in which he included an item of Rs. 79,543 as personal income. He also made a return on behalf of the joint Hindu family and the Income-tax Officer who was dealing with that income made an assessment thereon, including the item of Rs. 79,543. Thereupon the Income-tax Officer, who was dealing with the assessment of M. M. L. as an individual assessed him on the return furnished by him, but excluding the item of Rs. 79,543 on the ground that it had been assessed as income of the joint family by the Tax Officer dealing with that case. On appeal in the joint family case the Assistant Commissioner accepted the appeal and excluded the item of Rs. 79,543 from the income of the joint family, holding that it was the personal income of the assessee. The Income-tax Officer dealing with the personal case then took action under S. 34 of the Act and decided that the item of Rs. 79,543 had "escaped assessment" and, accepting the return of

1. Madan Mohan Lal v. Commissioner of Income-tax, Punjab, 1935 Lah 742=158 I G 718=16 Lah 987=38 P L R 52 (F B).

the assessee, assessed him on this item. The assessee objected that S. 34 had no application, that the income had not escaped assessment and that the fresh assessment was without jurisdiction.

It was held by Addison, Ag. C. J. that the sum of Rs. 79,543 did "escape assessment" in the hands of the assessee at first, if these words are given their ordinary meaning, and that there was no reason to give the words "escaped assessment" some restricted meaning. Din Mohammad, J. was of the opinion that S. 34 is not confined to cases where the income in question is not disclosed in the return, that if an item of income is included in the return submitted by an assessee during the tax year, but is left unassessed by the Income-tax Officer or if assessed in the first instance, the assessment is cancelled by an appellate or revisional authority, such income "escapes assessment" within the meaning of S. 34. Dalip Singh, J. dissented from the opinion of the other learned Judges and held that the word "escape" was not to be read in the widest sense that that word was capable of bearing and that the word "escaped" was equivalent to "eluded notice" in the course of assessment and did not mean 'had avoided being assessed.' In coming to this conclusion the learned Judge relied on a Privy Council ruling reported as 61 Cal 285 (2). I respectfully agree with the opinion of the majority so far as the meaning of the words "escaped assessment" is concerned.

It appears to me however that in the present case the sum of Rs. 23,447 must be held to be income which had "escaped assessment" even if the words "escaped assessment" are used in the restricted sense as being equivalent to "eluded notice." The books of the firm showed income from the sales of jewellery as Rs. 26,553 while the Commissioner computed the income from that source as being Rs. 50,000. The difference between the two incomes did not find any place either in the return or in the books of the company. In the very nature of things therefore this income was bound to "elude notice" and did "elude notice."

The commissioner has stated that the enhancement made by him did not amount to the assessing of something that

had "escaped assessment." According to him he had merely "enhanced the existing determinations of the selfsame subject," and had discovered no new source or new income that had "escaped," that the same profits from the same sources stood, but the "determination of their quanta was revised wholly upon existing record." I am unable to appreciate the force of these observations of the Commissioner. The order passed by the Commissioner under S. 33 of the Act shows that he estimated the income from the sales of jewellery to be Rs. 50,000 instead of Rs. 26,553, as according to him the sales were greatly understated and the sales total was not therefore complete. The enhancement to Rs. 50,000 clearly implies that sales to the extent of Rupees 23,447 were estimated to have taken place but were not included in the books of the assessee. The sales which had been omitted from the account books of the assessee had obviously "escaped assessment" when the Income-tax Officer passed the order of assessment. These sales therefore clearly fall within the meaning of the words "income that had escaped assessment" according to the decision of the Full Bench in 16 Lah 937 (1).

The learned counsel for the Commissioner however contended that the word "assessment" was not synonymous with the "order of assessment," that assessment was a continuous process and included proceedings before the Income-tax Officer, the Assistant Commissioner, the Commissioner and even the High Court in cases where a reference was made to that Court, and that in this view of the matter the assessment for 1932-33 had not been concluded when the Commissioner enhanced the income derived from sales of jewellery from Rs. 26,553 to Rs. 50,000. It was urged that as the assessment had not been completed no income had yet "escaped assessment," and that the provisions of S. 34 of the Act were therefore inapplicable in the present case. Reliance was placed in this connexion on a Privy Council ruling reported in 61 Cal 285 (2), where it was held that :

So long as proceedings for the assessment of an assessee's income for a financial year are pending, no final assessment having been made upon him, his income has not "escaped assessment" within the meaning of S. 34, Income-tax Act 1922, so as to make service of a notice within one year of the end of the year, as therein

2. Rajendra Nath Mukerji v. Commissioner of Income-tax, 1934 P O 80=147 I C 668 = 61 I A 10=61 Cal 285 (P O).

required, a condition to assessment. Where a case does not fall within S. 34, an assessment can be made at any time under S. 23, sub-s. (1) pursuant to a notice under S. 22, sub-s. (2) calling for a return.

The observations of their Lordships of the Privy Council must however be read subject to the facts of the case which was under consideration by their Lordships at the time of making the observations quoted above. It is therefore necessary to make a detailed reference to the facts of that case which were as follows: Towards the end of year 1926-27, the partners of the registered firm of Martin & Co., which also carried on business in Calcutta, purchased the business and assets of Burn & Co. The purchase was effected not by or on behalf of the firm of Martin & Co., but by the partners of that firm as individuals who contributed funds for the purpose proportionally to their shares in Martin & Co., and became partners in Burn & Co., with the same shares therein as they held in Martin & Co. In the year 1927-28 Martin & Co., was a registered firm, while Burn & Co. was unregistered. On 7th April 1927, the Income-tax Officer of District I issued a notice to Burn & Co., under S. 22 (2) calling for a return of their total income for the year to 31st March 1927, with a view to assessing them for the year 1927-28. A similar notice was issued to Martin & Co., on 8th April 1927, by the Income-tax Officer of District II. When they issued these separate notices, the Income-tax Officers were unaware that the business of Burn & Co., had been bought by the partners of Martin & Co. On 24th September 1927, Martin & Co. made a return of their total income in compliance with the notice issued to them in April, and on 13th January 1928 Burn & Co. made their return. Meantime, the purchase of the business of Burn & Co., by the partners of Martin & Co., having come to the knowledge of the income-tax authorities, Burn & Co.'s file was transferred to the Officer dealing with District II, and on 25th February 1928, he made an assessment on Martin & Co., in respect of the combined incomes returned by Martin & Co. and Burn & Co., on the footing that the business of Burn & Co., had become a branch of the business of Martin & Co. Martin & Co. appealed against this assessment and ultimately the income of Burn & Co., was excluded from

the return of Martin & Co. Thereafter on 8th November 1930, an assessment was made on Burn & Co. on their income as returned by them on 13th January 1928. It was in these circumstances that their Lordships held that the income of Burn & Co. had not "escaped assessment," as no final assessment had ever been made on Burn & Co. The learned counsel for the Commissioner relied on the following observation in the judgment of their Lordships of the Privy Council:

That the word "assessment" is not confined in the statute to the definite act of making an order of assessment appears from S. 66 which refers to 'the course of any assessment'.

It must however be remembered that this observation was made by their Lordships to repel the contention raised on behalf of the appellant to the effect that assessment is a definite act and that if an assessment is not made on income within the tax year, then that income has "escaped assessment" within that year and can be subsequently assessed only under S. 34 within its time limitation. In that case no order of assessment had ever been made against Burn & Co. and their income had at one time been included in the income of Martin & Co., and thereafter excluded from such assessment. What was really decided in that case was that an assessment can be made under S. 23 (1) of the Act, more than a year, in fact at any time, after the assessment year, if in the meantime no final assessment has been made. 61 Cal 285 (2) does not justify an inference that an assessment is not concluded when the amount of tax payable by the assessee has been determined and a demand notice issued to him. The use of the words "cancel the assessment, make a fresh assessment" and "annul or enhance the assessment" in Ss. 27, 30 and 31 shows that the proceedings after the issue of the demand notice do not form part of the assessment. I would, therefore hold that the sum of Rs. 23,447 must be regarded as income which had "escaped assessment" within the purview of S. 34 of the Act, and that such income could only be re-assessed if a notice had been issued to the assessee within one year of 31st March 1933. In the present case no notice was issued to the assessee till 3rd September 1934 and the Commissioner was therefore not entitled to enhance the income from

Rs. 26,553 to Rs. 50,000. I would accordingly answer the second question referred by the Commissioner in the affirmative.

On the third question I am of the opinion that the Commissioner could take action under S. 33 and proceed to enhance the assessment after having disposed of the assessee's appeal under S. 32. The exercise of the powers of review under S. 33 would however be subject to the limitation provided in S. 34 as held in 8 Lah 347 (3). The learned counsel for the assessee contended that the provisions of S. 32 (3) of the Act give the Commissioner ample powers when disposing of an appeal to pass such orders as he thinks fit and that this includes the power to enhance an assessment. The use of the word "thereon" in this sub-section, however seems to imply that the Commissioner, when dealing with the appeal under S. 32, can pass orders only with respect to the subject matter of the appeal, and cannot suo motu proceed to enhance an assessment which he has the power to do under S. 33 of the Act. If the Commissioner calls for the records of a case after disposing of the appeal preferred to him against the order of an Assistant Commissioner he would be exercising powers of review in respect of proceedings which have been taken by an authority subordinate to him and not in respect of proceedings taken by himself as a Court of appeal. I would therefore answer the third question in the affirmative.

In view of the findings given above, the first question is not of any great importance. The only material referred to by the learned counsel for the Commissioner consists of the history of the assessee's relations with Banji Lal and of the history of his assessment for several years in the past. There is no evidence to show that the assessee was falsifying the accounts for the year under assessment. The Commissioner has also remarked in his referring order that he was struck by the surprising relation of the expenditure to the disclosed extent of trade. The history of the assessment of the previous years is irrelevant for the purpose of determining whether the sales have been understated during the assess-

ment year. The fact that the expenses of the Delhi shop in relation to the disclosed extent of trade were rather high cannot be held to provide any material for the finding that the sales total was not complete and that a number of sales amounting to Rs. 23,447 were omitted from the account-books of the assessee. I would, therefore answer the first question in the negative. The Commissioner will pay the costs of the assessee which we fix at Rs. 100 (one hundred).

Addison, J.—I agree.

V.B.B./R.K. Order accordingly.

A. I. R. 1936 Lahore 901

COLDSTREAM AND BHIDE, JJ.

Anjuman Dehi — Defendant — Appellant.

v.

Kehar Singh—Plaintiff—Respondent.

Second Appeal No 813 of 1934, Decided on 9th June 1936, from decree of Dist. Judge, Gurdaspur, D/- 14th April 1934.

(a) Co-operative Societies Act (1912), S. 43—Rules under, R. 18—Award—Execution held time barred by executing Court—Subsequent dispute relating to discharge of award is decidable only by executing Court—Second award on it held not within scope of Act and rules under S. 43—Suit could lie to have it declared void.

The execution of an award settling the dispute between the Society and its member was held by the executing Court as time-barred and the Society again referred the same dispute to arbitration and obtained an award:

Held: that the dispute between the Society and its member was determined by the first award and the subsequent dispute referred by the Society to arbitration was one which under the rules made under S. 43 could only be decided by the executing Court, for it related wholly to the discharge of the award. The proceedings of the executing Court were subject to the ordinary laws and if the society neglected to execute the award within time, its right to have the award enforced was lost, and that was an end of the dispute which left nothing to be referred to arbitration. Hence the second award was one which could not be passed within the scope of the Act and the rules made under it and a suit could lie to have it declared void: 1932 Lah 53; 1935 Lah 691 and 947, *Rel. on.*

[P 903 O 1,2]

(b) Co-operative Societies Act (1912), S. 43—Rules under, R. 18—Arbitrator giving award on matter decidable only by executing Court—Civil Court can entertain suit to give relief and that even before aggrieved person exhausts remedies provided by Act.

Where an Act of the Legislature gives power to any person for a public purpose from the exercise of which an individual may receive an injury, and also provides a mode of redress, the

8. *Jesa Ram v. Commissioner of Income Tax*, 1927 Lah 421 = 101 I O 139 = 8 Lah 817 = 28 P L R 212.

jurisdiction of the civil Court is excluded. But that principle will have no application where there was no matter in existence with which the person empowered was authorised to deal. So where an arbitrator gave an award upon a matter upon which under the rules made under S. 43 he had no authority to adjudicate, the civil Courts could give relief; and if the civil Court could give relief it could do so either before the aggrieved person had exhausted the remedies provided by the Act against the action of the arbitrator or after it. [P 903 C 2]

(c) **Co-operative Societies Act (1912), S. 43—Rules under, R. 18—Rule excluding jurisdiction of civil Courts whether ultra vires of local Government—(Obiter).**

Obiter.—Although the power to make rules determining in what cases an appeal shall lie from the orders of a Registrar and prescribing the procedure in disposing of such appeals is specifically given in Cl. (s) of sub-s. (2) of S. 43, there is no mention of a power to exclude the jurisdiction of the civil Court. Had the intention been to allow the local Government to lay down by rules that a person cannot on any grounds attack an award by an action in civil Courts this intention would have been distinctly expressed. [P 904 C 1]

Badri Das—for Appellant.

Charanjivalal Aggarwal—for Respondent.

Edmunds and Kishen Lal Kapur—for the Crown.

Coldstream, J.—This appeal arises out of litigation between the Co-operative Society of Virk Talwandi in Gurdaspur District and one of its members Kehar Singh. S. 43, Co-operative Societies Act 1912, the object of which as stated in its preamble is to promote thrift and self-help among agriculturists, artisans, and persons of limited means, gives the Local Government power to make rules to carry out the purposes of the Act. The section also lays down in Cl. (1) of sub-s. (2) that in particular, and without prejudice to the generality of this power such rules may provide that any dispute touching the business of a Society between a member of the Society and its Committee shall be referred to the Registrar for decision, or if he so directs, to arbitration, and may prescribe the mode of appointing an arbitrator and the procedure to be followed in proceedings before the Registrar or such arbitrator, and in the enforcement of the decisions of the Registrar or the awards of arbitrators. In exercise of these powers the Local Government of this Province has framed rules requiring disputes touching the business of a Co-operative Society between a member and the Committee to be referred to the Registrar, R. 18 (a) and autho-

rising the Registrar to refer such disputes to an arbitrator, R. 18 (b), R. 18 (i) gives any party aggrieved by an award the right to appeal to the Registrar within a month of the award, and R. 18 (j) provides that an award which has not been appealed against shall not, as between the parties to the dispute, be liable to be called in question by any civil or revenue Court, except on proof of the receipt of corrupt gratification by the arbitrator. R. 18 (k) provides that an award shall, on application to a civil Court having local jurisdiction, be enforced in the same manner as a decree of that Court.

The facts giving rise to the present appeal are as follows: Kehar Singh owed money to the Co-operative Society of Virk Talwandi. The dispute was referred to arbitration and an award for the payment of Rs. 3,019 was made by the arbitrator on 14th July 1928. The award was executed as a decree by a civil Court in accordance with the rules under the Act. The last application for execution was made on 13th July 1928. This was dismissed, consigned to the record room after partial satisfaction and as no further application was made within three years execution of the award became time barred. A second reference to arbitration was then made, so it is alleged by the Society, and an award was obtained for Rs. 2,454 on 20th September 1932. When the Society sought to execute the award, Kehar Singh raised an objection in the executing Court that it had been obtained by fraud and was a nullity. He was directed by the executing Court to establish his right in a civil Court, whereupon he instituted a suit in the Court of the Subordinate Judge, 3rd Class, Gurdaspur, for a declaration that the award was not executable and for an injunction against its execution by the Society.

The suit was dismissed, the Court holding that R. 18 (j) made by the Local Government precluded a civil Court from entertaining the suit. This decision was reversed on appeal by the District Judge who decreed the suit. His view was that the dispute between Kehar Singh and the Society had been settled by the first award, that therefore there was no dispute which could be referred to arbitration under the Act, that the award was therefore invalid, and that the civil Court had jurisdiction in such a case to entertain the suit and grant relief. Against

this judgment the Society appealed to this Court and it was contended before Bhide, J. that the District Court was not correct in holding that R. 18 (j) was not a bar to the suit, there being no allegation that the arbitrator who gave the award in question had received corrupt gratification. In view of some apparent conflict of judicial decisions on the question whether the second award could be attacked by a civil action my learned brother referred the case for decision by a Division Bench. In his referring note he has expressed a doubt whether R. 18 (j) was within the authority given to the Local Government by S. 43 of the Act, which does not expressly confer any power to restrict the right of a party to resort to a civil Court. After hearing counsel at length, I am of opinion that this appeal must be dismissed on the short ground that the second award was clearly not one which could be passed within the scope of the Co-operative Act and the rules made under it and was therefore not one to which R. 18 (j) was applicable.

I have no doubt that where an award given by an arbitrator is not one which could be given under the provisions of the Act it is open to a person aggrieved to obtain a declaration restraining its enforcement against him. This Court has more than once given a declaration in similar circumstances. In 1932 Lah 53 (1) a Division Bench, of which my learned brother Bhide was one of the Judges, held that an award made in a case where one of the disputants was not a member of the Society concerned was invalid, the submission of the dispute to the Registrar not being within the scope of the Act. Again, in 1935 Lah 631 (2) it was decided by Agha Haidar, J., that when an award has been held by the executing Court to have been fully satisfied there can be no dispute left to be referred to arbitration and that a suit will lie to have a second award on the same matter declared unexecutable. For the appellant Society reliance is placed upon 1935 Lah 947 (3), a ruling by a Single Judge of this Court. The judgment is directly to the

point, but with due respect I am unable to agree with the view adopted by the learned Judge in that case. It seems to me clear that R. 18 (k) itself precludes a second reference to arbitration in the circumstances of the present case. The dispute between Kehar Singh and the Committee was determined by the award of 14th July 1928. The subsequent 'dispute', alleged by the Society to have been referred to arbitration, was one which under the rules could only be decided by the executing Court, for it related wholly to the discharge of the award. The proceedings of the executing Court are subject to the ordinary laws and if a Society neglects to execute an award within time, its right to have the award enforced is lost, and that is an end of that dispute.

It is admitted that in this case the second award related only to the recovery of the debt settled by the first award, the only disagreement alleged to exist between the parties being on the question whether the unpaid balance of the amount awarded by the arbitrator on 14th July 1928 should or should not be paid. I do not see force in the argument advanced by appellant's counsel that apart from the provisions of R. 18 (j), a suit of the present kind is barred by the provisions of R. 18 (i). There is no doubt ample authority for the proposition that where an Act of the legislature gives power to any person for a public purpose from the exercise of which an individual may receive an injury, and also provides a mode of redress, the jurisdiction of the civil Courts is excluded. But that principle will have no application where there was no matter in existence with which the person empowered was authorised to deal, and no ruling has been cited by appellant's counsel supporting the view that where a tribunal appointed by an Act for a special purpose has adjudicated on a matter upon which under the provisions of the Act he had not authority to adjudicate, the civil Courts cannot give relief. If a civil Court can give relief I cannot see why it should not do so either before the aggrieved person has exhausted the remedies provided by the Act against the action of the tribunal or after he has done so.

Taking the view that R. 18 (j) has no application I see no necessity for deciding here the question whether the rule is or is not ultra vires of the Local Govern-

1. Mahomed Sherif v. Union Bank Ltd., 1932 Lah 58=133 I C 888=32 P L R 780.

2. Hira Nand v. Anjuman Imdadi-i-Qirza Mansuma Sunar Bank, Darapur, 1935 Lah 631=161 I C 248.

3. Dhanpat v. Anjuman Dahi Alo Mahar, 1935 Lah 947.

ment. The question is not free from difficulty. As has been pointed out in my learned brother's order of reference, a power to exclude recourse to civil Courts for redress against an award is at least as important as the power to make rules determining in what cases an appeal shall lie from the orders of a registrar and prescribing the procedure in disposing of such appeals, but although the latter power is specifically given in Cl. 2 (s), S. 43, there is no mention of a power to exclude the jurisdiction of the civil Courts. The argument that had the intention been to allow the Local Government to lay down by rules that a person cannot on any grounds attack an award by an action in the civil Courts this intention would have been distinctly expressed is therefore not without force. The argument is strengthened by the fact that under the Government of India Act (S. 80 and the Devolution Rules) the Provincial Legislature itself cannot enact laws affecting civil law and procedure, and by the fact that the legislature of other provinces have incorporated in their Acts provisions barring interference by the civil Courts. The question is obviously one which in the interests of all concerned and in view of the desirability of restricting unnecessary litigations calls for serious consideration by the legislature. For the reasons stated I would dismiss this appeal with costs.

Bhide, J.—I agree.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1936 Lahore 904

JAI LAL, J.

S. R. Laul—Defendant—Petitioner.

v.

Ganga Sugar Corporation, Ltd.—Plaintiff and others — Defendants — Opposite Parties.

Civil Revn. No. 125 of 1936, Decided on 21st May 1936, from order of Sub-Judge, 1st Class, Rawalpindi, D/- 16th December 1935.

Arbitration Act (1899), S. 19 — Application to stay suit—Complicated question of law likely to arise—Trial Court in exercise of jurisdiction rejecting application — High Court in revision will not interfere.

Where an application under S. 19 was made praying that the matters in dispute which were the subject matter of the suit had already been validly referred to arbitration and therefore the suit should be stayed and the trial Court in the exercise of its jurisdiction rejected

the application on the ground that some complicated questions of law were likely to arise which could better be determined by the Court than the arbitration :

Held: that in those circumstances High Court would not interfere with the discretion exercised by the trial Court and the revision therefore must fail. [P 905 C 2]

Achhru Ram—for Petitioner.

Dev Raj Sawhney, Gurbachan Singh and H. L. Bhagat—for Opposite Parties.

Order.—In the year 1932 a company named Ganga Sugar Corporation, Ltd. was incorporated with its Head Office in Lahore. Mr. S. R. Laul, Petitioner, claims to be its Director in Charge, having been appointed by the company on a salary of Rs. 500 and commission. It appears that a dispute arose between the company and Mr. S. R. Laul as to his right to a salary of Rs. 500. It may be that in order to deprive Mr. S. R. Laul of an opportunity to act as a Director in Charge of the company, the Head Office of the company was removed to Rawalpindi because Mr. S. R. Laul is a resident of Lahore. In any case there were disputes between the company and Mr. S. R. Laul and it now transpires that he has filed a suit in Lahore for recovery of three months' salary against the company and some of the Directors personally. He then proceeded to appoint an arbitrator to settle the disputes between him and the company professing to act under Cl. 143 of the Articles of Association of the company. That clause provides that certain disputes between the company and its members shall be referred to arbitration of either a sole arbitrator, if parties agree, or of arbitrators appointed by the parties, and in case of difference, of an umpire. It is also provided in the Articles of Association that if on being notified by one of the parties the other does not appoint an arbitrator within a specified time, the first party may appoint an arbitrator for the second party as well. It seems that the arbitrator who was appointed by Mr. S. R. Laul was appointed by him as the sole arbitrator apparently by mistake, but he declined to act. He thereupon called upon the other party, the company, to nominate their arbitrator, and on their failure to do so, nominated an arbitrator in their behalf. He also nominated an arbitrator on his own behalf so that now there are two arbitrators who, according to him, are com-

petent to decide the disputes between the parties.

The company instituted a suit in the Court of the Subordinate Judge at Rawalpindi claiming that the arbitrators be restrained from going on with the arbitration because the disputes were not covered by the arbitration clause which it was claimed had ceased to exist having been repealed by the company and that the matters referred to arbitration were not covered by Cl. 143. There were other grounds also taken for attacking the validity of the reference to arbitration. On the institution of the suit an application was filed for a temporary injunction against Mr. S. R. Laul restraining him during the pendency of the suit from going on with the arbitration proceedings and an ad interim order restraining the petitioner was passed by the Court and a notice of the application was issued to him. On the date fixed however he did not appear and the order was made absolute. He then made an application to set aside this injunction but the application has been dismissed. He then made an application under S. 19, Arbitration Act praying that the matters in dispute which were the subject-matter of the suit had already been validly referred to arbitration and therefore the suit should be stayed. The learned trial Judge has rejected this application. Consequently two appeals and one petition for revision have been presented in this Court.

The application for revision is against the refusal of the Subordinate Judge to stay the suit under S. 19, Arbitration Act. The appeals are against the order confirming the injunction and the order refusing to set aside the injunction. It is conceded by Mr. Achhru Ram on behalf of the petitioner that the real question between the parties is involved in the petition for revision and that if that petition fails, the two appeals become infructuous. I have consequently heard Counsel on both sides on the petition for revision. I have already shown that before referring the matter to arbitration Mr. S. R. Laul himself had filed a suit in the Court of a Subordinate Judge at Lahore, in which substantially the same question is involved which is to be decided by the arbitrators, and this suit is still pending in Lahore. The subsequent suit instituted by the company in the Court of the Subordinate Judge at Rawal-

pindi comprises substantially the same matters which are to be decided in the suit in Lahore and by the arbitrators. The real dispute between the parties is whether Mr. S. R. Laul is entitled to a salary of Rs. 500 a month as a Director in Charge and the removal of the Head Office to Rawalpindi is objected to merely in order to establish his right to that salary.

In my opinion the petition for revision must fail on the simple ground that the trial Judge has exercised a discretion which vested in him. One ground for exercising that discretion against the petitioner is that complicated questions of law are likely to arise which can better be determined by the Court than by the arbitrators. The question is also likely to arise whether Cl. 143 of the Articles of Association has been validly repealed by the company. The case of the petitioner apparently is that it has been illegally repealed and dishonestly in order to injure him. That also is a question which will have to be decided by the Court and not by the arbitrators. Moreover, the conduct of Mr. S. R. Laul in having instituted his suit in the Court of the Subordinate Judge at Lahore disentitles him to claim that the matter should go to the arbitrators and should not be adjudicated upon by the Court at Rawalpindi merely on the ground that it has been referred to the arbitrators.

Having regard to all the circumstances I am not prepared to interfere with the discretion exercised by the trial Judge and dismiss this petition for revision with costs. The appeals are consequently dismissed with costs.

D.S./R.K.

Petition dismissed.

A. I. R. 1936 Lahore 905

ADDISON AND ABDUL RASHID, JJ.

Sher Mohammad and another—Defendants—Appellants.

v.

Mt. Mahbub Begum—Plaintiff—Respondent.

Letters Patent Appeal No. 153 of 1935, Decided on 17th March 1936, from decree of Agha Haidar, J., D/- 18th October 1935, as reported in 1936 Lah. 109.

(a) Registration Act (1908), S. 17 (1) (b)—Document containing agreement permitting owner of adjacent vacant site to build house thereon in any manner he cared—Registration is not necessary.

On a partition of property A got a house and B got a vacant site adjacent to it. A executed a document containing an agreement permitting B to build a house on the vacant site irrespective of any sources of light or air :

Held : that the agreement could not be with respect to immoveable property nor could it be found that the value of the immoveable property involved was more than Rs. 100. Hence no registration was necessary. [P 906 C 2]

(b) Limitation Act (1908), S. 26—Permissive enjoyment of access and use of light or air for more than 20 years—User being not as of right there can be no prescriptive right under S. 26.

Where an owner of a vacant site having full power to build a house thereon irrespective of any sources of light or air, does not build any house for 20 years, the enjoyment of the access and use of light and air by the openings to the adjacent house cannot be said to be as of right but simply permissive. Hence there can be no prescriptive right under S. 26. [P 907 C 1]

Jalal Din and N. C. Mehra—for Appellants.

Malik Barkat Ali—for Respondent.

Addison, J. — Mt. Mahbub Begum, widow of Nazar Mohammad, sued the two brothers of her deceased husband, Sher Mohammad and Ghulam Mohammad, for a permanent injunction restraining them from obstructing the plaintiff's door A and windows B and C in the southern wall of her house and also for a mandatory injunction directing them to remove such structures as had already been erected. The trial Court held that, although the passage of light and air was interfered with, the comfort of the house had not been materially diminished thereby and dismissed the suit. The lower appellate Court held that the obstruction amounted to an actionable nuisance but that by virtue of an agreement executed by the plaintiff's deceased husband in 1907 the plaintiff could acquire no easement with respect to the door and windows. He therefore dismissed the appeal and there was a second appeal to this Court. The learned Judge who decided it held that the agreement referred to was invalid for want of registration and could not be referred to, but that, even if it were taken into consideration, it did not prevent the plaintiff acquiring an easement with respect to the door and windows. He therefore, accepted the appeal and granted the plaintiff a decree. Against this decision this Letters Patent appeal has been preferred by the defendants.

Rahim Bakhsh was the father of the three brothers. He died in 1906 leaving three sons, namely defendants 1 and 2,

and Nazar Mohammad, husband of the plaintiff. It has been found that in 1907 these three sons effected a partition of the property in dispute. Nazar Mohammad got the northern portion of the house, the rest of which went to Sher Mohammad, while Ghulam Mohammad received an open site to the south of that portion of the house which went to the plaintiff's husband. Ghulam Mohammad did not build at once on the vacant site which fell to his share and only put up the obstructions in question in the year 1927. The door and windows were existing at the time of the partition, but obviously no easement had commenced to be acquired until the partition in 1907. It has been found that 20 years had elapsed from the date of the partition to the date of erecting these obstructions and the only question is whether a right of easement has, as a consequence, been acquired by the plaintiff.

The document is Ex. D-1. It was written by Nazar Mohammad and is to the effect that Ghulam Mohammad was entitled to build a house in any way he cared on the vacant site which fell to his share and that nobody could prevent him. That means that he had full power, when erecting any building on the vacant site which fell to his share, to build irrespective of any sources of light or air in that portion of the house which fell to the share of Nazar Mohammad now represented by his widow, the plaintiff. In our judgment this document does not require registration. It is an agreement by which Nazar Mohammad gave permission to Ghulam Mohammad, who obtained merely a vacant site, to build a house to be erected on that site in any manner he cared. It is difficult to hold that this is an agreement with respect to immoveable property or to find that the value of the immoveable property involved is more than Rs. 100. It was merely written to clear up the situation as regards building on the vacant site which had already fallen to the share of Ghulam Mohammad. We, therefore, hold that the document does not require registration while in our opinion it must be interpreted to mean that no easement would be acquired by Nazar Mohammad or his representatives-in-interest with respect to the existing openings in that portion of the house which fell to Nazar Mohammad. The fact, therefore, that Ghulam Mohammad

did not build for 20 years did not give Nazar Mohammad or his widow an easement with respect to the existing openings. It cannot be said that the access and use of light or air to and for that portion of the building which fell to Nazar Mohammad had in these circumstances been peaceably enjoyed as an easement, and as of right, without interruption, and for 20 years. The user remained permissive and not as of right. We accordingly hold that no easement had been acquired and accepting the appeal dismiss the plaintiff's suit. The parties will bear their own costs throughout.

D.S./R.K.

*Appeal accepted.***A. I. R. 1936 Lahore 907**

DALIP SINGH, J.

Gurbakhsh Singh — Convict — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1171 of 1934, Decided on 27th November 1934, from order of Magistrate, First Class, Lahore, D/- 11th August 1934.

Penal Code (1860), S. 409—Accused charged under S. 409—It is not open to him to put a defence that prosecution have failed to prove embezzlement of particular sum with which he is charged, although they have succeeded in proving embezzlement of other sums—Such defence cannot hold good.

It is not open to an accused charged under S. 409 to put up a defence that the prosecution have failed to prove the embezzlement of a particular sum with which he is charged, though they might have succeeded in proving embezzlement of other sums, for the defence amounts to no more than this: that the prosecution have failed to prove the embezzlement because it is possible to explain all the circumstances against the accused by the hypothesis that he embezzled some other sums shortly before or after the alleged occurrence. Such a defence cannot hold good for the simple reason that if accepted it would merely involve a conviction, whatever hypothesis was adopted, and no prejudice can be urged by the accused for lack of charge because it was his own defence. [P 908 O 1, 2]

*B. R. Puri and R. L. Anand II—*for Appellant.

Harparshad for the Govt. Advocate — for the Crown.

Judgment.—The appellant Gurbakhsh Singh was convicted by the learned Magistrate on a charge under S. 409, I. P. C., on three counts and sentenced to two years' rigorous imprisonment on the first count, two years' rigorous imprisonment

on the second count and five years' rigorous imprisonment and Rs. 1,000 fine, or in default one year's further rigorous imprisonment, on the third count, the sentences to run concurrently. The hearing of the appeal was greatly delayed by the learned counsel for the appellant, Mr. B. R. Puri insisting on an enquiry into an allegation made by the appellant that a statement on the record, dated 1st May 1934, purporting to be the statement of the appellant was not his statement and a similar statement, dated 22nd May 1934, was also not his statement at all. In this connexion my orders, dated 22nd October and 26th November 1934 may be read as a part of the present judgment. It is sufficient here to state that I have found after enquiry held that the allegations of the appellant were false and must have been deliberately false to his knowledge. The time of this Court has been wasted without rhyme or reason in an impotent attempt to have the trial quashed or set aside on allegations supported by gross perjury. I cannot but too strongly condemn the procedure adopted by the appellant and I consider that the learned counsel who appeared for him, Mr. B. R. Puri, might have studied the facts a little more before he insisted on such an enquiry and the salient fact that the copy of the statement of 1st May was obtained by the accused on 4th May which was known or should have been known to the learned counsel ought clearly to have shown that the allegations of the accused were in all probability incorrect.

I pass now to consider the question of the appeal. The learned Magistrate has written a full and elaborate judgment stating the facts of the case and it is not necessary for me to do more than briefly recapitulate the main points. The prosecution case is that the appellant as Moharrir Jagir was bound to receive the land revenue collected from the urban area of Lahore and to forward it for deposit in the Imperial Bank. For this purpose the appellant had to make entries in a book called Roznamcha as well as in certain khataunis of the sums so received and also to enter up dakhals of the money despatched to the Imperial Bank. It is not contested that all the money shown in the Roznamcha as received was not despatched to the Imperial Bank but the main defence of the ap-

pellant was that he was not the receiving agency and that the Roznamcha, Ex. P. T. was not a cash book at all but merely a record of the demand due from the various assesseees. He, therefore, contended that he was not responsible for the deficit. The learned Magistrate has given good reasons for holding that the Roznamcha is clearly not a mere record of the assessments due but is a cash book as shown by the form of the register and by the fact that there is a column which is entered in the handwriting of the accused showing despatch by cash or cheque of certain sums to the Imperial Bank.

The learned counsel for the appellant was unable to give me any explanation as to why these entries should occur in a register of assessments due only but it is sufficient for me to hold that I agree with the learned Magistrate on this point. The first point taken in appeal by the learned counsel was on the question of the first count, and his argument amounted to this: that the prosecution had failed to prove the embezzlement of the sum of Rs. 47.5-0 though they might have succeeded in proving an embezzlement of other sums either in the month of April or in the month of May. It seems that this question is purely academic as the sentences on the counts were made to run concurrently. But apart from this it appears to me that there is sufficient material on the record to justify the inference that it was the sum of Rs. 47 that was embezzled. There is a receipt that the sum of Rs. 47.5-0 was received by the appellant from Sir Fazl-i-Hussain or more correctly on behalf of Sir Fazl-i-Hussain. This sum, however, is not entered in the Roznamcha as Rs. 47.5-0 but is entered only as Re. 0-5-0. The assessee's name is illegibly written and cannot be exactly deciphered but it is possible that it is Sir Fazl-i-Hussain and any doubt on the point is set at rest by the serial No. 450 which also occurs on the receipt. There could be no motive for making any false entry on the point unless the sum of Rs. 47 was intended to be embezzled. Further I do not think that it is open to the appellant to put up such a defence against the charge framed for the defence amounts to no more than this that the prosecution have failed to prove the embezzlement because it is possible to explain all the circumstances against the appellant by the hypothesis that the ap-

pellant embezzled some other sums shortly before or after the alleged occurrence.

I do not think such a defence can hold good for the simple reason that if accepted it would merely involve a conviction whatever hypothesis was adopted and no prejudice can be urged by the accused for lack of charge because it was his own defence. I therefore repel the contention of the learned counsel. On the second count the contention of the learned counsel was that there was no evidence to prove that the deposits made in the Bank during the month to which that charge refers were made by cheque and that, therefore, the reasoning of the learned Magistrate on the point was incorrect. There is evidence on the point as to the meaning of the words 'clearing Bank' and 'Bank Transfers.' There is nothing to rebut this evidence and it seems to me, therefore, that the learned Magistrate was right in his conclusion that all the monies deposited in the Bank during this month were monies deposited by cheques and no money was deposited in the form of cash at all, and hence the second charge is also proved. Coming now to the third and the main charge, the question really turns on the point as to whether the Roznamcha was, as urged by the prosecution, a cash book or whether it was merely a memorandum of the assessments due as urged by the appellant. I have already given reasons for holding that I agree with the learned Magistrate's view on the point.

All the entries in the book are practically admitted to be in the handwriting of the appellant except the entries on a certain date which have been explained by Sardar Din, Patwari, as made by him on that date at the instance of the appellant. I see no reason to doubt this evidence. This being so and the deficits being admittedly there the natural inference is that the appellant is responsible for these deficits. It was urged that the Khataunis had not been produced and that had they been produced they would have shown that the sums deposited in the Bank were correctly entered in the Khataunis. This matter of the Khataunis is not perfectly clear. The appellant undoubtedly did apply for these Khataunis to be sent for and the Court ordered that they should be sent for. The date in these Khataunis is illegible and it is pos-

sible that a bona fide mistake was made by the prosecution on the question whether the entries related to the year 1931 or the year 1932 but a number of the entries of the year 1932 undoubtedly exist in these Khataunis and there is nothing to show that the contention of the accused on the point is correct. But apart altogether from this I have seen the Khataunis and it is quite obvious that there could be no check whatsoever on any entry made in the Khataunis and they could not by any means prove what the appellant contends. Many of the entries in the handwriting of the accused shew receipts without dates and some show dates without receipt. They are illegible and might be entered at any time.

The Khatauni in fact corresponds to what would be the khata book in an ordinary business and the Roznamcha corresponds to what would be the daily cash book. It is obvious that it is the daily cash book that might furnish a check but not the Khataunis which could be entered up at any time. I, therefore, attach no importance to this contention. This also disposes of the other argument that the Khataunis being the prescribed book there can be no necessity for a Roznamcha. Another point raised was that the Siah register (book showing entries in the Imperial Treasury corresponding to the Bank entries) had not been produced for the month of January. This appears correct but as pointed out by the learned counsel for the prosecution it is merely an oversight and the dakhlas from which the Siah register is prepared are all present on the record and therefore there is no force in this contention. There was also a contention that the accused had been credited with a sum of Rs. 87-5-9 and the misappropriation of this item related not to the year 1932 but to the year 1931.

I do not think there is any force in this contention. If it means anything at all it means that there is a greater embezzlement than the accused has been charged with. Certainly there is nothing to show that a charge is technically wrong for exceeding the statutory period of one year. I therefore repel this contention also. This was practically all that was contended before me. I agree with the learned Magistrate and uphold the conviction of the appellant on all three counts. I have considered the question of sentence with some anxiety. I may say at once that I

warned counsel for the appellant that if the enquiry he demanded turned out against him I would in all probability make a complaint against him for perjury. I have enquired from the appellant whether he would prefer that a complaint for perjury be made against him separately or whether that matter should be taken into account in considering the question of sentence in this case through his learned counsel. He has preferred the second alternative. I may say I would have certainly reduced the sentence because it is a substantial sentence of imprisonment and a substantial sentence of fine and I do not think that circumstances called for so much. I have now, however to consider, bearing in mind the conduct of the appellant in this appeal and the fact that I am dropping the question of the complaint of perjury, what sentence should be given him. Taking all things into account I do not propose to reduce the sentence. I therefore uphold the sentences also and dismiss the appeal.

R. M./R. K.

Appeal dismissed.

A. I. R. 1936 Lahore 909

JAI LAL, J.

Mt. Ram Rakhi—Plaintiff—Petitioner.
v.

Bawa Ishar Das and others—Defendants—Respondents.

Civil Misc. Petn. No. 29 of 1934, Decided on 1st October 1934.

Practice—Court-fees—Time fixed by lower appellate Court already expired and appeal dismissed for want of payment of Court-fees—High Court, even then, can extend time.

High Court extended the time for payment of the requisite court-fees on an appeal in the lower Court even where the time fixed by the lower appellate Court for paying the court-fees had already expired and appeal dismissed for want of payment of court-fees, in a revision against the order rejecting the petitioner's application to appeal as a pauper.

[P 909 C 2; P 910 C 1]

R. L. Anand I—for Petitioner.

Niamat Rai—for Respondents.

Order.—I have examined the judgments of the trial Judge and of the lower appellate Court and am of opinion that this is a fit case in which I should have given further time to the petitioner to pay the requisite court-fees when I dismissed her petition for revision against the order rejecting her application to appeal as a pauper. No authority has been cited by the respondents' counsel in support of his contention that I cannot

extend the time now on the ground that the time fixed by the District Judge for paying the court-fees had already expired and the appeal dismissed when I dismissed the petition for revision. I observe that unless I grant the extension prayed for the petitioner will lose her rights to appeal as a fresh appeal would be barred by time and this fact has influenced me in granting the extension. I allow the petitioner one month from today to pay the requisite court fee on the memorandum of appeal before the District Judge. If court-fee is paid within one month the District Judge will hear the appeal on the merits. The petitioner must pay the respondents' costs of this petition because it was her own negligence in not asking the extension at the previous hearing which has necessitated this petition.

D.S./R.K.

*Petition allowed.***A. I. R. 1936 Lahore 910**

YOUNG, C. J. AND RANGI LAL, J.

Ghulam Mohammad—Plaintiff—Appellant.

v.

Secy. of State — Defendant — Respondent.

First Appeal No. 1020 of 1931, Decided on 14th December 1934, from decree of senior Sub-Judge, Gujranwala, D/- 15th April 1931.

Custom (Punjab)—Burden of proof—Person claiming to be member of statutory agricultural tribe must prove that he himself or his relatives or his ancestors have held land within living memory.

For a tribe to be statutory agricultural tribe, it is necessary that sometime or other the tribe must have held land within living memory.

[P 910 C 2]

Where the person claiming to be a member of an agricultural tribe, all his living relations and all his ancestors, as far as any one knows have been engaged on business and there is no evidence that the person himself or any of his relations have ever held land, he cannot be held to be a member of an agricultural tribe.

[P 910 C 2]

Barkat Ali and Niaz Ali—for Appellant.*Dewan Ram Lal*—for Respondent.

Young, C. J.—This is a first appeal from the decision of the learned senior Subordinate Judge of Gujranwala. The plaintiff Ghulam Mohammad bought some land from one Nawab Din. In due course, it was necessary to obtain mutation. The vendor was a non-agriculturist. The patwari noted in the mutation proceedings

that the plaintiff was an Ulma by caste but that he wished to be entered as a Rajput Khokhar. The patwari also suggested that the plaintiff wished to be described as a Rajput Khokhar, in order that he might, in future, be able to purchase land. The plaintiff objected to this description and brought this declaratory suit to establish that he was a Rajput Khokhar and, therefore, a member of an agricultural tribe. The learned senior Subordinate Judge dismissed the plaintiff's suit, holding that the plaintiff had not proved his case. The plaintiff, therefore, appeals. We have examined the evidence produced by the plaintiff. We do not need to consider in this case whether the description as an Ulma is a caste or not. Prima facie, Ulma is a word, like Maulvi, giving a description as a learned man. The real point is: Has the plaintiff satisfactorily proved that he is a Khokhar Rajput? We have examined the evidence and have come to the conclusion that the plaintiff has failed to establish this. He has called a number of connections by marriage, who say that he is a Khokhar Rajput. The evidence of these witnesses is wholly insufficient, in our opinion, to establish the fact. They are, obviously interested parties. It is to their interest that the status of the plaintiff should be raised to that of a Khokhar Rajput. Two other witnesses were produced, who say that they are Khokhar Rajputs and that the plaintiff is related to them by blood. They say that the plaintiff is their uncle in the fourth degree and a cousin in the third. This, again, does not strike us as being particularly reliable evidence. It seems to us that if, in fact, the plaintiff was related to them by blood, it would have been possible to produce some better evidence than the mere statements of the witnesses.

The facts of this case are that the plaintiff himself, all his living relatives and all his ancestors, as far as any one knows, have been engaged in business. There is not a tittle of evidence that either he himself or any of his relatives have ever held land. For a tribe to be a statutory agricultural tribe, it is necessary that sometime or other the tribe must have held land within living memory. If the plaintiff had led evidence to prove that his ancestors had held land it would have assisted his case. This evidence combined with other evidence of caste, would satis-

factorily establish that the plaintiff was a member of an agricultural tribe. The revenue records which could be produced, if land had been held by himself or his ancestors, would then show the caste to which he belonged. In this case, there is nothing of this sort on the record. We, therefore, see no reason to interfere with the decision of the lower Court, and dismiss the appeal with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 911

TEK CHAND AND DALIP SINGH, JJ.

Mohammada and others—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 489 of 1936, Decided on 12th June 1936, from order of Addl. Sess. Judge, Gujranwala, D/- 23rd March 1936.

Penal Code (1860), Ss. 302/34, 304-1 and 460—Number of persons jointly entering house at dead of night with intention to abduct woman and after some of them having mortally wounded inmates by lethal weapons quitting house by scaling court yard wall—Offence is under S. 460 and not under S. 302/34 or 304-1.

A number of persons armed with dangs and chhavis jointly entered a house at dead of night with the intention of abducting a woman. While abducting the woman some of them attacked an inmate with lathi blows which resulted in his death and also caused grievous hurt to another. Having done this they went away after scaling the wall of the court-yard of the house:

Held: that they having committed house breaking by night and some of them having voluntarily caused death and grievous hurt, the offence was under S. 460 and they having entered the house not with the intention of killing, the offence could, not be under S. 302/34 or under S. 304-1.

[P 913 C 1,2]

Mian Abdul Aziz—for Appellants.

A. R. Khosla for Govt. Advocate—for the Crown.

Tek Chand, J.—The appellants, Mohammada Tarar of Mouza Mamdana, Rehman Musalli and Raja Gondal of Rerka, district Gujrat, have been convicted under S. 302/34, I. P. C. and sentenced to transportation for life. They have also been convicted under S. 326/34, I. P. C. and Mohammada has been sentenced to three years, and Raja and Rahman to 1½ years' rigorous imprisonment, the sentences to run concurrently. The case for the prosecution is that Mt. Fatima (P. W. 3), who originally

belonged to Mouza Rerka, was abducted by Mohammada appellant before her marriage. She returned to her parents after 5 or 6 days, and shortly afterwards was married to one Salihon of the same village. She lived with Salihon for about six months, but was not very happy with him. Mohammada appears to have turned his attention again to her and she eloped with him from Salihon's house. For about two years, Mohammada and Mt. Fatima remained together going from place to place, untraced by Salihon and the parents of Mt. Fatima. Eventually they came to Chak No. 40, near Kuthala Police Station, where they lived with Sultan (P. W. 4), as his guests. After ten or twelve days, Mohammada left the Chak leaving Mt. Fatima with Sultan. He returned a couple of weeks later and asked Mt. Fatima to accompany him. In the meantime however Mt. Fatima had transferred her affections to Sultan and she declined to go with Mohammada, Mohammada was much disappointed, but ultimately he agreed to Mt. Fatima remaining with Sultan, on receipt of Rs. 60 from him. Shortly afterwards, Salihon, the husband of Mt. Fatima, came to know that she was living with Sultan. Accordingly he, accompanied by Mt. Fatima's father and other persons, came to Chak No. 40 with a view to persuade Mt. Fatima to live with him, but she did not agree and finally and definitely refused to go back to her husband. Salihon, finding that all attempts to take her back had been infructuous, agreed to divorce Mt. Fatima on receipt of Rs. 80 from Sultan. This amount is stated to have been paid by Sultan to Salihon, and it is alleged that a divorce-deed was actually written. Accordingly, Salihon and his people departed from Chak No. 40, leaving Mt. Fatima with Sultan. A few days later, one Ziada Mirasi came to the Chak, at the instance of Mohammada, in order to find out if Mt. Fatima was still with Sultan. While peeping over the wall of the courtyard, he was noticed by Mt. Fatima and Sultan, who gave him a beating.

Within ten or twelve days of this incident, on the night between 21st and 22nd November 1935, when Sultan and Mt. Fatima were sleeping in a kotha of their house, and Hakam Ali, father of Sultan, was sleeping in the courtyard, a number of persons surreptitiously entered

the house. Mt. Fatima felt some body was holding her by the arm. She woke up and noticed that it was Raja appellant. She raised a cry, which roused Sultan. It is alleged that Mohammada, appellant, who was armed with a chhavi, struck Sultan, and his companions beat him with lathis. Sultan was seriously injured and fell down. On hearing his cries, his father Hakam Ali, who as already stated was sleeping in the courtyard, got up and shouted for help. The culprits then moved to the courtyard and attacked Hakam Ali inflicting serious injuries on his head, which caused extensive fracture of the skull. Hakam Ali fell down and never regained consciousness. The cries of the inmates of the house attracted a number of neighbours to the spot, including Piran Ditta (P. W. 5), Raja (P. W. 6) and Hakam Ali (P. W. 7). By that time however the culprits had scaled the wall of the courtyard and had gone out. Blows were exchanged between Piran Ditta, Hakam Ali and Raja who were inside the courtyard and the culprits who were outside. Hakam Ali was removed to the hospital at Kuthala, from where he was taken to the Police Station at Pindi Baha-ud-Din, but died on the way. The first information report was soon lodged, in which the three appellants and one Hussain (who has been acquitted by the Sessions Judge), were mentioned as the culprits.

That Hakim Ali died as a result of the injuries received at the hands of the persons, who had entered his house at night and had attacked him, and that his son Sultan was grievously hurt with lethal weapons, admit of no doubt whatsoever. The only question is whether the identity of the culprits has been sufficiently established. It has been argued on behalf of the appellants that the night was dark and therefore it was difficult to identify the assailant. It has also been suggested, that it was more likely that the crime was committed by Salihon, the husband of Mt. Fatima and his friends, who must have come to forcibly take her away. This suggestion was put forward in the lower Court also, but was rejected by the learned Sessions Judge. After giving consideration to the arguments of counsel, I have no hesitation in agreeing with the learned Sessions Judge on this point. As stated above, according to Sultan and Mt. Fatima,

Salihon had already divorced Mt. Fatima. The divorce-deed, however, has not been produced.

It has been suggested, therefore, that as a matter of fact no divorce was given, and this story has been invented by Mt. Fatima in order to save her former husband. I am unable to accept this contention. In the first place, it is quite clear that Mt. Fatima had never liked Salihon and there is no reason why she should have been anxious to save him, if he was really the person who had raided Sultan's house to forcibly carry her away and had seriously injured Sultan, with whom she was living and whom she married soon afterwards, and killed Sultan's father. Secondly, assuming that as a matter of fact she had not been divorced and Salihon was anxious to get her back, there is no reason why he should not have adopted the easier and less risky method of seeking redress in civil or criminal Courts. Nor is there any reason, why Mt. Fatima and Sultan should have falsely implicated Mohammada. As already stated, Mohammada was well known to Mt. Fatima and had lived in the house of Sultan for a considerable time. There was, therefore, no difficulty in their being able to identify him. The evidence as to whether there was a light burning at the time in the kotha is conflicting, and it is not possible to come to a definite finding on the point. But assuming that there was no light burning in the kotha at the time, I do not think it was difficult for the victims to recognize the assailants, who were known to them already. One of them pulled Mt. Fatima by the arm and he and the others remained in the house for a considerable time. Mohammada, of course, was well known to Mt. Fatima and Sultan. The other appellants, Raja and Rehman, belonged to Mauza Rerka, where Mt. Fatima was born and brought up, and she knew them well.

It is also in evidence that during the period that Mohammada and Mt. Fatima had lived with Sultan in Chak No. 40, before the divorce, both Rehman and Raja had come to the chak twice on visits to Mohammada. Thus, Sultan also knew them well. In my opinion, there is no reason to doubt the identification of any of the appellants. I am satisfied that Mohammada, Rehman and Raja, with one other person whose identity has

not been established, came to Chak No. 40, armed with dangs, and chhavis, with the object of forcibly taking away Mt. Fatima, that they stealthily entered Sultan's house at night, that while in the house some of them inflicted lathi blows on Hakim Ali which resulted in his death and also caused grievous hurt with a chhavi to Sultan, and then they went away after scaling the wall of the courtyard of the house.

The question for consideration is whether on the facts as found above, the appellants are guilty of the offences of which they have been convicted. The Committing Magistrate had charged them under S. 304, Part 1, for causing the death of Hakim Ali, and under S. 326, I. P. C., for causing grievous hurt to Sultan. The learned Sessions Judge, at the commencement of the trial, altered the charges to those under S. 302/34 and S. 326/34 respectively and found the three appellants guilty on both counts. I have no doubt that neither S. 302/34, nor S. 304, Part 1/34, is applicable to the facts as alleged or proved. It is obvious that the preliminary intention of the culprits was to forcibly take away Mt. Fatima. They had no doubt armed themselves with dangs and chhavis, and would have used them in case obstruction was offered to them in carrying out their preliminary intention. But in the circumstances a common intention to commit culpable homicide amounting to murder, or culpable homicide not amounting to murder, cannot possibly be imputed to them. This was frankly conceded by counsel for the Crown before us, and it is obvious that in the absence of such an intention the charge under S. 302/34 could not possibly be sustained. Nor is the evidence definite as to who actually struck the fatal blow to Hakim Ali. Therefore, none of the appellants could be held guilty under S. 302, or S. 304-1 for his own personal act.

On the facts found however the case clearly falls under S. 460, I. P. C. It has been found that the appellants jointly entered the house of Hakim Ali at dead of night with the intention of abducting Mt. Fatima, and after one or more of them had mortally wounded Hakim Ali and caused grievous hurt to Sultan they quitted the house by climbing over the wall of the courtyard. They therefore committed "house-breaking" as defined

in S. 445. Secondly S. 460 lays down that if at the time of committing house-breaking by night, any person, guilty of such offence voluntarily causes or attempts to cause death or grievous hurt to any person, every person jointly concerned in committing such house-breaking by night shall be punished with transportation for life or with imprisonment of either description which may extend to ten years and shall also be liable to fine. All facts necessary to make this section applicable have been proved in this case and therefore the appellants are punishable as provided therein. We have carefully considered the question of sentence, but are unable to find any extenuating circumstance. The crime was a particularly heinous one: the appellants trespassed into the house of Hakim Ali at dead of night, intending to forcibly carry away Mt. Fatima; they had armed themselves with deadly weapons, which they freely used, killing Hakim Ali and seriously wounding his son Sultan. In the circumstances the ends of justice require that the maximum sentence be imposed on them. Accordingly the conviction of the appellants for the major offence must be altered from one under S. 302/34 to that under S. 460, I. P. C., and the sentence of transportation for life imposed on each appellant affirmed. In the circumstances it does not appear necessary to impose a separate sentence for the grievous hurt caused to Sultan. The conviction and sentences under S. 326/34, I. P. C., are therefore set aside. With this modification I would dismiss the appeal.

Dalip Singh, J.—I agree.

D.S./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 913

DIN MOHAMMAD, J.

Ali Mohammad and others—Accused—
Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 633 of 1936, Decided on 15th June 1936, from order of Addl. Sess. Judge, Lahore, in No. 105 of 1935.

Punjab Opium Smoking Act (6 of 1923), Ss. 5 and 2 (b)—Three-storeyed building—Different tenants occupying different storeys—Finding of Chandu in third storey—Presumption under S. 5, held, not applicable to tenants occupying other two storeys.

In a three-storeyed building different tenants occupied different storeys. In the third storey

Chandu and other articles used by Chandu smokers were found. In second storey no Chandu was found but there were only bands and other articles used by bandsmen:

Held: that the presumption under S. 5 did not apply to the occupants of the other two storeys and even if it did apply it was rebutted by the finding of bands and by proof that they were not Chandu smokers. [P 914 C 2]

Facts.—On 23rd June 1935, the Excise Sub-Inspector, accompanied by Jai Gopal and others, raided a three storeyed house in Chauk Matti. They found accused Nos. 5 to 12 sitting in the second storey. They placed a guard there and went up the third storey. There they found accused 1 to 4 smoking Chandu. A lamp, two Niqarian and other articles connected with Chandu smoking were found in the room, where accused 1 to 4 were sitting and other articles connected with the same were recovered from the verandah of the third storey. Accused 13 is the owner of the house. Imam Din No. 13 has been convicted under S. 8, Punjab Opium Smoking Act No. 6 of 1923, while the remaining accused have been convicted under S. 6 of the same Act as being members of an opium smoking assembly. Imam Din, accused 13, admits that the house belongs to him. It has been amply proved by the prosecution evidence that accused 1 to 4 were smoking Chandu in the third storey of the house, apparently with the knowledge of the owner. In my opinion, these five accused have been rightly convicted. But I am not convinced of the guilt of the remaining eight accused. They were sitting in the second storey. The prosecution witnesses admit that bands were lying near them and other articles used by bandsmen were also lying near them. Mr. Abdul Hassan P. W. admits that Imam Din and his brothers work as bandsmen. These accused were apparently bandsmen living in the second storey of this house.

The Magistrate has apparently convicted these eight accused on the basis of the presumption mentioned in S. 5 of the Act, which says that the presence of any opium in any place where three or more persons are assembled, shall be held sufficient to raise a presumption that each member of such assembly is present at such place for the purpose of smoking opium, or of preparing opium for smoking purposes. The word 'place' is defined in S. 2, sub-cl. (b) as a building, house

and any part thereof. The presumption indicated by S. 5 could surely apply to the case of the men sitting in the third storey, even if they had not been actually smoking Chandu; but in my opinion the same presumption cannot be applied to any other part of the same building, viz. to the second storey where no Chandu or any apparatus in connexion with its preparation were found and where, on the other hand, bands and other articles connected with drum-beating were found. If in a three-storeyed building different tenants occupy different storeys, and in one storey Chandu is found I do not think that the presumption indicated in S. 5 applies to the tenants occupying the other two storeys. Even if the presumption applies, I think it has been sufficiently rebutted by the prosecution evidence that the accused were bandsmen and were not smoking Chandu. I, therefore, recommend that the conviction against accused 5 to 12 should be set aside, and submit the record to the High Court for orders.

Order.—The interpretation placed by the Additional Sessions Judge upon the wording of S. 5 read with S. 2 (b), Punjab Opium Smoking Act, appears to me to be quite reasonable. I accordingly quash the conviction of accused 5 to 12. The fines, if already paid, will be refunded to them.

D.S./R.K. *Order accordingly.*

A. I. R. 1936 Lahore 914

SKEMP, J.

Khuda Bakhsh—Convict—Appellant.
v.

Emperor—Opposite Party.

Criminal Appeal No. 385 of 1935, Decided on 10th May 1935, from order of Magistrate, 1st Class, Lahore, D/- 2nd February 1935.

(a) Criminal Trial—Evidence—Accused refusing at first to cross-examine prosecution witnesses but subsequently requesting to recall witnesses for cross-examination—Non-compliance with such request is justifiable.

In a criminal trial the accused refused to cross-examine the prosecution witnesses even though he had been given an opportunity to do so, but subsequently requested to recall the witnesses for cross-examination. The Magistrate refused:

Held: that the Magistrate in refusing such request was entirely justified: 1931 Lah 186, [P 915 C 2] Disting.

(b) Penal Code (1860), S. 307—Accused drunk and on provocation inflicting slight

injuries with sharp edged weapon—Offence held to be under S. 324 and not under S. 307.

In determining the nature of the offence important consideration is intention or knowledge of the accused and circumstances under which the offence was committed. Thus where the accused when he committed offence was drunk and on provocation he inflicted the injuries which were slight with a sharp edged weapon :

Held : that the conviction under S. 307 could not be maintained but under S. 324 the accused was guilty of causing hurt. [P 916 C 2]

(c) Evidence Act (1872), S. 54—Evidence of bad character of accused is irrelevant—But previous conviction may be considered in awarding sentence.

Under S. 54, Evidence Act, the bad character of an accused person is irrelevant. But by universal practice the previous character of an accused may be taken into account in awarding sentence. [P 916 C 2]

S. D. Kitchlu—for Appellant.

M. Tufail for Govt. Advocate—for the Crown.

Judgment. — The appellant Khuda Bakhsh has been convicted under S. 307, I. P. C., of an attempt to murder one Mohammad Bashir and sentenced to five years' rigorous imprisonment. He has further been ordered to furnish security under S. 106, Criminal P. C., to keep the peace for three years after the expiry of sentence and himself execute a bond in the sum of Rs. 3,000 with two sureties for that amount. He has appealed through Dr. Kitchlu. The first point taken in appeal is that the Magistrate did not comply with the provisions of S. 257, Criminal P. C. At an early stage of the case the accused applied and was granted an adjournment to make an oral application for transfer of the case, but his application for transfer was refused by the Additional District Magistrate. The case was then returned to the trying Magistrate. This was before the conclusion of the first witness for the prosecution, the medical witness. Thereafter the accused refused to cross-examine any of the witnesses although asked when each prosecution witness was examined. After the seventh prosecution witness the accused was examined under S. 342, Criminal P. C., but refused to answer questions. After the charge was framed he again refused to answer questions ; the Magistrate called up one by one all the prosecution witnesses, excepting the medical witness, and the accused asked them no questions. The Magistrate then took some more prosecution witnesses who were also not cross-examined, though

the accused was given an opportunity to do so, and then, at the request of the prosecuting Sub-Inspector, adjourned the case for arguments. On the date fixed for arguments the accused engaged a counsel who requested the Magistrate to recall all the prosecution witnesses for cross-examination. The Magistrate refused. In my opinion he was entirely justified in so doing. The accused was "mute of malice" and the proviso to S. 257, Criminal P. C., was enacted to deal with cases like this. It runs :

Provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the purposes of justice.

The accused had been given ample opportunity for cross-examination and it would not have been reasonable to put the Crown to the expense or the witnesses to the trouble of appearing again. Dr. Kitchlu referred to 134 I C 580 (1). That was a political case in which the accused declined to cross-examine the prosecution witnesses and made a statement. After the charge had been framed, however,

he apparently changed his mind and claimed that all the prosecution witnesses should be recalled for cross-examination. They were recalled six days later and when all the prosecution witnesses were present, the accused professed his inability to cross-examine them on the ground that he had not been furnished with a copy of their statements. He further stated that, if the Court considered that the witnesses could not be re-called again for cross-examination, he would summon them as his defence witnesses. The Magistrate declined to allow the accused an opportunity to cross-examine the witnesses or to summon them as defence witnesses.

A learned Judge of this Court said that as the accused did not know the names of the prosecution witnesses when they attended for cross-examination by him he could not cross-examine them properly without obtaining copies of their depositions, and the refusal of the Magistrate to resummon these witnesses was unreasonable and had prejudiced the trial. This opinion, however, is obiter, because the learned Judge accepted the appeal on the merits and finished by saying:

If I had held that there was a *prima facie* case against the appellant I would have consi-

1. Chint Ram v. Emperor, 1931 Lah 186=1931 Or O 306=134 I O 580=32 Or L J 1202=32 P L R 13.

dered the necessity of allowing the applicant an opportunity to further cross-examine the prosecution witnesses, but, in view of my opinion on the merits of the case, it is not necessary to do so.

It is moreover clear that the opinion was expressed on the particular facts of that case, which were more favourable to the accused than the present facts. On the merits, Dr. Kitchlu's main point is that the charge of attempted murder is not brought home and at most the circumstances justify a conviction for causing simple hurt with a sharp-edged weapon under S. 324, I. P. C. The case for the prosecution as developed in Court and not subjected to cross-examination is as follows: A Pahlwan named Miraj Din, his servant named Mohammad Bashir, and others were watching a political procession in Lahore on the night of 30th November 1934. The appellant Khuda Bakhsh asked Miraj Din for money, but Miraj Din had not got it at the time. Miraj Din left the place followed by Mohammad Bashir. The accused kept demanding money with menaces and finally, stabbed Mohammad Bashir. Mohammad Bashir was rescued by the on-lookers, several of whom have given evidence. One of them, Diwan Chand, seized the knife from Khuda Bakhsh and was himself cut in the palm of the hand in doing so. The prosecution witnesses admit that Khuda Bakhsh was struck by somebody in the crowd with a "a hunter" in order to make him let go. The medical evidence is that Mohammad Bashir had three cuts on the arms: two on the left arm and one on the right. All these cuts were slight, the worst being $3/4'' \times 1/4'' \times 1/2''$. The wound on the right arm was only $1/8'' \times 1/8''$. These cuts could be caused by the end of the knife produced in Court. He also had two scratches. Diwan Chand had a cut on the palm of the hand and Khuda Bakhsh had eleven contused wounds, swellings and abrasions, six of them on the head.

The medical witness also said that Khuda Bakhsh was drunk, smelling of drink and talking nonsense. This was not admitted at the trial by Mohammad Bashir, but when he made the first information report at 10-30 p. m. on the night in question he told a story less damaging to the accused. He then said that Khuda Bakhsh demanded money from Miraj Din who refused. Miraj Din

and he were going home. Khuda Bakhsh being drunk, Mohammad Bashir pushed Khuda Bakhsh who fell down and on getting up got out a knife and attacked him. A pullover figured in the prosecution story which had cuts in the arm. The doctor was of opinion that the cuts on the pullover did not correspond to the cuts on the person of the injured man as they were $2-1/4''$ apart, whereas cuts on the arm of the accused were $2-1/2''$ apart. There were two cut marks on the right arm and only one cut on the right arm of the injured man. I am, however, of opinion that this is over meticulous and no attention need be paid to this. The learned counsel for the Crown urged that all the eye-witnesses say that Khuda Bakhsh was threatening death to everybody. There is, however, no doubt that most of them wanted to make out as heinous an offence as possible and that they had a motive for doing so. In the circumstances I do not think that it is safe to maintain the conviction under S. 307, I. P. C., and I alter the conviction to one under S. 324, I. P. C. As to sentence, as laid down in S. 54, Evidence Act, the bad character of an accused person is irrelevant. But by universal practice the previous character of an accused may be taken into account in awarding sentence. It is in evidence that this Khuda Bakhsh is the same Khuda Bakhsh who stabbed Rajpal, the author of the notorious pamphlet "Rangila Rasul" and was sentenced to seven years' rigorous imprisonment by the District Magistrate of Lahore in 1928, a sentence maintained on appeal. Taking all the circumstances into account, the previous bad record of the accused, his drunkenness, the provocation he had both given and received, the dangerous character of his act, the trivial nature of the injuries he inflicted and the beating he received, I think two and a half years' rigorous imprisonment will meet this case and I reduce the sentence accordingly.

I also think it proper that the accused should be put on security to keep the peace after his release. It is, however, represented that he is a poor man unable to give security of Rs. 3,000. I direct that after release he be put on security to keep the peace for a period of two years and execute a bond in the sum of Rs. 500 with two sureties each of Rs. 500. If he fails to give this security

he is to suffer simple imprisonment for two years.

P.R./R.K.

Sentence reduced.

A. I. R. 1936 Lahore 917

MONROE AND DIN MOHAMMAD, JJ.

Bennett Coleman & Co., Ltd.—Applicants.

v.

G. S. Monga and another—Respondents.

Criminal Appln. No. 4 of 1936, Decided on 13th May 1936.

(a) Contempt — Plaintiff reflecting severely on defendant's conduct—Its publication is contempt.

Where the publication of a plaint is the publication of a document reflecting severely on the conduct of the defendant, a contempt of scandalous and serious nature is committed: *In re Cheltenham and Swansea Ry. Carriage & Waggon Co.*, (1869) 38 L J Ch 330; *Roach v. Garvanor Hall*, 2 Atk 469; *Cheshire v. Strauss*, (1896) 12 T L R 291, *Rel. on*; 1934 Cal 606, *Disting.* [P 918 C 2]

(b) Contempt of Courts Act (1926), S. 2, sub-s. (3)—Meaning of.

Sub-s. (3), S. 2, Contempt of Courts Act, means that the contempt must be punishable as a contempt under the Penal Code and not punishable only because it otherwise is an offence. [P 918 C 1]

Shamsher Bahadur—for Applicants.

Ishar Das Khanna and Ram Narain—for Respondent 1.

Partab Singh and Bhagat Singh—for Respondent 2.

Monroe, J.—This is an application under the Contempt of Courts Act brought by Bennett Coleman and Co. Ltd., against G. S. Monga and S. Bakhshish Singh. The applicants are the publishers of a weekly paper called "The Illustrated Weekly of India," and Bakhshish Singh, respondent 2, is the editor of a paper called "The Khalsa" which is published in Lahore. The applicants carry on in their paper a competition known as "The Commonsense Crossword Competition", and give prizes for correct solutions. G. S. Monga, respondent 1, attempted to solve the puzzle contained in issue of 29th December 1935 and posted three separate solutions. The applicants admitted the receipt of two, one of which contained 12 and the other 13 mistakes. Mr. Monga asserted that he had sent in a third solution which, when compared with the published result, was correct in all respects. Some correspondence took place between Mr. Monga and the applicants and on 6th February 1936 he insti-

tuted a suit against the applicants in the Court of the Senior Subordinate Judge, Lahore, praying for a declaration that he was entitled to a prize as a winner. A summons in this suit was served on 26th February 1936. In the meantime Bakhshish Singh had published the plaint together with a photograph of Mr. Monga in the paper "Khalsa". It is further alleged by the applicants and has not been denied by Mr. Monga that he circularized copies of the page containing the plaint and photograph to several newspapers in India, with a letter asking the editors of such newspapers to reproduce the plaint in an early issue of their papers. It was further stated and not denied that the plaint had been amended on 30th April 1936, and that the claim had been altered to one for damages only, the amount being one rupee. The applicants complain that the publication of the plaint is likely to do them damage and it has been argued before us that this publication is likely to prejudice them in their defence to the suit and is a contempt of Court.

The answer put forward by Mr. Monga is that his plaint merely sets out the facts and that he has given in it not only his side of the story but that of the applicants. The argument for the editor of "Khalsa" is that he published this item merely as an item of news. In the first place, we have no doubt whatever that the publication of this plaint is the publication of a document reflecting severely on the conduct of the applicants. Though no express charge is made, yet it is clearly implied that the competition was not properly conducted by the applicants. Mr. Monga has clearly shown that his action was inspired purely by spite, by sending a copy of this publication with a request for its reproduction in newspapers all over India. Such a reproduction could do him no good and any effect it could have would certainly be detrimental to the applicants and would be calculated to raise prejudice against them. It is impossible to conceive why a newspaper should publish such document. It together with a photograph of Mr. Monga takes up an entire page of the issue of the newspaper. It is not, as a perusal of it shows, a paper that is normally illustrated; yet, in order to draw attention to this trivial dispute, a large photograph of Mr. Monga is published in it. We have no hesi-

tation in coming to the conclusion that not only was this publication calculated to prejudice the applicants in their case but the publication was caused by Mr. Monga out of spite and with the intention of damaging his opponents and earning a notoriety for himself. What the motive of the newspaper proprietor in publishing the plaint and photograph was, it is impossible even to surmise. No one could regard this plaint as an interesting item of news. It is necessary to consider then whether the mere publication of a plaint in a suit may amount to a contempt of Court. The first ground of objection that was brought before us against holding the present publication as a contempt of Court, was not pressed. In sub-s. (3), S. 2, Contempt of Courts Act, it is provided :

No High Court shall take cognisance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Penal Code.

It was suggested that in the present case if the publication of the document could be contempt, it would also be defamatory and, therefore, punishable as an offence. But, in our opinion, this subsection means that the contempt must be punishable as a contempt under the Penal Code and not only because it otherwise is an offence. That the publication of a plaint may amount to contempt, is clear on the authorities cited to us. In 38 L J Ch 330 (1), it was held that the publication of a petition for the winding up of a Company, containing charges of fraud against the directors, before the hearing of the petition was a contempt. Vice-Chancellor Malins relied upon the principle laid down by Lord Hardwicke in 2 Atk 469 (2). The passage which has been frequently cited in later cases and which may be taken as the basis of the modern law on this question runs as follows :

Nothing is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented: nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard.

Vice-Chancellor Malins lays down as a general proposition that :

1. In re Cheltenham and Swansea Ry. Carriage & Waggon Co., (1869) 38 L J Ch 330=20 L T 169=17 W R 463.
2. St. James's Evening Post Case: Roach v. Garvanor Hall, (1742) 2 Atk 469.

Whenever a newspaper, either on its own motion or at the instigation of others, publishes the proceedings in a cause before the hearing, it tends to prejudice that cause in the minds of the public.

In 12 T L R 291 (3), so very clearly was it recognised that the publication of a statement of claim amounted to a contempt of Court that Sir Frank Lockwood for the respondent refused even to contend that it was not a contempt. He relied on the fact that his client had realised his error and done all that he could to remedy it. Day, J. in his judgment said :

It was shocking that newspapers should publish such matters as this which had not been before any Court of Justice. There was no excuse for that. It was interfering with the course of justice to make public the statement of claim in this way, which was the ex parte statement of one side.

The learned counsel for the respondents relied on a passage from the judgment in 1934 Cal 606 (4). The facts in that case bear a strong resemblance to those of the present case except that there was an intermediary between the plaintiff in the suit, the plaint in which was published, and the editor of the newspaper which published it. The learned Judge came to the conclusion that there had not been a contempt of Court and added:

But I desire to say that if the editors and proprietors of newspapers take upon themselves to publish copies or resumes of pleadings and similar documents in pending suits, they do so at considerable risk.

The learned Judge distinguished the case before him from the authorities cited on the ground that in those authorities it appeared that the documents reproduced contained charges of disgraceful conduct against the opposite party, while in the case before him he considered that the defendant was represented as merely the victim of the wickedness of others and he thought that no one reading the article would form an unfavourable view of the conduct of the defendant. Whether the distinction made by the learned Judge is well founded in law or not—and in our opinion it is not—his decision has no bearing on the case before us. There can be no doubt that the plaint which was published in the present case, reflects seriously on the conduct of the applicants. We have no doubt that a serious contempt

3. Cheshire v. Strauss, (1896) 12 T L R 291.

4. Atindra Narayan Roy v. Hemanta Kumari Devi, 1934 Cal 606=152 I C 900=38 C W N 330.

has been committed, a contempt which has been described as of a scandalous nature, and a form of contempt which, if allowed to flourish, might become a serious danger, as was argued by Mr. Carson (afterwards Lord Carson) in 12 T L R 291 (3), the case to which we have referred above:

If such a thing could be done, no one was safe. All that a man had to do was to commence an action against a public man, draw up a statement of claim containing any matters of prejudice he might choose to invent, and then threaten to make public the statement of claim.

During the hearing we asked the learned counsel for both parties what their attitude was about the contempt. Mr. Partap Singh for the editor of the newspaper said that he regretted the publication which had been made without any intention of harming the applicants. Mr. Monga, on the other hand, claimed that it was his right to publish the plaint and, as we have indicated, his conduct shows that he was acting with deliberation, prompted by spite and a desire to injure the applicants. In the circumstances, we think that it would be sufficient for Sardar Bakshish Singh to pay Rs. 32 towards the costs of this application. We fine Mr. Monga Rs. 100 and order him to pay Rs. 32, costs of the application, also. Mr. Monga will have one month from the date of this judgment, within which to make the payment.

R.W./R.K. *Application allowed.*

A. I. R. 1936 Lahore 919

DIN MOHAMMAD, J.

Parshotam Das—Convict—Petitioner.
v.

Emperor—Opposite Party.

Criminal Revn. No. 521 of 1936, Decided on 12th June 1936, from order of Addl. Sess. Judge, Lahore.

Criminal P. C. (1898), S. 257—Accused summoning witness—Witness cannot refuse to attend Court when summoned—Fees of expert witness—Accused should not be burdened with costs of expert (if his demand is unreasonable) especially when Magistrate is empowered to enforce attendance of witness and to pay him reasonable dues.

A witness cannot refuse to attend the Court when summoned and the rules of the High Court have clearly laid down the fees to which an expert witness is entitled. The Court, therefore, should not hesitate in exercising its powers under the law, however highly placed a witness may be. An accused should not be burdened with the costs of an expert, if his demand is unreasonable, especially when the

Magistrate is empowered to enforce the attendance of the witness and to pay him his reasonable dues: 1929 Lah 23; 108 I C 907 and 1932 Lah 481, *Rel. on.* [P 912 C 2]

*Ram Lal Anand II—*for Petitioner.
*Ram Saran—*for the Crown.

Order.—In a complaint under S. 420, I. P. C. charges were framed against the accused who was called upon to enter on his defence. On the 18th November 1935, he was ordered to put in a list of the defence witnesses which he wished to summon. In compliance with this order the accused submitted a list on the 19th November and included in it two handwriting experts. Some time after, the accused gave up one of the experts and asked the Court to summon the other expert named in the application. Some correspondence ensued between the Court and the expert and as the expert made an excessive demand, the Court reserved its order on the 13th February 1936 and eventually on the 26th February called upon the accused to deposit the expenses of the expert before he could be summoned. A petition against this order was lodged before the Additional Sessions Judge who has forwarded the proceedings to this Court with the recommendation that the order of the Magistrate be set aside. This matter has so often come before this Court that I need not deal with it at length. Reference in this connection may be made to 1929 Lah 23 (1) 108 I C 907 (2) and 1932 Lah 481 (3). I specially draw the attention of the Magistrate to the remarks made by Jai Lal, J. in the last mentioned ruling. A witness cannot refuse to attend the Court when summoned and the rules of the High Court have clearly laid down the fees to which an expert witness is entitled. The Court, therefore, should not hesitate in exercising its powers under the law, however highly placed a witness may be. An accused person should not be burdened with the costs of an expert, if his demand is unreasonable, especially when the Magistrate is empowered to enforce the attendance of the witness and to pay him his reasonable dues.

1. Sayad Habib v. Emperor, 1929 Lah 23=117 I O 667=30 Cr L J 814.
2. Habib v. Mehdi Hussain, (1928) 108 I C 907=29 Cr L J 459.
3. Ram Narain v. Emperor, 1932 Lah 481=1932 Cr O 619=139 I O 508=33 Cr L J 761=33 P L R 811.

I therefore accept the recommendation of the Sessions Judge, set aside the order of the trial Magistrate and direct him to summon the witness at Government expense and to pay him what the rules permit.

D.S./R.K.

Order set aside.

A. I. R. 1936 Lahore 920

JAI LAL, J.

Mehr Das and another—Plaintiffs—Appellants.

v.

Munshi Ram and others—Defendants—Respondents.

Second Appeal No. 2138 of 1935, Decided on 8th April 1936, from decree of Dist. Judge, Ludhiana, D/- 15th August 1935.

(a) Custom (Punjab)—Ancestral property—Person appointed heir dying without lineal descendant—Property reverts to heirs of adoptive father.

In the case of ancestral property inherited by a person who has been appointed an heir under the Customary law such property reverts to the heirs of the adoptive father on the death of the appointed heir without lineal descendants. [P 920 C 2]

(b) Custom (Punjab)—Succession—'Chela'—His position is not like that of an appointed heir.

Although in some respects "chela" occupies the same position as a son his position is not like that of an appointed heir, and all the customary law rules relating to the succession to the estate of an appointed heir do not apply. [P 920 C 2]

(c) Custom (Punjab)—Cases under Customary Law cannot be decided on analogy.

Cases under Customary law cannot be decided on analogy. [P 920 C 2]

(d) Punjab Courts Act (6 of 1918), S. 41—Question of succession not decided on merits but on analogy—Certificate is not necessary.

Where the lower appellate Court decides a question of succession not on the basis of evidence but on analogy a certificate under S. 41 is not necessary. [P 921 C 1]

Achhru Ram—for Appellants.

Mukand Lal Puri—for Respondents.

Judgment.—The question involved in this appeal is not free from difficulty. One Mela Ram made Kehr Das his chela and on his death his property was inherited by Kehr Das in spite of the claim of his nephew. Mela Ram was an Udasi Fakir, but the property in dispute is not attached to any religious institution. It was the personal property of Mela Ram. Kehr Das has now died and the land in

dispute is in possession of his mother and his brother who are the plaintiff-appellants in this case. They instituted a suit for a declaration of their title against Munshi Ram, nephew of Mela Ram. They claim that the property left by Kehr Das descends to them by inheritance. The defendants, on the other hand, claim that the property reverts to the heirs of Mela Ram on the analogy of the death of an appointed heir under the Customary law who dies without leaving any lineal descendants.

There is no doubt that in the case of ancestral property inherited by a person who has been appointed an heir under the Customary law such property reverts to the heirs of the adoptive father on the death of the appointed heir without lineal descendants. The question is whether the same rule should apply to the case of a chela. It is true that in some respects a chela occupies the same position as a son. The question is whether his position is like that of an appointed heir or like that of a regularly adopted son or whether it is different from both. The learned counsel relies upon the judgment of the District Judge when on the death of Mela Ram he held Kehr Das to be preferential heir to the respondent Munshi Ram. He remarked there that Kehr Das as the chela of Mela Ram was like his son, but I am unable to hold that this remark imports all the Customary law rules relating to the succession to the estate of an appointed heir. The appellants are in possession of the property and the respondents can only succeed by proving a clearly better title to succeed to the land in suit to the plaintiffs. In my opinion in this they have not succeeded. The property admittedly has been left by Kehr Das and ordinarily his mother and his brother are entitled to inherit it unless it can be shown that by virtue of the status of Kehr Das as chela of Mela Ram the property reverts to the heirs of Mela Ram. No authority has been cited in support of this assertion of reversion except that it is contended that exactly the same rule should apply as governs the case of inheritance to an appointed heir. I do not think cases under the Customary law can be decided on mere analogy. The plaintiffs-appellants, therefore, are entitled to succeed on the force of their possession.

There is no force in the preliminary objection raised by the respondents that no appeal lies in this case without a certificate under S. 41, Punjab Courts Act. The learned Judge of the lower appellate Court has not decided the matter on the basis of any evidence but merely on the analogy to the succession to the estate of an appointed heir. A certificate is not necessary in these circumstances: 157 I C 341 (1). I accordingly accept this appeal, set aside the decree of the Courts below and decree the plaintiffs' suit so far as the land in suit is concerned. With regard to the house, the suit shall be dismissed because it appears from the judgment of the lower appellate Court that the plaintiffs abandoned their claim to it. Under the circumstances I leave the parties to bear their own costs throughout.

V.B./R.K. *Appeal accepted.*

1. Inder Singh v. Jai Singh, (1935) 157 I C 341 = 37 P L R 390.

A. I. R. 1936 Lahore 921

BHIDE, J.

Megh Raj and others — Plaintiffs — Appellants.

v.

Municipal Committee, Abohar—Defendant—Respondent.

Second Appeal No. 383 of 1936, Decided on 26th June 1936, from decree of Addl. Dist. Judge, Ferozepore, D/- 10th December 1935.

(a) Evidence Act (1872), S. 35—Entries in revenue record showing certain land to be thoroughfare are relevant under S. 35.

Entries in revenue record showing certain land to be a thoroughfare, although not entitled to presumption under S. 44, Punjab Land Revenue Act, can be considered as relevant under S. 35, Evidence Act, for purpose of showing that that land in dispute was used as a thoroughfare when the entries were made.

[P 921 O 2 ; P 922 O 1]

(b) Easement—Inference that land is dedicated for use as public road, on account of continuous user as such, is one of fact—It is open to rebuttal.

Inference that certain land is dedicated for use as public road, by reason of its long and continuous user as such, is one of fact and is open to rebuttal. [P 922 O 1]

Nawal Kishore—for Appellants.

J. N. Aggarwal and Asa Ram Aggarwal—for Respondent.

Judgment.—Plaintiffs sued in this case to restrain the defendant Municipal Committee of Abohar from interfering with

their rights in respect of land included in Khasra No. 2536. It appears that the plaintiffs wanted to build on this land but the defendant prevented them from doing so claiming that the land was a part of a public thoroughfare. The Courts below have upheld the defendant's contention that the land in dispute is a portion of a public way and have dismissed the suit. From this decision plaintiffs have preferred a second appeal. The material facts briefly are that the plaintiffs are recorded as owners of the land in dispute in the revenue records. Prior to 1913-14 the land used to be cultivated, but from 1913-14 to 1927 the land has been described in the revenue records as 'share' 'am (thoroughfare) or rasta (road).' In 1927 the land was shown as cultivated, but I agree with the view of the learned District Judge that the entry is suspicious and may have been made merely with a view to support the present claim of the plaintiffs. The oral evidence produced was not of much value and was not relied on ; but from the long user of the land as a road as shown by the entries in the revenue records and the inspection of the spot which showed that the land was an essential part of a thoroughfare the learned District Judge has inferred that the land was dedicated for use as a public road.

The learned counsel for the plaintiffs contended that the entries in the revenue records have no presumption of correctness as they do not fall within the scope of the information which is required to be given in the revenue records under S. 31, Punjab Land Revenue Act. In support of this contention he relied on 4 Lah 327 (1). He accordingly urged that there was no evidence to establish any long user of the land as a road, much less to justify any inference as to its dedication for the purpose. The entry "Shara 'am or rasta" is made in the revenue records against the land in dispute in the column of cultivation. The land is also shown as "ghair mumkin rasta" in column with regard to the quality of the land (qisam zamin). These entries were made by a public officer in discharge of his duties and even if they are not entitled to presumption under S. 44, Punjab Land Revenue Act, I do not see why they

1. Sadiq Hussain v. Anup Singh, 1924 Lah 151 = 76 I C 91 = 4 Lah 327.

should not be considered to be relevant under S. 35, Evidence Act. I do not think the entries in question can be said to be wholly outside the scope of the duties of the revenue officers who made them. Under the Punjab Land Revenue Act the Financial Commissioners have made rules prescribing the forms in which the annual record is to be prepared and according to the instructions issued the entries in question were made (see standing order of Financial Commissioner No. 23). In my opinion the entries are relevant for the purpose of showing that the land was found to be used as a road or a thoroughfare when the entries were made. They support the defendant's evidence and in the circumstances there seems to be no reason why the defendant's evidence should not be accepted.

The fact that the land is being used as a public road at present is also shown by the inspection note of the trial Court. I, therefore, agree with the finding of the learned District Judge that the land has been used as a public road from 1913-1927. The learned District Judge has inferred dedication of the land for use as a public road from its long and continuous user as such for some 25 years. Now, this inference was really one of fact rather than of law. It was open to the plaintiffs to rebut it, but they have given no reasonable explanation why they should have allowed the land to be used as a road for such a long period. It is not alleged that they were absent from the village. They have other cultivable land close by. In the circumstances the learned District Judge was I think justified in holding that the plaintiffs must have been aware during this period that the land was being used as a public road. In my opinion there is no valid ground for interference with the decision of the learned District Judge in second appeal. I dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1936 Lahore 922

JAI LAL, J.

Mt. Mallan—Defendant—Appellant.

v.

Gora Mal—Plaintiff—Respondent.

Civil Regular Second Appeal No. 267 of 1936, Decided on 1st May 1936, against decree of Senior Sub-Judge, Hoshiarpur, D/- 28th November 1935.

Punjab Tenancy Act (16 of 1887), Ss. 59, 60 and 77 (3)—Sale of occupancy rights by widow to landlord—Sale is voidable at option of landlord—Suit by landlord for declaration that he is owner is cognizable by civil Court.

Primarily, the Punjab Tenancy Act has been enacted to regulate the relationship between landlord and tenant and it has nothing to do with the rights of the reversioners which are governed by the rules of inheritance based on the personal law of the parties or on the customary law. [P 923 C 1]

Where a widow succeeding to the occupancy rights of her husband sold them to the landlord, and the landlord brought a suit for a declaration that he became owner of the rights by reason of the sale in his favour, but the widow contested that the sale was void and that the civil Court had no jurisdiction to entertain the suit:

Held: that the dispute was between the former landlord and former tenant and not between the reversioners and the tenants or the landlord. S. 60 therefore applied and the sale was voidable at the option of the landlord; [P 923 C 1]

Held also: that the suit was not between a landlord and a tenant but was a suit by a person who previously was a landlord and who claimed that the occupancy rights had been sold to him. He did not claim the extinction of the occupancy rights by virtue of any custom or any default in the performance of the requisite conditions by the tenant, but by a deliberate act of abandonment on receipt of consideration, that is by sale. The suit therefore was cognizable by the civil Courts. [P 923 C 2]

D. N. Aggarwal—for Appellant.

Parkash Chandra Jain and Shamair Chand—for Respondent.

Judgment.—The appellant Mt. Mallan, succeeded to the occupancy rights of her husband in the land in dispute. Subsequently she sold those rights to the respondent, the landlord, and gave him possession of the land. It has been found by the lower appellate Court that the landlord has been in possession of the land subsequent to the sale of the occupancy rights to him by the appellant, but when he attempted to have mutation of those rights made in his favour, the Revenue Authorities refused to effect the mutation on the ground that the sale of the occupancy rights was void under the law. He consequently instituted a suit for a declaration that he was the owner of the land; in other words, that the occupancy rights which vested in Mt. Mallan had been extinguished by the sale in his favour. Mt. Mallan was the only defendant. She contested the suit firstly on the ground that the sale of the occupancy rights was void under S. 59, Punjab Ten-

ancy Act, and therefore the plaintiff, the landlord, was not entitled to a declaration; and secondly that the civil Courts had no jurisdiction to entertain the suit. I am not concerned in this appeal with the other grounds of defence, because they have not been raised here; the factum of sale was denied, but this has been found against the appellant.

Section 60, Punjab Tenancy Act, provides that any sale of occupancy rights made in contravention of the provisions of the Act shall be voidable at the option of the landlord. But it is contended that S. 59 provides that a widow in possession of the occupancy rights shall not alienate them except as is provided in that section. It is therefore contended that the sale of occupancy rights is void and that S. 60 does not govern the cases of alienation made by a widow against the provisions of S. 59. There is no force in this contention. No doubt it is supported by some authority of the Chief Court of the Punjab, but the subsequent judgments of that Court and also of this Court are in favour of the proposition that such a sale is voidable at the option of the landlord. It is not necessary to discuss those cases because they have all been mentioned in the judgment of the learned Senior Sub-Judge. Primarily, the Punjab Tenancy Act has been enacted to regulate the relationship between landlord and tenant; it has nothing to do with the rights of the reversioners which are governed by the rules of inheritance based on the personal law of the parties or on the Customary Law. Therefore in my opinion, the conclusion of the learned Senior Sub-Judge is correct, that the sale of occupancy rights by a widow is voidable at the option of the landlord. The dispute in this case is between the landlord and the tenant or rather between the former landlord and the former tenant and not between the reversioners and the tenants or the landlord, and the Senior Sub-Judge has expressly left it open to the reversioners to institute a suit, if they are so advised, when the occasion arises.

With regard to the question of jurisdiction, in my opinion, the view of the Senior Sub-Judge is correct, that the suit is cognizable by the civil Courts. The relationship of landlord and tenant does not exist on the facts found. It is not a suit between a landlord and a tenant, but it is a suit by a person who previously

was a landlord and who claims that the occupancy rights have been sold to him. He does not claim the extinction of the occupancy rights by virtue of any custom or any default in the performance of the requisite conditions by the tenant but by a deliberate act of abandonment on receipt of consideration, that is to say, by sale. In my opinion, such a suit is cognizable by the civil Courts and I dismiss this appeal with costs.

D.S./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 923

JAI LAL, J.

Amin Chand—Petitioner.

v.

Duni Chand and others—Opposite Parties.

Civil Revn. No. 718 of 1935, Decided on 12th March 1936, from order of Addl. Dist. Judge, Lyallpur, D/- 11th May 1935.

Insolvency—Application by creditor—Date of actual transfer and not date of mutation is date of act of insolvency.

A debtor transferred some of his agricultural property to another on a certain date and applied for mutation. The mutation took place on a different date. Within three months of the date of mutation a creditor of the transferor applied to Court for getting the transferor declared an insolvent alleging the transfer as an act of insolvency:

Held: that the date of mutation was not the date of act of insolvency but the date of transfer was the date of act of insolvency and as such the application of the creditor was incompetent: 1925 Lah 436, *Foll.*; 1935 Lah 565 (*F B*), *Disting.* [P 924 C 1]

*J. R. Agnihotri and M. L. Puri—*for Petitioner.

Jiwan Lal Kapur for *Duni Chand* (Respondent)—for Opposite Parties.

Order.—On 20th October 1932 Ghulam reported to the Patwari that he had mortgaged his property to Duni Chand on 10th October 1932. The Patwari recorded the report and mutation was sanctioned on 24th November 1932. On 24th February 1933 an application was made by one of the creditors of Ghulam for the adjudication of Ghulam as an insolvent on the ground that he had committed an act of insolvency within three months. Apparently the creditor alleged that the act of insolvency consisted of the fact of mutation on 24th November 1932. The question in this petition is whether Ghulam should be deemed to have committed the act of insolvency at the latest

on 20th October 1932 or on 24th November 1932. In the latter case the application would be within three months of the act of insolvency and in the former case it would be beyond three months and therefore incompetent. The learned Additional District Judge has held that the act of insolvency should be deemed to have been committed on 20th October 1932 and in support of this view he has cited 1925 Lah 436 (1) which clearly supports his conclusion. This view is further supported by the judgment of Agha Haidar, J., in Civil Revision No. 12 of 1936 (2).

The appellant's counsel however relies upon 16 Lah 735 (3). In that case the alleged act of insolvency consisted of transfer of his property by the alleged insolvent by means of a deed executed by him and subsequently registered. The question was whether the act of insolvency should be deemed to have been committed on the date of the execution of the deed or on the date of its registration. It was held that it was the registration which would produce the legal effect of transferring the property of the insolvent to the alienee and therefore the act of insolvency should be deemed to have been committed on the date of the registration. There is however a clear distinction between that case and the case before me. In the case of a transfer by means of a deed it is the deed which confers the title on the alienee. A mutation does not by itself confer any title; it merely purports to record a transaction which has already taken place. That transaction may be an oral transaction or it may have been by means of a deed. In the present case it was an oral transaction and according to the report made to the Patwari the transaction took place on 10th October 1932, but as the report was made on 20th October 1932 the Additional District Judge acted on the safe side by taking the latter date as the date of the alienation, and therefore of the act of insolvency. In my opinion the view of the learned Additional District Judge is correct and I dismiss this petition with costs.

B.D./R.K.

Petition dismissed.

1. Nur Mahomed v. Lal Chand, 1925 Lah 436 = 90 I C 254 = 26 P L R 501.
2. Tirath Das v. Jhangli Ram, Civil Revn. No. 12 of 1936.
3. Lakhmi Chand v. Kesho Ram, 1935 Lah 565 = 158 I C 226 = 16 Lah 735 (F B).

A. I. R. 1936 Lahore 924

COLDSTREAM AND BHIDE, JJ.

Mukand Singh—Objector—Appellant.
v.*Puran Das — Petitioner and others — Objectors—Respondents.*

First Appeal No. 1710 of 1932, Decided on 22nd April 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 20th July 1932.

Punjab Sikh Gurdwaras Act (8 of 1925), Ss. 2 (a) and 16 (2) (iii) — Udasis or 'Almast Dhuan' are not Sikhs — Dharamsala founded by Udasi is not Sikh Gurdwara under provisions of S. 16 (2) (iii).

In order to succeed in proving that an institution is a Sikh Gurdwara under the provisions of S. 16 (2) (iii) of the Act, a petitioner has to prove both that the institution is being used for public worship by Sikhs before and at the time of the presentation of the petition and that it was established for this purpose by the Sikhs. [P 925 C 2]

Where a dharamsala has been proved to be founded by an Udasi of Almast Dhuan, the dharamsala is not a Sikh Gurdwara although it is proved that it is being used for public worship by Sikhs before and at the time of presentation of petition. For Udasis or Udasis of Almast Dhuan are not Sikhs. Finding of four Granth Sahibs, Sikh Shlokas in Gurumukhi on the walls and pictures of Guru Nanak and Guru Govind Singh will not prove such dharamsala to be a Sikh Gurdwara, for they are consistent with the dharamsala being founded as an Udasi institution : 1931 Lah 161 and 1936 P C 93, Rel. on. [P 928 C 2]

*Bhagat Singh and R. C. Manchanda—*for Appellant.*Jagan Nath Aggarwal, Iqbal Singh and Shaikat Rai—*for Respondents.

Coldstream, J. — This judgment will dispose of the two appeals Nos. 1710 and 1711 of 1932 against a decision of the Second Sikh Gurdwaras Tribunal that an institution at Kamalia in Montgomery District known as the Dharamsala Saindaswali which had been claimed in a petition presented to the Local Government under S. 7, Sikh Gurdwaras Act, to be a Sikh Gurdwara was not a Sikh Gurdwara. On that petition being published two petitions were presented under S. 8 of the Act, one No. 209 by Puran Das, the Mahant of the Institution, and the other No. 210 by 32 Hindu residents of Kamalia who asserted that the Dharamsala was an Udasi institution. The Tribunal issued notice to the signatories of the original petition presented under S. 7, and to the Sikh Gurdwara Parbandhak Committee. The latter declined to become a party to the proceedings. Two of the for-

mer, Sunder Singh and Jai Kishen Singh, appeared before the Tribunal. Proceedings were ordered to be ex parte against the others.

On 4th August 1930, the proceedings were adjourned at the instance of counsel for Sunder Singh and Jai Kishen in order that they might be dealt with together with similar petitions relating to the Dharamsala at Chauntra Sargana in Multan District submitted by Puran Das and 42 Hindus of Chauntra Sargana which petitions were before the First Tribunal. Those petitions Nos. 337 and 338 were transferred to the Second Tribunal. On 16th March 1931, when all four petitions were to be dealt with, the Tribunal was informed that the Sikh Gurdwara Parbandhak Committee did not wish to be joined as parties in the proceedings relating to the petitions Nos. 337 and 338 and the only three Sikhs who appeared in compliance with the notices issued to them in respect of these petitions declared that they did not wish to contest the claim made in them. The Tribunal accordingly passed orders on the petitions No. 337 and 338 declaring that the Dharamsala at Chauntra Sargana was not a Sikh Gurdwara.

On the same day the Tribunal ordered that petitions Nos. 209 and 210 would be tried together, the only issue being whether the Dharamsala Saindaswali was a Sikh Gurdwara under the Sikh Gurdwaras Act. On 4th June 1931 six of the Sikh petitioners under S. 7 attended the Court and applied for the ex parte order to be set aside as against them. This application was accepted apparently because the applicants had not been served with notice. A similar application made on behalf of the Sikh Gurdwara Parbandhak Committee was rightly rejected. At the same time the Tribunal, with some hesitation granted an application by Mukand Singh, who had not appeared before to contest the petition, to have the ex parte order against him set aside, in view of his statement that he "did not think he had been given notice." After this the six other petitioners under S. 7, against whom the ex parte order had been set aside, made statements that they did not wish to resist Puran Das's claim. Next day the tribunal commissioned its Reader Ali Mohammad to inspect the Dharamsala. Ali Mohammad visited the Dharamsala and submitted a report on

7th June. After some of the evidence for the objectors, (that is to say the Sikhs) had been recorded on 15th August the hearing was adjourned as the case had "almost been compromised." The compromise however fell through and the tribunal proceeded to record evidence on 5th and 6th January 1932. On the latter date an order was passed that the proceedings had been ex parte as against Sunder Singh and Jai Kishen Singh since 13th July 1931. Thus the only objector remaining a party to the case was Mukand Singh, who had appeared before the tribunal more than a year after the proceedings had started. Evidence was concluded on 11th May, arguments were finished on 29th June 1932, and on 4th July Sardar Kharak Singh delivered a judgment in favour of the objectors, finding that the Dharamsala was a Gurdwara within the definition in S. 16 (2) (iii), Sikh Gurdwaras Act, inasmuch as it was proved that it had been founded for public worship by Sikhs and was being used for such worship. From this judgment the President and the third member of the tribunal dissented, with the result that the tribunal by a majority declared the Dharamsala not to be a Sikh Gurdwara. It is against this decision that the appeals now before us have been presented, the only appellant in each case being Mukand Singh.

In order to succeed in proving that the Dharamsala is a Sikh Gurdwara under the provisions of S. 16 (2) (iii) of the Act, which is the case put forward by the appellants, the appellants had to prove both that the Dharamsala was being used for public worship by Sikhs before and at the time of the presentation of the petition and that it was established for this purpose. There is a good deal of evidence that since about 1898 public Sikh religious services have been held from time to time in the Gurdwara. Shabads have been sung in the presence of the Granth Sahib, four copies of which have been displayed for worship—two in one apartment and two in another resorted to by women. Amrit has sometimes been administered, the Granth Sahib recited, though not regularly nor by professional Granthis and morning and evening Sikh services have been held. It is true that the witnesses are mostly related to Mukand Singh by blood or marriage or are interested in him but this is natural for, according to the

evidence, the Sikhs in Kamalia are few and inter-related (O. W. No. 13.). There is also some documentary evidence to which I will refer later indicating that the third Mahant Brahm Das who died about the year 1920 had strong Sikh leanings and revered the ten Gurus. His Chela and successor Ram Das described his occupation as Sikhi when he sold some land belonging to the institution for the purpose, according to the deed of sale, of constructing of Gurdwaras at Nankana Sahib and Kamalia.

The evidence on the other side that the Granth Sahib is not and never has been worshipped or recited and that there has never been any public worship in the Dharamsala other than that of the Gola Sahib and the image of Baba Sri Chand is most unconvincing and discrepant and I believe it to be untrue, although I see no reason to reject the respondents' evidence that the Murti of Babu Sri Chand and a Gola Sahib or Ball of Ashes (the ordinary object of Udasi worship) have been worshipped in the institution. It is in my opinion proved that the institution was used for public worship by Sikhs before and at the time of the presentation of the petition. It remains to decide whether the Dharamsala has been proved to have been established for public worship by Sikhs. There is no documentary evidence to show for what particular purpose the Dharamsala was established. It was founded by Bawa Sain Das, an Udasi Sadh, who was the founder and Mahant of the Dharamsala at Chauntra Sargana, and the Mahants of that Dharamsala have already been the Mahants of this institution, the succession being from Guru to Chela. Sain Das died in 1872. The second Mahant was his Chela Narain Das, the third another of his Chelas Brahm Das, the fourth Ram Das and the fifth Puran Das who presented the petition No. 209 and is the respondent in appeal No. 1910. It was admitted by the appellant's own witness Sundar Singh that this Dharamsala and the Chauntra are one institution, managed and financed by the same Mahant.

For the appellants it is contended that the proved prevalence of Sikh worship during the last thirty years affords, in the absence of any evidence of a change in the form of worship, basis for a strong presumption that the Dharamsala was founded for Sikh worship and that this

presumption is strengthened by the evidence that the Granth Sahib has always been kept in the institution, that the third Mahant, Brahm Das, was at heart a Sikh, and that Bawa Sain Das, the founder, belonged to the Almast Dhuan or order of Udasis. It is not disputed that a copy of the Granth Sahib was placed in the Dharamsala when it was founded, but its presence there is consistent with the institution being an Udasi Dera.

In support of the contention that Brahm Das was a Sikh, reliance is placed before us on two Gurmukhi books Exs. O. 2 and O. 3. The particular passages quoted have not been translated but as the books were admitted in evidence, we have allowed reference to be made to them. The first which was published about 1914 is alleged to have been written by a Sikh called Dhara Singh, father of the objector's witness Budh Singh (O. W. No. 24). The second purports to be the work of Brahm Das who died about the year 1919 (P. W. No. 27) but was published, according to the objectors' witness Karam Singh (O. W. No. 1), two or three years after his death. The first book describes, so we are informed, the Sikh religious ceremonials held in the Chauntra Sargana Dharamsala, the parent institution, but the statements made in this book can have little importance now in view of the fact that that institution has been found not to be a Sikh Gurdwara. The second book praises the Sikh Gurus and invokes their blessings. It also solicits the help of Baba Sri Chand, the founder of the Udasi sect. The book has upon its cover a reproduction of a photograph, presumably of the author, and a comparison of it with another photograph proved to be of Brahm Das, leave no doubt that the book was written or, at any rate, inspired by Brahm Das. The contents of the book proved only that the author revered the Gurus and the Sikh religion. Assuming, however, that Brahm Das in his time was looked upon as a Sikh, this fact is not evidence that Sain Das who was certainly an Udasi professed the Sikh religion or was known to be a Sikh or established this institution for Sikh worship.

The evidence that Sain Das belonged to the Almast sub-division or order (Dhuan) of Udasis (Mahant Bhagat Das P. W. No. 27) has not been rebutted.

According to Macauliffe's Sikh Religion (Vol. 4, p. 40) Almast, which means the enthusiast, was an adherent of Guru Hargobind, the Sixth Guru and his spiritual son (p. 53) and we are asked to hold on the authority of this statement that every religious institution founded by an Udasi of the Almast order must be presumed to have been established for public worship by Sikhs. Reference has also been made to the remark in para. 90 of Ch. 4, Vol. 1, of MacLagan's Census of India 1891, that it is a mistake to say that Udasis are not generally recognized as Sikhs, for

they pay special reverence to the Adi Granth but also respect the Granth of Govind Singh and attend the same shrines as the Sikhs generally.

I do not think that any such general presumption is justified. It is not disputed that the Almast referred to by Macauliffe is the Udasi after whom the Dhan is called, but there is no doubt that he was an Udasi, that the Udasis were not orthodox Sikhs (although Sikh Gurdwaras have often, indeed mostly, been managed by Udasis, who as Mahants of those institutions, came to be regarded generally as the priests of the Sikhs), that they belonged to communities who owned many purely Udasi institutions, did not adhere strictly to the Sikh customs of wearing their hair long and abstaining from tobacco but wore Hindu caste marks on their faces and, while they respected the Granth Sahib, studied and recited the Ramayana and other Hindu scriptures and commonly worshipped Smadhs and Golas (balls of ashes).

The question whether Udasis may be presumed to be Sikhs for the purpose of the Sikh Gurdwaras Act was discussed by a Division Bench of this Court in the well known *Manak case* 12 Lah 497 (1), where upon a most careful enquiry into the beliefs and traditions relating to the Udasis it was held Udasis were not Sikhs for the purpose of the Sikh Gurdwaras Act. The judgment came in appeal before the Privy Council, 1936 P C 93 (2), who agreed with this decision which is undoubtedly an authoritative adjudication of the broad question whether Udasis are Sikhs for the purpose of the Sikh

Gurdwaras Act. It is argued before us that since that case was decided, the definition of Sikh in the Act [S. 2 (a)] has been so modified as to render the Privy Council judgment so far as this question is concerned, irrelevant for the purposes of its decision in later cases. The definition originally ran as follows :

'Sikh' means a person who professes the Sikh religion. If any question arises as to whether any person is or is not a Sikh, he shall be deemed respectively to be or not to be a Sikh according as he makes or refuses to make in such manner as the Local Government may prescribe the following declaration :

I solemnly affirm that I am a Sikh, that I believe in the Guru Granth Sahib, that I believe in the Ten Gurus, and that I have no other religion.

The amending Punjab Act 3 of 1930 substituted for the first sentence of this definition the sentence :

'Sikh' means a person who professes the Sikh religion, or in the case of a deceased person, who professed the Sikh religion or was known to be a Sikh during his lifetime.

The change in the statute does not appear to me to affect the applicability of the Privy Council decision so far as it is relevant for the purposes of deciding whether Sain Das established the Dharamsala for Sikh worship. We have not been shown any reason for supposing either that Udasis of the Almast Dhan at the time when the Dharamsala was founded differed in their tenets from those of other Dhans so as to justify a presumption, in spite of the decision in the *Manak case* (1), that the Almast Udasis were at that time Sikhs, or that any fusion or reconciliation has ever taken place between the Udasis of the Almast Dhan and the professed worshippers of the Ten Gurus who called themselves Sikhs. As pointed out by Johnstone, J. in 12 Lah 497 (1), the fact that some Dhans were founded by persons who may originally have been Sikhs is of no great importance for the purpose of deciding whether Udasis are Sikhs, for the fact that they became Udasis itself indicates that they no longer remained Sikhs.

Appellants' counsel has also referred us to a History of the Montgomery District published privately in 1879 in which is given a list of fifteen religious institutions. The first two institutions named are mosques and last six are described as Thakardwaras and a Mandar. The remaining institutions Nos. 3 to 9 are described as Dharamsalas and among them is mentioned the Dharamsala of Sain Das.

1. Ram Pershad v. Shiromoni Gurdwara Parbandhak Committee, 1931 Lah 161=135 I O 657=12 Lah 497=32 P L R 910.

2. Hem Singh v. Basant Das, 1936 P C 93=161 I O 529=17 Lah 146 (P O).

It is argued that the arrangement adopted shows that this Dharamsala was in 1879 regarded as a Sikh institution. But it is not shown that all the other Dharamsalas mentioned are Sikh institutions and the place given to this institution in the list is certainly not proof that it was established for public worship by Sikhs. Another passage in this book to which our attention has been drawn divides the inhabitants of the District into two religious categories, Hindus and Mahomedans, and includes the followers of Nanak (Nanakpanthis) among the former. It is then stated that the Nanakpanthis include Monas who cut their hair and Singhs who are fewer, wear their hair long and take the Amrit of Guru Gobind Singh. According to the author the Nanakpanthis reverence the Mahomedan saints as much as they do the Hindu scriptures. I am unable to see how this account of the Nanakpanthis can be regarded as evidence that this Dharamsala was founded for public worship by Sikhs and was not an Udasi institution.

Had there been nothing to show who founded the Dharamsala, the fact that during the present century it has been used for public worship for Sikhs might possibly have justified an inference that it had been founded for Sikh worship. But when it is known that the founder was an Udasi who was the Mahant of an institution which the tribunal has held to be not a Sikh Gurdwara, the only natural presumption is that the Dharamsala was an Udasi Dera. The history referred to above mentions that the cost of establishing the Dharamsala was met half by Sain Das and half by money subscribed by the villagers. If the fact be as stated, it does not go far to support the appellant's case, for Kamalia is not a Sikh village and it is in evidence that the Sikhs have many other places of public worship in the village. According to the Census report, of the total population of 7,490, there were only 119 Sikhs in 1891. In 1901 there were 102 out of 6,976, the Hindus being thirty times as numerous. The shamilat area of the village on which the Dharamsala was built did not belong to Sikhs but to the Mahomedan proprietors of the revenue estate in which the Sikhs had no share.

The decision of the tribunal that the Chountra Sargana Dharamsala is not a Sikh Gurdwara, which was made upon

an admission by those Sikhs who appeared before it when the petition to declare it to be a Sikh Gurdwara was tried, is a final one having under the scheme of Sikh Gurdwaras Act the effect of a judgment *in rem* binding the present parties, and the admitted fact that the Kamalia institution is part and parcel of that institution is in my opinion strong proof that this institution is not a Sikh Gurdwara. It has no independent existence but is managed by the Mahant of the Chauntra Sargana Dharamsala. The income is remitted to the Mahant at Chauntra Sargana who defrays its expenses, and has made many important and valuable additions to it without reference, so far as the evidence shows, to the worshippers, in 1903, 1905, 1909, 1918, 1923, 1924 and 1929. There has not always been an appointed Granthi or any regular arrangement for the recitation of the Granth Sahib (see O. W. No. 25), though there is at present a Granthi who is employed by the Udasis of the Chauntra Sargana Dharamsala (O. W. No. 24). When the Dharamsala was visited by the Commissioner on 7th June 1931, a picture of Baba Sri Chand was standing beside the Granth Sahib and a copy of the Ramayana was lying under a muslin cover in the room frequented by women worshippers; there were also pictures of Ganesha and Shivaji, and 'Shlokas' in Shastri character were written on the walls. The presence of these pictures may not be conclusive proof that the Dharamsala was not from its inception a place of Sikh worship, for the Commissioner found that four Granth Sahibs were displayed. Sikh Shlokas in Gurmukhi were on the walls and pictures of Guru Nanak and Guru Gobind Singh in the men's apartment, but they are consistent with the Dharamsala being founded as an Udasi institution. Upon a careful consideration of all the evidence, I am of opinion that the tribunal was correct in finding it not proved that this institution was established for public worship by Sikhs and I would accordingly dismiss both appeals with costs.

Bhide, J.—I agree.

D.S./R.K.

Appeals dismissed.

A. I. R. 1936 Lahore 929

AGHA HAIDAR, J.

Mt. Imam Bibi—Plaintiff—Appellant.
v.*Abdul Rahman and others*—Defendants
—Respondents.

Second Appeal No. 1930 of 1935, Decided on 5th May 1936, from decree of Dist. Judge, Jullundur, D/- 29th July 1935.

(a) Specific Relief Act (1877), S. 41—Defendant not in possession of property—Suit for mere declaration that plaintiff is owner of property is maintainable.

Where the defendants are not in possession of the property the plaintiff cannot ask the Court for dispossessing the defendants. In these circumstances suit for a mere declaration is not obnoxious to the provisions of S. 42 and can therefore be maintained: 36 *Mad* 62, *Foll.* [P 930 C 1]

(b) Evidence Act (1872), Ss. 13 and 42—Right of public nature claimed in previous suit—Judgment is relevant in subsequent suit involving same question though not between same parties.

Where in a previous suit a right of a public nature that certain land was takya was contested by the opposite parties and the Judge decided that it was takya and hence not alienable, the judgment though by no means *res judicata* is relevant in a subsequent suit involving the same question but not between the same parties. [P 930 C 1]

Achhru Ram—for Appellant.

R. C. Soni—for Respondents.

Judgment.—This is a plaintiff's appeal arising out of a suit for a permanent injunction that the plaintiff is the owner and in possession of the site shown in the plaint and that the defendants 1 to 4 should not restrain the plaintiff from building upon the said site. Both the Courts below have dismissed the plaintiff's suit. The plaintiff has preferred this second appeal to this Court. The case for the plaintiff is that the land in suit was owned by her father Tabe Shah, a faqir, and that Tabe Shah bequeathed the property in suit to the plaintiff by virtue of the will dated 28th August 1928. Tabe Shah died some time in 1930 leaving him surviving two sons: Hub Ali and Mohammad Ali and Mt. Imam Bibi, the present plaintiff. The contesting defendants are certain occupancy tenants who hold land in the village. On 4th November 1931, a number of persons, including the contesting defendants, brought an action against Hub Ali and Mohammad Ali for an injunction

ordering them to demolish the kotha which they had built on the land now in dispute. In this suit there was also a prayer for injunction to restrain the defendants from preventing the plaintiffs from using the land as a takya. It was alleged that the plaintiffs and their predecessors had reserved 1 kanal and 11 marlas of land for the purpose of the takya and that the defendants and their ancestors were in possession merely as takyadars and had only recently misappropriated the land to their exclusive use.

In that suit the present plaintiff was not impleaded. She made an application to be made a party alleging that the kotha had been erected by her and that the land had been left to her by her father under the will, dated 28th August 1928. Her application was opposed by the then plaintiffs and was dismissed. The suit for injunction was ultimately decreed on 28th November 1932. In execution of the decree the kotha which the defendants had built was demolished. Thereupon, on 10th June 1933, the plaintiff instituted the present suit and asked for the relief already quoted. The defendants pleaded that the plaintiff was not in possession and that the present suit had been misconceived inasmuch as she ought to have framed the plaint as one for possession. They further denied the title of Tabe Shah and pleaded that he had no right to make a will in favour of the plaintiff in respect of the land attached to the takya as it was inalienable. The trial Court held that the suit was maintainable in the form in which it had been brought. On the merits, however, it held that the land being a takya was inalienable and, therefore the will of Tabe Shah did not confer any title upon the plaintiff. On appeal the District Judge decided both the points against the plaintiff and affirmed the decree of the trial Court. In second appeal Mr. Achhru Ram has urged that on the finding of the lower appellate Court the present suit in the form in which it was brought was maintainable and that the Court below was in error in arriving at a contrary decision holding that the plaintiff ought to have sued for possession. In my opinion, the contention of Mr. Achhru Ram is perfectly sound. The defendants are not in possession; consequently the plaintiff could not ask

the Court for dispossessing the defendants. Under these circumstances the relief which the plaintiff claimed was not obnoxious to the provisions of S. 42, Specific Relief Act. Mr. Aohbru Ram has invited my attention to a Division Bench judgment of the Madras High Court in 36 Mad 62 (1). In that case the High Court had ordered, in the course of certain criminal proceedings, that the defendant was entitled to obtain possession, but at the date of the suit possession had not been actually taken over by the defendant. Under these circumstances the plaintiff was held entitled to maintain a suit for a mere declaration. The learned Judges rightly pointed out that in order to defeat the plaintiff's claim for a declaration, it must be shown that the defendant was in possession, and as against him, the plaintiff could have obtained an order for delivery of possession. The fact that the Magistrate after the order of the High Court was bound to give possession to the defendant but had not yet done so, would not make any difference. The same principle applied to the present case. I therefore following the law as laid down in the Madras case noted above, hold that the plaintiff in the circumstances of the present case, was not bound to bring a suit for possession and that her plaint, as framed and the relief which she asked, were not contrary to any rule of law.

On the merits the judgment, dated 28th November 1932, in the previous case, though not by any means *res judicata*, is an important piece of relevant evidence in view of the provisions of Ss. 13 and 42, Evidence Act. Referring to the terms of S. 13, Evidence Act, there cannot be any manner of doubt that the right now claimed by the plaintiff was asserted by one party and denied by the other in the previous suit. S. 42 is also applicable. The right which the plaintiff in the previous suit claimed was of a public nature since the case for the plaintiff was that the land in suit was a *takya* which is a public club of the village and therefore any decision of a Court of Justice concerning the public nature of the land in suit would be relevant. The learned Judge has referred to evidence, oral and documentary, and has in the end come to the conclusion that the occu-

pation of Tabe Shah was that of *takya*-dar and cannot, therefore, be said to be adverse to the defendants or to the owners of the site. He further held that the site in dispute is, and has always been a *takya* and as such, it was not alienable by the *takya*dar. This being so, it follows that the will in favour of Mt. Imam Bibi by her father would not confer any title upon her. On this point I agree with the decision of the two Courts below. The appeal therefore fails and is dismissed. Under all the circumstances I make no order as to costs.

D.S./R.K.

*Appeal dismissed.***A. I. R. 1936 Lahore 930**

AGHA HAIDAR, J.

Ram Chand — Judgment-debtor —
Objector—Appellant.

v.

Co-operative Society, Kharar—Plaintiff
—Respondent.

Second Appeal No. 1533 of 1935, Decided on 10th June 1936, from order of Dist. Judge, Hoshiarpur, D/- 28th June 1935.

(a) Civil P. C. (1908), S. 60—Judgment-debtor objecting to attachment of his house—House is exempt from attachment unless there is definite finding that judgment-debtor is not agriculturist or that property does not belong to him.

The provisions of S. 60 and the proviso to it are stringent. Where a judgment-debtor objects to the attachment of certain house belonging to him, on the ground that he is an agriculturist, unless there is a definite decision by the Court that either the judgment-debtor is not an agriculturist or that the property does not belong to him, the house would be immune from the process of execution and attachment. [P 931 C 2]

(b) Civil P. C. (1908), Ss. 11 and 60—Application raising objection under S. 60 does not operate as *res judicata* unless there is finding deciding question one way or other.

In order that an application raising an objection to attachment under S. 60 should operate as *res judicata* there must be some finding either express or by necessary implication deciding the question one way or other. [P 931 C 2]

Mohammad Amin—for Appellant.

Judgment.—This appeal arises out of certain execution proceedings. A decree was obtained by the Co-operative Society of Kharar, through one Hari Singh, against Ram Chand, appellant. In execution of his decree the decree-holder attached certain houses belonging to the judgment-debtor. The judgment-debtor raised objections on 4th December 1933, on the ground that he was an agricultu-

rist and the houses under the provisions of S. 60, Civil P. C., were not liable to attachment and sale. On 2nd August 1934 the judgment-debtor, Ram Chand, made a statement that he would pay the decretal amount by 5th October 1934, failing which his objections would stand dismissed with costs. Payment was not made and the objections were accordingly dismissed. Subsequently in the course of execution proceedings against these houses Ram Chand repeated his objections under S. 60/47, Civil P. C. These objections were dismissed by the trial Court. He went up in appeal and the learned District Judge held that the judgment-debtor was precluded by the principles of res judicata from raising the objections, when they had once been dismissed on the basis of his own statement, dated 2nd August 1934. He accordingly dismissed the appeal.

The judgment-debtor has come up in appeal to this Court and the point which has been taken on his behalf is that the question, whether the houses were exempt under the provisions of S. 60, Civil P. C., had not been finally heard and decided and that it was therefore competent to him to raise this question. In my opinion, this contention is well founded. The legislature has laid down in clear and unmistakable language that certain properties shall not be liable to attachment or sale and one of these properties is mentioned in Cl. (c), S. 60, Civil P. C., in these terms ;

houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him.

The policy of the legislature is re-stated in the amendment introduced by S. 35, Punjab Relief of Indebtedness Act (local Act 7 of 1934). A Division Bench of the Allahabad High Court in 127 I C 447 (1) has laid down that:

When attachment and sale of the property is once prohibited by law and though objection has not been taken in the execution department by the judgment-debtor, if the Court had otherwise become cognizant of the fact that the property attached was the house of an agriculturist, it would have been its duty to withdraw the attachment.

This, according to the learned Judges, followed from the language of S. 60, Civil P. C. The learned Judges observed that

1. Aidal Singh v. Khazan Singh, 1930 All 727 = 127 I C 447 = 1930 A L J 1244.

the proviso to S. 60, Civil P. C., was imperative, inasmuch as it prohibits the Court from levying execution against the properties detailed in the section and the proviso. I have followed this case sitting singly in 1935 Lah 942 (2). It would thus appear that the provisions of law are stringent and unless there is a definite decision by the Court that either the judgment-debtor was not an agriculturist or the property did not belong to him and was not occupied by him the house or other building would be immune from the process of execution and attachment. In the previous application there was no decision at all. Before the doctrine of res judicata is invoked in aid there must be some finding, either express or by necessary implication, deciding the question one way or the other. There was no such finding in the present case and the objections were dismissed because the judgment-debtor had failed to pay up the decretal amount by 5th October 1934. In my opinion the Courts below were in error in shutting out the judgment-debtor from raising the plea and proving the points taken by him in his objections regarding the applicability of S. 60, Civil P. C. I would therefore allow the appeal, set aside the orders of the two Courts below and remand the case to the original Court for recording evidence and disposing of the case according to law. Costs here and hereafter shall abide the result. It is to be regretted that the respondent was not represented at the hearing.

R.M./R.K.

Appeal allowed.

2. Mohammad Din v. Hirda Ram, 1935 Lah 942 = 160 I C 749.

A. I. R. 1936 Lahore 931

TEK CHAND AND SKEMP, JJ.

Mt. Zainab Bibi and another — Plaintiffs—Appellants.

v.

Jamaldin and another—Defendants—Respondents.

Second Appeal No. 1071 of 1933, Decided on 5th June 1936, from decree of Dist. Judge, Lyallpur, D/- 21-3-1933.

Custom (Punjab)—Succession—Arains of Amritsar District—Self-acquired property—Daughters are preferred to collaterals of third degree.

According to the custom prevailing among the Arains of Amritsar District, daughters succeed to the self-acquired property of the father in preference to the collaterals of the third degree.

[P 938 C 2]

Muhammad Amin Malak—for Appellants.

M. A. Majid—for Respondents.

Tek Chand, J.—This should be read in continuation of our order of remand, dated 27th April 1935, in which the preliminary facts of the case are given. The property in dispute is situate in Mauza Maur, District Sheikhpura, and was acquired by Diwan, an Arain of Amritsar District, who had migrated to the colony. Diwan died sonless and was succeeded by his widow Mt. Malan. On Mt. Malan's death mutation was sanctioned in favour of Jamal Din and Jalal Din defendants-respondents, who are his collaterals of the third degree. The plaintiffs, Mt. Zainab Bibi and Mt. Karim Bibi, daughters of Diwan, brought a suit for a declaration that, according to the custom prevailing in the tribe, they had a preferential right to succeed to the self-acquired property of Diwan. The trial Court placed the onus on the defendants to prove their superior right of inheritance, and holding that they had failed to discharge it, decreed the suit. The collaterals' appeal to the District Judge was successful. On second appeal we held that in view of the entries in Craik's Customary Law of the Amritsar District the onus of the issue had been wrongly placed on the defendants. We accordingly re-framed the issue in the following terms and remanded the case for further enquiry:

Whether according to the custom prevailing in the tribe, daughters have a superior right to succeed to the non-ancestral property of their father as against his collaterals of the third degree.

Both parties led evidence and the Subordinate Judge has reported that the plaintiffs have discharged the onus and have proved that their right to succeed is superior to that of the defendants. After examining the record and hearing counsel I agree with the conclusion of the learned Subordinate Judge. The plaintiffs have proved five instances of succession of daughters to self-acquired property in preference to collaterals among the Arains of Amritsar District. These instances are as follows: (1) Ex. P-A. Mutation No. 50 of Mauza Bhindi Nain, Tahsil Ajnala, District Amritsar. On the death of Badar-ud-Din Arain his self-acquired property was mutated in favour of his daughter Mt. Karan Bibi. An objection was raised by the collaterals of the third degree but was overruled.

(2) Ex. P. B., Mutation No. 139 of the same village.—Sadar-ud-Din, brother of Badar-ud-Din, above-mentioned gifted his entire land to his daughter Mt. Mehtab Bibi in 1923. The patwari put up the mutation, but before it was decided Sadar-ud-Din died. It is in evidence in the present case, that the land of Sadar-ud-Din was both ancestral and self-acquired. Mutation was sanctioned in respect of both kinds of land in favour of the daughter in 1927. Sadar-ud-Din had left a brother Badar-ud-Din and there were other collaterals also. The gift regarding the ancestral property was invalid beyond his life-time, but the collaterals admitted the daughter's right to succeed with regard to both kinds of property and mutation was sanctioned accordingly. (3) Ex. P. C., Mutation No. 453 of Mauza Mudh Bhilowal, Tahsil Ajnala.—Mt. Budhi, widow of Sher Muhammad Arain, who had succeeded to the property of her husband, gifted it to her daughter Mt. Begam. The brother's sons of Sher Muhammad objected, but their objection was overruled and mutation sanctioned in favour of the daughter on 28th March 1923. (4) Ex. P. D., Mutation No. 952.—Mt. Hasso, widow of Mehtab Din of Mauza Tungbala, District Amritsar, was in possession of her husband's self-acquired land. On Mt. Hasso's death, disputes arose between Mt. Chirag Bibi and Mt. Nawab Bibi, daughters of Mehtab, and Nabi Bakhsh, his cousin. The matter was referred to the panchayat who decided in favour of the daughters. Mutation was sanctioned according to the decision of the panchayat. Nabi Bakhsh accepted the decision as correct and the Revenue Officer noted in his order that all the members of the brotherhood, who were present, supported the daughter's claim. (5) Ex. P-4. Imam Din Arain, who had migrated to Sheikhpura District and had acquired land there, was succeeded by his daughter Mt. Fatima. The nephews of Imam Din objected, but Khan Bahadur Chaudhri Muhammad Din, Collector, decided in favour of the daughter on 2nd November 1926. A copy of the order of the Collector was placed on the record before remand. After remand Nur Muhammad, husband of Mt. Fatima, gave evidence as P. W. No. 1, and proved these facts.

In addition to these instances, P. W. No. 2, Abdul Ghani, and P. W. No. 4,

Ramzan, examined before remand, proved the instance of succession of a sister to the estate of Labha Arain of Mauza Hemrajpora, Chak No. 40, District Sheikhupura. On Labha's death his son Ghulam Muhammad succeeded; Ghulam Muhammad died childless and the property went to his mother Mt. Mahtabo. On Mt. Mahtabo's death the property went to her daughter's son Muhammad Ismail, Muhammad Ishaq and Ibrahim, sons of P. W. No. 4, Ramzan, in preference to collaterals. This case of sister's succession indirectly supports the appellants' case. A sister admittedly holds an inferior position to a daughter and the fact that among Arains sisters are allowed to succeed shows that in this tribe females occupy a much more favourable position than in other tribes. As against all this, the respondents have not been able to produce any instance supported by documentary or credible oral evidence of succession among Arains. After remand they produced copies of two judicial decisions in which collaterals were preferred to daughters. The parties to none of these decisions, however, were Arains. The first case, *Hakim Bibi v. Fazal Din*, decided by the District Judge, Lyallpur, on 28th March 1935, was among Jats of Amritsar District who had settled in the Chenab Colony. The learned District Judge decided in favour of the collaterals holding that the evidence produced by the daughters was not sufficient to rebut the presumption arising from the entry in the *riwaj-i-am*. The second case, *Jhanda Singh v. Basant Kaur*, which was among the Sikh Jats of Amritsar District residing the Chenab Colony, was also decided on the *riwaj-i-am*, it having been found that not a single instance of succession among Jats had been proved on the record of that case by the daughters.

The oral evidence produced by the defendants, both before and after remand, is of the vaguest possible kind. Some of the instances deposed to by the witnesses admittedly related to ancestral property. In others, it was not stated as to whether the property concerned was ancestral or acquired. The defendant Jamal Din, when examined as D. W. No. 4, admitted that he knew of no instance of succession of collaterals to the self-acquired property of an Arain to the exclusion of daughters. Similarly D. W. No. 3,

Jalal Din, also admitted that to his knowledge no such instance existed. In my opinion, the plaintiffs-appellants have succeeded in discharging the onus which lay on them, and it is satisfactorily proved on the record that according to the custom prevailing among the Arains of the Amritsar District, daughters succeed to the self-acquired property of their father in preference to the collaterals of the third degree. I would accordingly accept this appeal, set aside the judgment and decree of the learned District Judge and restore that of the Court of first instance decreeing the plaintiff's suit with costs throughout.

Skemp, J.—I agree.

R.W./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 933

AGHA HAIDAR, J.

Shadi Ram—Decree-holder—Auction-purchaser—Defendant—Appellant.

v.

Mt. Atri—Plaintiff and another—Judgment-debtors—Respondents.

Second Appeal No. 1805 of 1935, Decided on 13th February 1936, from decree of Dist. Judge, Ambala, D/- 13th June 1935.

(a) Evidence—Admissibility of—Fresh evidence—Discretion in allowing production of additional evidence should be exercised only when inherent lacuna becomes apparent—No lacuna found—Court without giving reasons sending for fresh and additional evidence of its own accord—No application by party to fill up gap in evidence—Such evidence must be discarded.

The legitimate occasion for the exercise of discretion in allowing additional evidence to be produced is not whenever before the appeal is heard a party applies to adduce fresh evidence but when on examining the evidence, as it stands, some inherent lacuna or defect becomes apparent. [P 935 C 1]

Where the Court does not say that it found a lacuna after an examination of the evidence on the record and there does not seem to have been any application by any party inviting the attention of the Court to fill up any gap in the evidence on the record and the Court itself sends for additional evidence and gives no reason for admitting fresh evidence as required by O. 41, R. 27 (2) or fulfil the requirements of O. 41, R. 29, the additional evidence supplied must be taken to have been admitted contrary to law and must be discarded. But it would be open to the Court after examining the record of the case at the hearing, and in the presence of the pleader for the parties, to send for such additional evidence after fully complying with the requirements of law: 1931 P O 143 and 175 and 31 Bom 381 (P O), *Rel. on.* [P 935 C 1, 2]

(b) Practice—Evidence—Document — Production of—Party relying should produce proper and certified copy—Sending for records from other departments or offices wholesale as evidence is no correct procedure—Court must give opposite party fullest opportunity of rebutting such fresh evidence.

If the party relies upon any document it should obtain a proper and certified copy of the same and tender it in Court. It is not the correct procedure to send for the records from other departments or offices wholesale as evidence in the case. If the Court decides to admit fresh evidence after following the correct procedure, it should give the opposite party the fullest opportunity of rebutting the evidence supplied by the document by producing such evidence as they may think relevant and proper. [P 935 C 1, 2]

Asa Ram Aggarwal—for Appellant.

D. N. Aggarwal — for Respondent (Plaintiff).

Judgment.—This is a defendant's appeal arising out of a suit for a declaration that the house in dispute was the property of the plaintiff and was therefore not liable to attachment and sale in execution of the decree obtained by Shadi Ram, defendant 1, against Shib Ram, defendant 2. In 1925 Shadi Ram (defendant 1) held a mortgage in his favour from Dasaundhi now dead and represented by Shib Ram, (defendant 2). In 1932 Shadi Ram obtained a decree against Dasaundhi on foot of his mortgage. The property in suit was sold but the decree was not fully satisfied. On 14th January 1933, a personal decree was obtained by the decree-holder against Dasaundhi and in that decree a number of houses were attached and put up for sale. Mt. Atri raised objections in respect of three houses. Her objections were dismissed and the suits which she brought for declaration of title in respect of those houses were also dismissed on 5th December 1933.

We are at present concerned with house No. 3064 only as to which there has been no decision so far. This house was attached and Mt. Atri brought the present suit for the declaration already mentioned. The case for the plaintiff is that the house belonged to her husband Raman and she was entitled to it in her capacity as his widow. She filed six receipts (Exs. P-1 to P-6) for the years 1931 to 1935 issued by the Municipality in order to show that throughout this period she had been paying the Municipal taxes as owner. The relevant registers for the years 1931 to 1935 were sent for and the

receipts were duly proved. She had filed a number of other receipts also but they were not formally proved and were ordered to be returned to her. In the trial Court one Abdul Habib, a Municipal clerk, was examined as a witness on behalf of the plaintiff and stated that he had not brought the registers for years prior to 1931 because they had not been summoned. The trial Court dismissed the plaintiff's claim. The plaintiff Mt. Atri preferred an appeal to the learned District Judge on 23rd February 1935. On 25th February 1935, notices were issued to the respondents mentioning 16th April 1935, as the date of the hearing of the appeal. On this date it appears that the pleaders for the parties were present before the Court. There is nothing whatsoever to show that any arguments were heard in the appeal. In fact there are indications that no arguments were addressed to the Court on that day. The Court however made the following order:

Lala Devi Dayal for appellant and Lala Nand Kishore for respondent. Muharrir House-tax Register relating to No. 3064 to be called with House-tax registers for the last 20 years. Lala Nand Kishore wants to send for the execution file showing when the house was attached. He can do so. He should put in details of the file he wants to be called.

On 29th May 1935, the case was again put up for hearing and the registers summoned by the Court were produced by Abdul Habib, Municipal clerk, who was summoned with the registers. Abdul Habib also prepared a goshwara apparently under the orders of the Court. Arguments were heard on 13th June 1935, and the judgment was delivered on the same day. These registers seem to have influenced the mind of the Judge to a very considerable extent and he arrived at the conclusion on a consideration of the evidence that the defendant-decree-holder had failed to prove that Dasaundhi owned this house. He further held that possession is presumptive evidence of title and it must therefore be held that the plaintiff's husband was the owner of the house and the plaintiff was in possession after his death as his widow. The appeal was accordingly accepted and the plaintiff's suit decreed. The defendant Shadi Ram has come up to this Court in second appeal. The learned counsel for the appellant has argued that the District Judge was not justified in summoning additional evidence in the appeal and that

in doing so he had contravened the provisions of O. 41, R. 26, Civil P. C., as interpreted by the recent pronouncement of their Lordships of the Privy Council in 10 Pat 654 (1) and 1931 P C 175 (2). This contention seems to be well founded. It does not appear that the order of the District Judge quoted above was passed after examining all the evidence on the record. No argument seems to have been heard on 16th April 1935, and the lower appellate Court seems to have read the judgment of the trial Court perhaps in the privacy of his chamber and passed its order on 16th April 1935. Under the law as recently reiterated by their Lordships of the Privy Council, the legitimate occasion for the exercise of discretion in allowing additional evidence to be produced is not whenever before the appeal is heard a party applies to adduce fresh evidence, but when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. In the present case the Court does not say that it found a lacuna after an examination of the evidence on the record. There does not seem to have been any application by any party inviting the attention of the Court to fill up any gap in the evidence on the record. In fact the learned Judge of his own motion seems to have sent for the Municipal registers for 20 years in order to ascertain who had been paying the Municipal taxes in respect of the house. Furthermore, the learned District Judge did not record any reasons whatsoever for admitting fresh evidence as required by O. 41, R. 27 (2) or fulfil the requirements of O. 41, R. 29. Under these circumstances the additional evidence supplied by the Municipal registers must be taken to have been admitted contrary to law and must be discarded.

There is a further point of practice which I should like to notice here. If a party relies upon any document it should obtain a proper and certified copy of the same and tender it in Court. It is not the correct procedure to send for the records from other departments or offices wholesale as evidence in the case. I would therefore allow the appeal to this

extent that I would eliminate the registers entirely from consideration. The decree of the Court below which was passed on a consideration of the evidence supplied by the registers is set aside and the case is remanded for disposal according to law. It would be open to the Court after examining the record of the case at the hearing and in the presence of the pleader for the parties to send for these registers after fully complying with the requirements of law, as laid down by their Lordships of the Privy Council in 31 Bom 381 (3), 10 Pat 654 (1) and 1931 P C 175 (2). If the learned Judge decides to admit fresh evidence after following the correct procedure, he should give the opposite party the fullest opportunity of rebutting the evidence supplied by the registers by producing such evidence as they may think relevant and proper. All that I have held in the present appeal is that the registers, which were admitted by the lower appellate Court, were improperly admitted in evidence and the procedure adopted by the Court was erroneous and unwarranted by the law as interpreted by the highest tribunal. As regards the costs of this appeal they shall abide the result. The same order applies to the cross-objections.

R.W./R.K.

Appeal allowed.

3. Kessowji Issur v. G. I. P. Ry. Co., (1907) 31 Bom 381=34 I A 115 (P C).

A. I. R. 1936 Lahore 935

BHIDE, J.

Ghulam Mohammad — Defendant — Appellant.

v.

Barkat Ali and others — Plaintiffs — Respondents.

Second Appeal No. 353 of 1936, Decided on 25th June 1936, from order of Sr. Sub-Judge, Amritsar, D/- 4th February 1936.

(a) Court-fees—Appeal—Suit for possession—Appellant-defendant admitting plaintiff's title but claiming charge of Rs. 700—He should pay ad valorem court-fee on Rs. 700 for appeal.

Where a suit for possession in which the defendant admits plaintiff's title but claims a charge of Rs. 700 over that property is decreed but without up-holding defendant's claim and the defendant files an appeal, he should pay ad valorem court-fee on Rs. 700, the amount claimed by him: 1914 All 279, *Disting.*

[P 936 C 1]

(b) Limitation Act (1908), S. 5—Deficient court-fee—Application for extension of time to make up deficiency not made till after

1. Parsotim Thakur v. Lal Mohan Thakur 1931 P O 143=132 I O 721=59 I A 254=10 Pat 654 (P C).

2. Manmohan v. Ramdei, 1931 P O 175=134 I O 669 (P C).

about 7 months after its discovery—Appeal barred during that time—Mistake of counsel not bona fide—No extension should be granted.

Where an application for extension of time to make up the deficient court-fee is not made by the pleader till after about 7 months since the discovery of deficiency and the appeal is time-barred by that time, the question of court-fee not being difficult and the error of counsel not being bona fide, it is not a fit case for granting extension of time: 1917 *Lah* 377 and 1926 *Mad* 676, *Disting.*; 1923 *All* 349, *Not Foll.*; 1920 *Lah* 92 and 1927 *Lah* 884, *Rel. on.* [P 936 C 1, 2]

Lal Chand Mehra—for Appellant.

Mohd. Munir—for Respondents.

Judgment.—This is a second appeal arising out of a suit for possession of land. The defendant's contention was that he held a charge of Rs. 700 on the land. This contention was not upheld and the suit was decreed by the trial Court. An appeal was preferred by the defendant, contending that the decision of the trial Court was erroneous in so far as he was not allowed the charge of Rs. 700. The defendant did not pay ad valorem court-fee on the sum of Rs. 700 claimed by him in appeal. An objection having been raised in this respect, the counsel for the defendant eventually conceded that the plaint was insufficiently stamped and asked for extension of time to make up the court-fee. This application was however not made till after about seven months since the deficiency in the court-fee was discovered. The appeal had become barred by that time and the learned Judge of the appellate Court did not consider it a fit case for granting extension of time for making up of the court-fee. The appeal was accordingly dismissed. From this decision the present appeal has been preferred. The learned counsel for the appellant contended that it was not necessary for the appellant to pay ad valorem court-fee on the sum of Rs. 700. He urged that the suit being one for possession of land the court-fee paid on thirty times the land revenue assessed on the land was sufficient. In support of the argument, he relied on a ruling reported in 36 *All* 322 (1). That ruling however seems to be clearly distinguishable, as in that case the defendant had challenged the plaintiff's title to the property in dispute. In the present case the appellant did not challenge the plaintiff's title in the appeal before the learned Senior Sub-Judge but merely claimed

Rs. 700 as a charge. In the circumstances it seems to me clear that ad valorem court-fee was necessary, and this point was rightly conceded by the counsel for the appellant in the Court below.

It was next urged that the learned Judge of the Court below ought to at any rate have allowed the appellant time to make up the deficiency in the court-fee and that he was bound to do so. In support of this argument reliance was placed on 39 *I C* 766 (2), 1926 *Mad* 676 (3) and 1923 *All* 349 (4). The first ruling is not in point as it relates to rejection of a plaint under O. 7, R. 11, Civil P. C. 1926 *Mad* 676 (3) is also a similar case. 1923 *All* 349 (4) seems to be in favour of the appellant but this Court has taken a different view of the matter as will appear from 1 *Lah* 234 (5) and 1927 *Lah* 884 (6). As stated already, the application for extension of time was not made till after about seven months since the time when the deficiency was discovered. The question of court-fee in this case was not by any means difficult and the error of counsel cannot I think be treated as a bona fide one. I, therefore see no adequate ground to interfere with the discretion exercised by the lower appellate Court in refusing to grant time for making up the deficiency in the court-fee. I dismiss the appeal with costs.

R.W./R.K.

Appeal dismissed.

2. *Jiwan Das v. Khushabi Ram*, 1917 *Lah* 377 = 39 *I C* 766 = 27 *P R* 1917.
3. *Basavayya v. Venkatapayya*, 1926 *Mad* 676 = 95 *I C* 439 = 51 *M L J* 90.
4. *Jai Singh Gir v. Sitaram Singh*, 1923 *All* 349 = 74 *I C* 757 = 21 *A L J* 833.
5. *Lekh Ram v. Ramji Das*, 1920 *Lah* 92 = 57 *I C* 215 = 1 *Lah* 234 = 3 *L L J* 370.
6. *Gurusaran Das v. District Board, Jullunder*, 1927 *Lah* 884 = 102 *I C* 615 = 28 *P L R* 338.

A. I. R. 1936 Lahore 936

COLDSTREAM AND BHIDE, JJ.

Guru Amarjit Singh—Petitioner—Appellant.

v.

Shiromani Gurdwara Parbandhak Committee and others—Objectors—Respondents.

First Appeal No. 13 of 1934, Decided on 2nd June 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 17th August 1933.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 7—Institution commemorating memory of

1. *Haidari Begam v. Gurzar Bano*, 1914 *All* 273 = 25 *I C* 395 = 36 *All* 322 = 12 *A L J* 481.

Guru Arjan Deo and his miracles, and used for worship predominantly by Sikhs is Sikh Gurdwara.

An institution which commemorates the memory of Guru Arjan Deo, and the working by him of miracles with a beam of wood or staff, which has always been used for worship predominantly by Sikhs is a Sikh Gurdwara.

[P 938 C 1, 2]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 7—Dhirmalis are Sikhs.

The Dhirmalis or followers of Guru Dhirmal are Sikhs and have always been so. There is very little difference in practice between them and the ordinary Sikhs.

[P 939 C 1]

Achhru Ram, Amar Nath Chona for Jhanda Singh and Jhanda Singh—for Appellant.

Bhagat Singh and Gurcharan Singh—for Respondents.

Coldstream, J.—The Punjab Government, on 12th February 1930, published a petition presented to Government under the provisions of S. 7, Sikh Gurdwaras Act, claiming that a Gurdwara known as the Thamji Sahib in Kartarpur, a small town in Jullundur District, was a Sikh Gurdwara. This claim was opposed in two petitions presented under S. 8 of the Act: one No. 310, by the Deputy Commissioner of Jullundur acting as Court of Wards on behalf of Guru Amarjit Singh of Kartarpur, and the other, No. 311, by Ishar Das Mahant of the Gurdwara. Ishar Das subsequently withdrew his petition No. 311 and substituted another No. 312. The petition on behalf of Guru Amarjit Singh stated that the petitioner who was a minor and ward of the Court of Wards had the hereditary right of appointing the manager of the Gurdwara which was the ancestral private property of the petitioner's family, that the petition under S. 7 had been presented by persons who were not worshippers of the Gurdwara Thamji Sahib, and that this Gurdwara was not a Sikh Gurdwara, but an institution used for worship not by Sikhs, but by a sect of dissenters founded by Guru Dhirmal, the nephew of Guru Tegh Bahadur, the ninth Guru. In his petition No. 312, Ishar Das asserted that neither the petitioners under S. 7 nor any other Sikh had any concern with the Thamji Sahib which was an Udasi Asthan and had for long been in possession of Ishar Das and his predecessors, chela succeeding Guru as its Mahants.

The Sikh Gurdwaras Tribunal proceeded to dispose of the three petitions in one consolidated proceeding. In opposing the

petitions the Shromani Gurdwara Prabandhak Committee disputed the right of Guru Amarjit Singh and Ishar Das to present petitions asserting that they were not hereditary office-holders of the Gurdwara. The Tribunal held that the Thamji Sahib was a Sikh Gurdwara under S. 16 (1) and (2), Sikh Gurdwaras Act, and made a declaration accordingly. Against this judgment, Guru Amarjit Singh has presented appeal No. 13 of 1934, and Ishar Das the appeals Nos. 2004 and 2005 of 1933, the first being against the order passed on his petition No. 311 which he withdrew, and the second against the order passed upon his petition No. 312. Ishar Das is dead and is represented by his Chela Karam Das. When the appeals came before this Court on 5th July 1935, an order was passed at the instance of Mr. Bhagat Singh who appeared on behalf of the respondents, the Shromani Gurdwara Prabandhak Committee, remitting the cases back to the Tribunal for a decision on the question whether the appellants had a locus standi, a question upon which the Tribunal had not recorded any finding. The Tribunal after hearing some further evidence has reported its decision that Guru Amarjit Singh is a hereditary office-holder, and that Ishar Das is not a hereditary office-holder having been appointed, not by virtue of any hereditary right or nomination by his predecessor, but by the Guru who is the Shri Mahant of the institution. This judgment will dispose of all three appeals. We have heard counsel for both the appellants. On behalf of Guru Amarjit Singh, whose right to present the petition under S. 8 is not disputed before us, the case put forward is that the Gurdwara Thamji Sahib is not shown to be a Sikh Gurdwara within the definition of Cl. (1) or Cl. (2), sub-s. 2, Sikh Gurdwaras Act.

The evidence relied upon by the parties has been fully discussed in the judgment of the Tribunal and it is not necessary to describe it again here at any length. It is admitted before us that the Thamji Sahib is a place used for public worship, but it is argued that the evidence does not prove that it was established by, or in memory of, any of the Ten Sikh Gurus, or in commemoration of any incident in the life of any of the Ten Sikh Gurus, and was used for public worship by the Sikhs before the time of the presentation of the petition under S. 7.

or that at that time it was used for public worship predominantly by Sikhs owing to some tradition connected with one of the Ten Sikh Gurus. The Thamji Sahib is a famous Gurdwara situated within the boundaries of a fort which has been occupied as their residence by Guru Amarjit Singh and his ancestors, the descendants of Guru Dhir Mal, the grandson of Guru Hargobind, the sixth Guru. A history of the family will be found at p. 145 of "Chiefs and Families of Note in the Punjab" by Colonel C. F. Massey. In another building in this fort is preserved what is said to be the original manuscript of the Adhi Granth which is venerated by all Sikhs as the most precious of their religious relics. In the Thamji Sahib itself is a platform marking the place where, in the original building, stood the 'tham' or wooden post from which the Gurdwara takes its name. The 'tham' was by some believed to be the walking stick of Guru Arjan Dev, by others a tree trunk to which the Guru gave miraculous growth when he visited the site of Kartarpur in 1598. There are also other traditions connecting the 'tham' with some miracle worked by the Guru at the place. On this site Kartarpur was built. In 1754 Ahmad Shah Abdali burnt it down but the town was restored by Guru Wad Bhag Singh, one of Guru Arjan Dev's descendants, who rebuilt the Thamji Sahib and appointed Daya Ram, the first Mahant, to be its manager (O. 49). In 1833 Maharaja Ranjit Singh enriched it with an endowment of the value of Rs. 1,25,000 and it is from this time that the present fine building exists. Subsequently other endowments were made for its benefit by various Sikh Sardars in the form of Jagirs.

At the beginning of the trial, on 2nd November 1931, Sardar Hari Singh Majithia, the manager of the Court of Wards representing Guru Amarjit Singh, admitted that the Thamji Sahib was regarded with veneration because Guru Arjan Dev wished to make his home there and placed a tree trunk (tham) there to signify the place where he wanted to build his home. He admitted further that although the Gurdwara was the private property of Guru Amarjit Singh, because it was situated in his fort at Kartarpur, people of all castes came and bowed down before the platform. In face of these admissions, Guru Amarjit Singh's

counsel found some difficulty in supporting his case that worship in this institution is not and has not been Sikh worship. The evidence on the record appears to me to leave no doubt whatever regarding the religion of the worshippers and the nature of their worship in this institution. In November 1849, during an enquiry by the Deputy Collector of the Jullundur district, the agent of Guru Sadhu Singh, an ancestor of the petitioner Guru Amarjit Singh, stated that Guru Arjan Dev had fixed a wooden pillar in the Thamji Sahib as an object of worship. According to him, the first Thamji Sahib was built by the Guru himself. He also stated that the Granth Sahib was recited in the Thamji Sahib all the day long (O. 21).

In his report the Deputy Collector described the institution as a very big place of Sikh worship, inhabited chiefly by Faqirs of the Sikh religion. In another report made in February 1850 (O. 23) the Deputy Collector again stated that the Thamji Sahib was a big place of worship. In June 1867, Mahant Ram Das, the grand guru of Ishar Das, petitioner, made a will in which he referred to the Thamji Sahib as a place of Sikh worship (O. 25). In January 1873 Mahant Santokh Das, Ishar Das's Guru, in applying for the release of a Jagir attached to the Gurdwara stated that the institution was a very holy place of worship by the general public. In 1883 the Deputy Commissioner of Jullundur in passing an order regarding one of the muafis attached to institution noticed that the Settlement Superintendent had recommended the continuance of the muafi because it was attached to a sacred makan visited by the Sikhs (O. 39). During an enquiry into another muafi of the institution the Settlement Superintendent reported that the Sikhs made offerings at the Thamji Sahib (O. 34).

All this evidence, along with the other evidence mentioned in its judgment, amply justify in my opinion the tribunal's decision that the institution is a Sikh Gurdwara. The Gurdwara commemorates the memory of Guru Arjan Dev and the working by him of miracles with a beam of wood or staff, and it has always been used for public worship by Sikhs. There can further be little doubt that it has also been used for worship predominantly by Sikhs, and I can find no satisfactory support in the evidence

for the contention, urged before us by the Guru's counsel, that the worshippers are not Sikhs but dissenters of a sect known as Dhirmalis, after Guru Dhirmal, who quarrelled with Guru Har Gobind. From Sir Edward MacLagan's Census Report of India, 1891, (Vol. 19, Ch. 4, para. 100) it would appear that the followers of Dhirmal are very few in number and that there is very little difference in practice between the Dhirmalis and the ordinary Sikhs. We have been shown no reason for supposing that Dhirmalis are not Sikhs or have not always been Sikhs.

On this finding the appeal of Guru Amarjit Singh must be dismissed, as must also the appeals of Ishar Das so far as they contest the finding that the Thamji Sahib is not a Sikh Gurdwara. Mr. Din Dayal for Ishar Das asks us to record in this judgment our decision on the question whether Ishar Das is or is not a hereditary office-holder. Such a decision, he states, may avoid difficulties in future cases. In my opinion the decision of the tribunal that Ishar Das is not a hereditary office holder is clearly correct, for the reasons given by the tribunal. No doubt the Mahants of the Thamji Sahib have always been Chelas of the preceding Mahants, but that the right to their office has not devolved by nomination is clear from the evidence described in the tribunal's report of 12th October 1935. This evidence shows that Ishar Das did not himself succeed to the office of Mahant by any right and that the Mahants of the institution are officers appointed to act on behalf of the Shri Mahant who is the Guru of Kartarpur. I would dismiss petitions Nos. 311 and 312 accordingly. The respondent will have his costs in all three appeals.

Bhide, J.—I agree.

R.M./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 939

COLDSTREAM AND BHIDE, JJ.

Guru Amarjit Singh—Appellant.

v.

Shiromani Gurdwara Parbandhak Committee and others — Objectors — Respondents.

First Appeal No. 43 of 1935, Decided on 11th June 1936, from decree of Sikh Gurdwaras Tribunal, Lahore, D/- 13th October 1934.

(a) Punjab Sikh Gurdwaras Act (8 of 1925), S. 10—Intention of Act was that tribunal should decide whether Gurdwara did or did not own property in petition under S. 10.

The purpose of the Sikh Gurdwaras Act was to settle not only pending disputes but all likely disputes in future and to have it determined whether the Gurdwara concerned or some possible claimant was owner of the right claimed on behalf of the Gurdwara. The intention of the Act was that the tribunal should decide whether the Gurdwara did or did not own property claimed in a petition presented under S. 10. [P 941 C 1, 2]

(b) Punjab Sikh Gurdwaras Act (8 of 1925), S. 10—Petition under S. 10—Tribunal can also decide and declare claim on behalf of Gurdwara when it is established by evidence.

The tribunal disposing of a petition under S. 10 is empowered to decide by its order not only the petitioner's claim but also the claim made on behalf of the Gurdwara and to make a declaration to that effect, when the right of the Gurdwara has been positively established by evidence: 1935 Lah 279, *Commented upon*; C.A. No. 837, decided on 4th November 1935, *Ref.*

[P 941 C 2]

*Achhru Ram, Amar Nath Chona for Jhanda Singh and Jhanda Singh—*for Appellant.

*Bhagat Singh and Gurcharan Singh—*for Respondents.

Coldstream, J.—By an order of 17th August 1933 a religious institution known as Gurdwara Thamji Sahib in Kartarpur, a revenue estate in Jullundur district, was declared by the Sikh Gurdwaras Tribunal to be a Sikh Gurdwara, as it had been claimed to be in a petition presented to the Local Government under S. 7, Sikh Gurdwaras Act. Thereupon one Ishar Das submitted petitions under S. 10 of the Act asserting that certain rights, which had been alleged to belong to the Gurdwara in the list accompanying the petition under S. 7, belonged to him and not to the Gurdwara. The petitions were resisted by the Sikh Gurdwaras Parbandhak Committee. Before the trial began the Tribunal, in exercise of its powers under S. 15, joined as a party to the proceedings the Court of Wards as representative of Guru Amarjit Singh, the Sri Mahant of the Gurdwara, who had also submitted a petition under S. 10 of the Act claiming the same rights. Ishar Das died and his Chela Karam Das was appointed his legal representative. The Tribunal struck two issues: (1) What right, title or interest has the petitioner Ishar Das got in the property claimed? (2) What right, title or interest, if any, has the Gurdwara Thamji Sahib in the

property claimed by the petitioner? One of the claims made by Ishar Das was in respect of occupancy rights in 220 Kanals 2 Marals of land in Kartarpur. The Tribunal found it proved that these occupancy rights belonged to the Gurdwara and not to Ishar Das, in dismissing whose petition it made a declaration accordingly.

Against this decision this appeal has been presented on behalf of Guru Amarjit Singh who has been found by the Tribunal in another proceeding to be the owner of the land concerned. His counsel does not before us dispute the correctness of the decision that the occupancy rights in question belong to the Gurdwara and not to Ishar Das, but he asks us to set aside the declaration in favour of the Gurdwara, his contention being that the Tribunal had no authority under the Act to make this declaration. He relies upon the judgment of this Court in 16 Lah 968 (1), where it was held by Monroe and Currie, JJ., that, in deciding petitions made under S. 10, Sikh Gurdwaras Act, the Tribunal has no power to make a declaration that the property concerned belongs to the Gurdwara, because the petition presented to the Local Government under S. 7, claiming the property for the Gurdwara, is not before the Tribunal. In that case a petition under S. 10, asserting a claim to certain rights which had been alleged to belong to the Gurdwara Thamji Sahib, was withdrawn by the petitioner when the petition came before the Tribunal for disposal under S. 14 (1) of the Act. The petition was accordingly dismissed. It was however claimed by the objectors, the Shiromani Gurdwaras Parbandhak Committee, that they were entitled to a declaration that the rights belonged to the Gurdwara. The Tribunal refused to make any such declaration and it was against this refusal that the Committee lodged the appeal decided by the High Court's judgment.

That judgment clearly supports the appellant. In opposing the appeal for the Gurdwara Parbandhak Committee Mr. Bhagat Singh, while he does not dispute the correctness of the decision that, in the circumstances of the case then before the Court, no declaration could be given in favour of the Gurdwara, contends that

the judgment goes too far in laying down the general proposition that the Tribunal has no power in disposing of a petition under S. 10 to give a declaration in favour of the Gurdwara, and he asks us in the present case to allow the declaration made by the Tribunal to stand because, in this case, the petition was not withdrawn but the question whether the disputed right belonged to the Gurdwara was distinctly put in issue and decreed in favour of the Gurdwara upon the evidence produced by the parties. It is obvious that where the Tribunal has not decided that a particular right belongs to a Gurdwara it cannot under the provisions of the Act grant a declaration that it does so belong, and the only question for decision by us is whether the judgment in 16 Lah 968 (1) is correct in laying down the general proposition that no declaration can ever be made in favour of a Gurdwara by the Tribunal when it disposes of a petition presented under Section 10 of the Act.

The arguments advanced by Mr. Bhagat Singh in support of this contention are on the lines of those urged before Monroe, J. in the case cited. Put generally, they are that, although the Act does not expressly empower the Tribunal to decide that property claimed in a petition under S. 10 belongs to the Gurdwara, its provisions show clearly that the intention of the Act is that the Tribunal should have power to decide the claim in favour of the Gurdwara and to give a declaration in favour of the Gurdwara if it so decides. S. 10 of the Act lays down that if no petition is presented under that section claiming a right which has been alleged in the petition presented to Government under S. 7 to belong to a Gurdwara, the Local Government shall publish a notification of this fact. When this has been done the Committee of the Gurdwara may, under the provisions of S. 28, bring a suit, on payment of a fixed Court-fee of Rs. 5, in the civil Court, asking to be given possession of any property a proprietary title in which has been specified in the notification. The Act originally passed did not however contain any provision for the institution of such a suit where a petition had been submitted under S. 10 disputing the claim made on behalf of the Gurdwara, and it was to remedy this defect that the present S. 25-A was enacted by the Punjab Act 3 of 1930.

1. *Shiromani Gurdwara Parbandhak Committee v. Jagat Ram*, 1935 Lah 279=156 I C 1042=16 Lah 968=38 P L R 44.

That this was the object of the amendment is clear from the "Statement of Objects and Reasons" published with the Bill, which also noticed that the new section was required to avoid double litigation. But if the Tribunal still has not the power in disposing of a petition under S. 10 to declare that a property belongs to a Gurdwara (although it certainly has power to dismiss a petition on the ground that the property belongs to a Gurdwara and therefore cannot belong to the petitioner) then, before a Gurdwara Committee can obtain possession of the property claimed for the Gurdwara, and found by the Tribunal not to belong to the petitioner, the question whether it belongs to the Gurdwara or not will have to be re-agitated in the civil Court, double litigation will not be avoided, and the purpose of the Act, which was to have all claims to immovable property alleged to belong to a Gurdwara finally and speedily settled by a Tribunal in accordance with the special procedure and rules of evidence laid down in the Act will be frustrated. The full court-fee will have to be paid, and in this respect the Gurdwara Committee will be in a worse position than they would have been if no petition in respect of the property had been made, although they had succeeded in establishing their case positively before the Tribunal.

A petition presented under S. 5 or 8 of that Act is not a plaint in a civil suit but an application of a most peculiar kind. It is not a mere petition asking for relief in consequence of any actual infringement of the petitioner's right, title or interest but a statement in defence made in reply to the petition submitted under S. 7. Having regard to the provisions of the Act as a whole there can, I think be no doubt that the purpose of the Act was to settle not only pending disputes but all likely disputes in future and to have it determined whether the Gurdwara concerned or some other possible claimant was owner of the right claimed on behalf of the Gurdwara. The claim which has to be decided by the Tribunal in disposing of a petition under S. 5 or 10 is in fact not one to which the petition gives rise but one originated by the claim previously made on behalf of the Gurdwara in the list submitted under S. 3 or 7. When the first Tribunal was constituted there was considerable doubt whether in dealing with a petition under

S. 10 it was the petitioner or the claimants on behalf of the Gurdwara who ought to be considered to be the plaintiffs in the proceedings for the purpose of applying generally the provisions of the Code of Civil Procedure. It was also understood that the matter to be decided was whether the right, etc., in dispute belonged to the Gurdwara or to the petitioner and if the property was found to belong to the Gurdwara the Tribunal was empowered to state this in its order. The view that the intention of the Act was that the Tribunal should decide whether the Gurdwara did or did not own a property claimed in a petition presented under S. 10 is, I think supported in some measure by S. 16. A dispute on the question whether a Gurdwara is or is not a Sikh Gurdwara is brought about by the submission of a petition under S. 7 to which the petition under S. 8 is a reply.

The petition presented under S. 7 is not forwarded to the Tribunal which has before it only the petition under S. 8. But S. 16 clearly implies that the question whether a Gurdwara is a Sikh Gurdwara must arise in disposing of the petition under S. 8 although, if the principle laid down in 16 Lah 968 (1) were to be applied strictly all that the Tribunal could decide in disposing of a petition under S. 8 would be that the Gurdwara was not a Sikh Gurdwara. That the Act is defective is obvious, but I do not think it clear that the words of S. 14 (1) preclude a decision by the Tribunal in favour of the Gurdwara. On the other hand the present difficulty in working the Act is removed to some extent if S. 15 be read as empowering the Tribunal to decide by its order not only the petitioner's claim but also the claim made for the Gurdwara. This interpretation is in my opinion not only consistent with the Act but is the only one which reconciles Ss. 14 and 25-A and this being so I am not convinced, and I say so with very great respect, of the correctness of the judgment in 16 Lah 968 (1) so far as it lays down a general proposition applicable to cases where the right of the Gurdwara has been positively established by the evidence. Here I may notice that in Civil Appeal No. 337 decided on 4th November 1935 a Division Bench has, on appeal by a petitioner in a case under S. 10 of the Act added to the Tribunal's order dismissing a petition under S. 10 a declaration that the pro-

party in suit does not belong to the Gurdwara concerned. In the case now before us there has been a decision in favour of the Gurdwara after the framing of an issue and upon evidence produced by the parties. The correctness of that decision is not challenged and I see no good reason why it should not be incorporated in the Tribunal's order which the Tribunal has chosen to embody in the form of a decree. Seeing no sufficient ground for interfering with the order of the Tribunal I would dismiss this appeal leaving the parties to bear their own costs.

Bhide, J.—I agree.

R.M./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 942

AGHA HAIDAR, J.

Panna Lal—Appellant.

v.

Ram Chand—Judgment-debtor—Respondent.

Misc. Second Appeal No. 376 of 1936, Decided on 5th June 1936, from order of Dist. Judge, Delhi, D/- 23rd January 1936.

Res judicata—Execution—Constructive res judicata—Plaintiff applying for execution of decree as trustee on behalf of insolvent and Official Receiver—Decision that he has no locus standi—He is precluded subsequently from applying for execution.

The principles of constructive res judicata are applicable to execution proceedings. Thus where the plaintiff makes an application for execution of a decree as a trustee on behalf of the insolvent and Official Receiver and the Court decides that he has no locus standi, he cannot come forward and apply for execution on the strength of credentials, which he could very well have relied upon while prosecuting the former application: 1935 Lah 200; 6 All 269 and 1927 Lah 289, *Rel. on.* [P 943 C 1]

Bishan Narain—for Appellant.

Qabul Chand and Shamair Chand—for Respondent.

Judgment.—The firm of Ram Gopal Sant Lal became insolvent. On 20th June 1929 the Official Receiver, Karachi, on behalf of the insolvent firm, obtained a decree for a sum of Rs. 2,000 against Ram Chand. Under the terms of the decree if the judgment-debtor paid the amount due within six months he was to be exempted from the payment of costs of the suit. On 9th October 1929 the Court of the Additional Judicial Commissioner,

Karachi, sanctioned a composition scheme between the creditors and the insolvent and five trustees from Delhi and two from Karachi were appointed to realise the assets of the insolvent and to distribute the same among the creditors. Panna Lal was one of these trustees. He made an application on 4th November 1932 for the execution of the decree. This application did not bear any fruit and was dismissed for default on 16th December 1932. On 18th May 1933 Panna Lal filed another application as a trustee on behalf of Ram Gopal, Sant Lal and the Official Receiver, Karachi. The judgment-debtor raised two objections to the application. In the first place, he denied that Panna Lal had any locus standi to make the application; and secondly, that the application was time-barred. On 5th October 1934 the matter came up before Mr. Bakshi Sher Singh, Subordinate Judge, 2nd Class, Delhi, who held that the composition-deed had not been proved in this case and a perusal of the order of the Judicial Commissioner did not show that under the composition scheme Panna Lal was appointed a trustee or at any rate that on the annulment of the adjudication of Ram Gopal-Sant Lal he was appointed an assignee in whom the estate of the insolvents was to vest. He further held that it has not been proved that Panna Lal has any authority to execute the decree.

It was also pointed out that no assignment in writing on behalf of the Official Receiver (decree-holder) in favour of Panna Lal or by his principals whose Mukhtar he professed to be, had been filed or proved in the case. He accordingly under the provisions of O. 21, R. 16, Civil P. C., held that Panna Lal had no locus standi to execute the decree. The application for execution was therefore rejected. Panna Lal made an application on 13th October 1934 for the review of the order dated 5th October 1934. He also put in a fresh application for execution on 20th December 1934 on behalf of himself and other trustees of the insolvent firm. The trial Court dismissed the application for review but allowed the execution to proceed against the judgment-debtor overruling the judgment debtor's plea of res judicata regarding Panna Lal's locus standi. He further held that the application was within time. The judgment-debtor went up in appeal. Reliance was

placed upon 34 Bom 68 (1). That ruling no doubt supports the decree-holder on the question of limitation but the formidable difficulty in the way of the decree-holders is the decision of Bakhshi Sher Singh dated 5th October 1934. In that decision the learned Subordinate Judge definitely held that Panna Lal had not been able to prove that he had any locus standi to execute the decree. In my opinion the rule of constructive res judicata, as embodied in Expl. 4 to S. 11, Civil P. C., applies to execution proceedings.

The point has been recently dealt with in a Divisional Bench judgment of this Court in 15 Lah 869 (2). After referring to the leading Privy Council case in 6 All 269 (3) and the Full Bench decision in 8 Lah 384 (4) at p. 395 the learned Judges observed that the applicability of the rule of res judicata is not limited to matters which were directly and substantially in issue and were heard and expressly decided in former execution proceedings, but the principle of "constructive res judicata" as embodied in Expl. 4 of S. 11 is also applicable to such proceedings. They further held, that it was not open to a judgment-debtor to object to execution, on a plea which could have been raised in former execution proceedings, but was not so raised. This was no doubt a converse case, but the principle applies all the same. All the materials which are now under the power and control of Panna Lal and on which he relies were also accessible to him when he made the application dated 18th May 1933 on which the order dated 5th October 1934 was passed by Bakhshi Sher Singh. It is not therefore open to Panna Lal now to come forward and to apply for execution on the strength of the credentials which he could very well have relied upon while prosecuting the application dated 18th May 1933. In my opinion the order of the lower appellate Court is correct. I dismiss the appeal but, under the circumstances, make no order as to costs.

P.R./R.K.

Appeal dismissed.

1. Vinayak Vaman v. Ananda Ramji, (1910) 34 Bom 68=4 I O 582=11 Bom L R 1281.

2. Prabhu Dayal v. Dewat Ram, 1935 Lah 200=155 I O 286=15 Lah 869=35 P L R 429.

3. Ram Kirpal v. Rup Kuarl, (1884) 6 All 269=11 I A 37 (P O).

4. Mt. Laohmi v. Mt. Bhull, 1927 Lah 289=104 I O 849=8 Lah 884 (F B).

* A. I. R. 1936 Lahore 943

ADDISON AND ABDUL RASHID, JJ.

Manak Chand and another—Defendants—Appellants.

v.

Madan Lal—Plaintiff—Respondent.

Letters Patent Appeal No. 16 of 1936, Decided on 11th May 1936, from order of Jai Lal, J., D/- 17th December 1935.

* Minor—Minor suing for getting transaction entered by him declared as null and void—Suit not for getting possession of immoveable property—Court cannot ask minors to refund benefit obtained by him under transaction.

The doctrine that a minor may be compelled to refund the benefit received by him when any of his transactions is declared to be null and void at his instance is only applicable to suits for possession so far as immoveable property is concerned. In suits for possession the Court may give the minor a decree to the effect that he will be entitled to regain possession of his property only if he pays the mortgagee or the vendee at least that part of the consideration which was required by him for necessary purposes. In a declaratory suit this equitable relief cannot be granted to the vendees because the Court cannot tack on the equitable relief for refund of the consideration or part thereof to the declaration sought by the minor plaintiff.

[P 944 C 1]

Rup Chand—for Appellant.

Abdul Rashid, J.—On 15th May 1931 Madan Lal plaintiff executed a mortgage-deed whereby he mortgaged two houses and four shops in favour of the defendants for a sum of Rs. 5,000. On 30th May 1933, the plaintiff, through his mother Mt. Charan Devi, instituted the present suit for a declaration to the effect that the mortgage-deed dated 15th May 1931, was null and void, and was not binding on him as at the time of the execution of the mortgage-deed, he was a minor, and also for a perpetual injunction to the effect that the defendants be restrained from taking any benefit under the said mortgage-deed. The suit was valued for purposes of jurisdiction and Court-fee at Rs. 110. The defendants pleaded, inter alia, that the plaintiff was a major at the time of the execution of the mortgage-deed, and that, in any case, as the plaintiff had held himself out to be a major he must refund the sum of Rs. 5,000 to the defendants as this amount had been paid to the plaintiff or to his creditors under the terms of the mortgage-deed by the defendants. The trial Court held that the plaintiff was a minor at the time of the execution of the mortgage-deed and

that the defendants were aware of his minority at the time. On this finding the plaintiff's suit was decreed without any obligation to pay the defendants the sum of Rs. 5,000 or any other sum.

The defendants preferred an appeal in the Court of the learned Senior Subordinate Judge, one of the grounds of appeal being that the plaintiff was not entitled to the declaration prayed for without paying the defendants the sum of Rupees 5,000 which had been paid to the plaintiff or to his creditors. The lower appellate Court held that the valuation in appeal must depend on the relief sought by the appellants and as this relief amounted to a sum of Rs. 5,000 the appeal could not be preferred in the Court of the Senior Subordinate Judge. The memorandum of appeal was therefore returned to the appellants with the direction that they might after valuing and stamping it correctly present it to a Court of competent jurisdiction. Against the decision of the Senior Subordinate Judge the defendants preferred an appeal to this Court. This appeal having been dismissed by a learned Single Judge the defendants have preferred the present appeal under Cl. 10, Letters Patent.

It appears that the mortgage in favour of the defendants was without possession, and that the plaintiff continued to be in possession of the land. The relief claimed by the plaintiff in the present suit was for a declaration that the mortgage-deed, dated 15th May 1931, was null and void. The doctrine that a minor may be compelled to refund the benefit received by him when any of his transactions is declared to be null and void at his instance is only applicable to suits for possession so far as immoveable property is concerned. In suits for possession the Court may give the minor a decree to the effect that he will be entitled to regain possession of his property only if he pays the mortgagee or the vendee at least that part of the consideration which was required by him for necessary purposes. In a declaratory suit this equitable relief cannot be granted to the defendants because the Court cannot tack on the equitable relief for refund of the consideration or part thereof to the declaration sought by the minor plaintiff. In such cases there is no property in possession of the defendants which can be held by them till the amount advanced

to the minor plaintiff for necessary purposes is refunded. We are therefore of the opinion that so far as the refund of Rs. 5,000 is concerned no relief can be granted to the defendants.

The suit so far as it relates to the declaration and injunction prayed for by the plaintiff was rightly valued at Rs. 110 under S. 7 (iv) (c), Court-fees Act, read with S. 8, Suits Valuation Act. The appeal of the defendants so far as this relief is concerned is entertainable by the Senior Subordinate Judge, being within his jurisdiction. For the reasons given above, we accept this appeal in part, and remit the case to the Senior Subordinate Judge with the direction that he shall hear the appeal merely with regard to the declaration and injunction claimed by the plaintiff-respondent. Parties will bear their own costs in this appeal.

B.D./R.K. *Appeal partly accepted.*

A. I. R. 1936 Lahore 944

AGHA HAIDAR, J.

Tara Chand — Judgment-debtor — Appellant.

v.

Bakhshi Sher Singh and others — Decree-holder — Respondents.

Exn. First Appeal No. 24 of 1936, Decided on 19th May 1936, from order of Sub.Judge, 1st Class, Lahore, D/- 14th December 1935.

(a) Civil P. C. (1908), S. 60, Proviso (n) — "Maintenance" — Meaning — Sum reserved in will as "pocket money" amounts to right of future maintenance and cannot be attached.

Maintenance includes the means of subsistence or necessities of life. It includes not only the provisions for board and residence but also includes the sum reserved for other things which a man would require to meet the necessities of life. [P 945 C 2; P 946 C 1]

Where the testator in his will made provisions for future maintenance of his half-witted son and stated that after his death, out of the income of his property his son was to get Rs. 100 per month as his pocket money (jeb kharch):

Held: that this sum amounted to right of future maintenance and could not be attached in execution: 1936 Lah 55; 1935 Lah 811 and 10 C W N 1102, *Disting.* [P 946 C 1]

(b) Transfer of Property Act (1882), S. 1 — General principles of Act are only applicable to Punjab.

The Transfer of Property Act does not strictly speaking apply to the Punjab but the general principles of the Act which are mostly based on the judgments of Equity Courts are always invoked in aid by the Courts. [P 945 C 2]

V. N. Sethi — for Appellant.

Mehr Chand Mahajan, J. L. Kapur and Jagan Nath Talwar — for Respds.

Judgment.—This is a judgment-debtor's appeal arising out of the following circumstances: Shankar Shah was a wealthy gentleman living at Shahdra, one of the suburbs of Lahore. He had two sons, Tara Chand, (judgment-debtor) by his first wife, and Kishore Chand, by his second wife. On 9th August 1928, Shankar Shah made a will giving ten annas out of 16 annas to Sat Parkash, the son of Tara Chand, and six annas out of 16 annas to Kishore Chand. At the date of the will Tara Chand was about 20 years old while Kishore Chand was aged six or seven years. According to the testator, Tara Chand was a half-witted young man in whose intelligence and capacity for business the testator had no faith. He accordingly disinherited him in the sense that he did not give him any share in his property under his will and made bequests in favour of his son Kishore Chand and his grandson Sat Parkash and other members of the family. A provision was made in the will that Tara Chand should have his food in the family kitchen for the maintenance of which a certain sum out of the estate was earmarked. It was further provided that he was to occupy a certain house in Lahore. An important provision was made in para. 11 of the will in which the testator stated that after his death, out of the income of his property his son Tara Chand should get Rs. 100 per month as his pocket money (*jeb kharch*). The decree-holders obtained a decree on the basis of an award against Tara Chand alone and in execution of that decree they have now proceeded to attach the allowance of Rs. 100 which had been provided for Tara Chand under the will of his father. The Court below has held that this sum of Rs. 100 was attachable in execution of the decree obtained by the decree holders. Tara Chand has come up to this Court in appeal and the sole question which has been argued before me is whether or not this sum of Rs. 100, which is payable under the will of Shankar Shah to Tara Chand, is attachable in execution of the decree obtained by the decree-holders. A number of cases were cited by the learned counsel for the parties; but I do not propose to discuss all of them at any considerable length. It would be desirable in the first instance to refer to the provisions of S. 60, Cl. (n), Civil P. C. Certain properties are exempted from attachment and sale and one

of these properties, mentioned in Cl. (n), is "a right to future maintenance". In this connexion a reference to S. 6, Cl. (dd), T. P. Act, would be relevant.

It is true that the Transfer of Property Act does not strictly speaking apply to the Punjab, but the general principles of the Act which are mostly based upon the judgments of Equity Courts, are always invoked in aid by the Courts in this Province. S. 6 (dd) lays down "a right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred." The word "maintenance" is not defined either in the Code of Civil Procedure or in the Transfer of Property Act. According to the Shorter Oxford English Dictionary "maintenance" is described as means of sustentation." Going back to the verb "to maintain," the same Dictionary says it means "to provide with means of subsistence or necessities of life." We may therefore take it that while Shankar Shah, made specific provision only for the board and residence of Tara Chand, this sum of Rs. 100 p. m. was reserved for other things which a man, born in the position of Tara Chand, would require to meet the necessities of life. Again, necessities of life vary in the case of different people belonging to different strata of society. Tara Chand, as the eldest son of a wealthy father, would require various things which in this case may be treated as necessities of life, though in the case of a child of poor parents, they would be luxuries. The father apparently realised the somewhat helpless condition of Tara Chand who, as already stated, is of somewhat weak intellect. He therefore took the obvious precaution of putting this sum of Rs. 100 a month at his disposal, so that he may spend it in buying necessities of his life. For instance, he would require a certain amount of clothing to protect his body from the inclemencies of weather; he may now and again stand in need of medical attendance and have to pay a chemist or druggist's bill and so on. No provision is made in the lengthy document, which is the will of Shankar Shah, to meet these expenses. Putting, therefore a general and liberal construction upon the word "maintenance" and at the same time bearing in mind the text of the will, I am of opinion that this sum of Rs. 100, which is described as "pocket money" of Tara Chand, may be treated as his "future

maintenance out of which he was to supply himself with such necessities of life as, having regard to his position in life, would be required for his sustentation and physical well being.

Reliance has been placed on behalf of the respondent upon the judgment of a learned Single Judge of this Court in 1935 Lah 811 (1). That judgment followed 10 C W N 1102 (2), another decision of a Single Judge sitting on the original side. In the latter case there was a gift by a testator in favour of the sons of his daughter by way of monthly allowance and the same was held to be attachable in execution of a decree. It was pointed out that such a gift could not be treated as one for the maintenance of the testator's daughter's sons inasmuch as he was not bound to maintain them. The present case is distinguishable inasmuch as the father under the Hindu law is bound to maintain his sons according to their position in life. There is another case reported in 1936 Lah 55 (3). It is not necessary to go into the details of that case as it was decided on its own facts which were different *toto coelo* from the facts of the present case. In my opinion the Court below was in error in not treating the sum of Rs. 100, which is payable to Tara Chand, as "future maintenance," under S. 60, Cl. (n), Civil P. C. No other question arises after this decision and none has been argued before me. I would therefore allow the appeal, set aside the order of the Court below and dismiss the application for execution of the decree in so far as it affects the sum of Rs. 100 p. m. reserved in the will of Shankar Shah, for the benefit of Tara Chand. The appellant shall get his costs.

P.R./R.K.

Appeal allowed.

1. Chuni Lal v. Munna Lal, 1935 Lah 811=159 I C 644=37 P L R 261.
2. Gopal Lal Seal v. F. J. Marsden, (1906) 10 C W N 1102.
3. Chuni Lal v. Jai Gopal, 1936 Lah 55=163 I C 103=17 Lah 378=38 P L R 707.

* * A. I. R. 1936 Lahore 946

TEK CHAND AND DALIP SINGH, JJ.

Brij Raj Saran—Defendant—Appellant.

v.

Alliance Bank, Simla, Ltd. — Plaintiff and another—Defendant—Respondents.

First Appeal No. 1201 of 1931, Decided on 29th February 1936.

(a) Deed—Proof of—Endorsements by Registrar are admissible.

The Sub-Registrar's endorsements, duly made under S. 60, Registration Act, are relevant evidence for proving the execution of documents: 1929 Lah 711 and 33 Cal 537 (P C), Ref.

[P 951 C 1, 2]

* * (b) Mortgage—Formalities — Property at one place and transaction at another—Law of *lex loci contractus* determines forum of transaction.

A transaction of equitable mortgage, even though entered into and carried out at a place where the Act does not apply, need not be executed, attested and registered according to the formalities laid down in S. 59, T. P. Act. In such cases, it is the *lex loci contractus* which determines the forum in which the transaction is to be clothed, and not the *lex situs* of every one of the properties comprised in it: 1930 Lah 920; 14 All 238; 1914 Bom 15; 1923 P C 211; 1931 P C 239 and 1933 Lah 972, Ref.

[P 953 C 1]

(c) Hindu Law—Alienation—Father—Alienation by adoptive father made prior to adoption — Adopted son cannot challenge it.

An adopted son cannot challenge the alienations of his adoptive father made prior to adoption and of the ancestral property devolved on the father of which he was the sole owner at the date of adoption.

[P 953 C 2]

(d) Guardians and Wards Act (1890), S. 29—Money advanced under sanction of Court—Minor's property taken as security—Inquiry as to necessity is unnecessary.

A person, who advances money to a guardian on a mortgage of the minor's property, effected under sanction of the Court, is entitled to trust the Court's sanction and is not bound to go behind it and inquire as to the expediency or necessity of the loan for the benefit of the minor's estate, unless there was fraud or underhand dealing, to which the mortgagee was a party: 11 Cal 379 (P C); 1927 Mad 283; 1928 Pat 543 and 1924 All 875, Ref.

[P 956 C 1]

J. N. Aggarwal, Achhru Ram and Nawal Kishore—for Appellant.

Mehr Chand Mahajan and Jindra Lal—for Respondent (plaintiff).

Tek Chand, J. — This judgment will dispose of Civil Appeal No. 1201 of 1931, Civil Appeal No. 1831 of 1933 and Civil Appeal No. 1594 of 1933, which arise from a suit brought by the Alliance Bank of Simla, Ltd., (in liquidation) against Brij Raj Saran, adopted son of Pandit Joti Parshad deceased, and his natural father, Pandit Ram Chandra, for recovery of Rs. 50,007-3-6, alleged to be due on foot of certain mortgages, together with future interest and costs. The suit was instituted as far back as 6th October 1922. In December 1922, before any proceedings could be taken in the case, Pandit Ram Chandra died and on application by the plaintiff Bank, Mt. Raja

Devi, widow of the deceased, was impleaded as a defendant. She did not appear and proceedings were ordered to be ex parte against her. The other defendant Brij Raj Saran was a minor at the time and the plaintiff Bank had applied that his adoptive mother, Mt. Ganpati Devi, be appointed his guardian-ad-litem. Mt. Ganpati Devi declined to act and the Subordinate Judge appointed the Court Nazir as such. He was, however, not given an opportunity to file a written statement, or communicate with the minor or his relatives and friends or take legal advice. The learned Subordinate Judge (Mr. S. L. Sale) proceeded to trial and after a formal examination of the Agent of the plaintiff Bank, passed a preliminary decree for the sum claimed with interest and costs against defendants on 27th November 1923. On appeal filed in this Court on behalf of Brij Raj Saran minor, it was held that there had been no trial of the case so far as the minor defendant was concerned. The appeal was accordingly accepted and the case remanded for re-trial (Civil Appeal No. 538 of 1924, decided on 26th April 1928).

In the meantime Mt. Raja Devi had died, and after remand disputes arose as to who her legal representative was. After protracted proceedings extending over nearly two years, one Hans Raj, a nephew of Pandit Ram Chandra, was impleaded as a defendant in her place. He put forward lengthy pleas, but eventually withdrew his defence, and is no longer concerned in the litigation. The suit was contested on behalf of Brij Raj Saran minor, defendant 1, by his adoptive mother Mt. Ganpati Devi, who was eventually appointed as his guardian-ad-litem. The trial of the suit really began in October 1930, and on 31st March 1931 the Senior Subordinate Judge (Mr. Sewa Singh) passed a preliminary decree in terms of O. 34, R. 4, for recovery of Rs. 1,04,942.12.4 and Rs. 2,829.3.10 costs, or Rs. 1,07,772.0.2 in all, and fixed 15th July 1931 as the date of payment. The decretal amount was to bear interest at 6 per cent. per annum. From this decree a first appeal has been lodged in this Court by the defendant Brij Raj Saran (Civil Appeal No. 1201 of 1931).

The judgment-debtor failed to pay the above amount by the date fixed in the

preliminary decree. Accordingly the Senior Subordinate Judge (Mr. S. A. Rahman) on 12th June 1933 passed a final decree for Rs. 1,20,109.13.2 directing that the amount due be recovered by sale of the mortgaged properties. He declined to allow any future interest on this sum from the date of the final decree till realization. From this final decree the defendant Brij Raj Saran has preferred a first appeal (Civil Appeal No. 1831 of 1933). The plaintiff Bank has also appealed praying that in the final decree interest should have been allowed at 6 per cent. per annum on the amount decreed from the date of that decree till realization (Civil Appeal No. 1594 of 1933).

Before setting out the pleadings of the parties and the points which require decision on the merits, it will be convenient to deal with the appellant's contention, which had been argued with much persistence by his learned counsel, Mr. Jagan Nath Aggarwal, that the lower Court did not give proper opportunity to the appellant to produce his evidence and that the case should be remanded for the purpose. It was alleged that after numerous adjournments the plaintiff produced a large number of documents on 25th March 1931, and after having them formally proved by one of his clerks suddenly closed his case, that thereupon the defendant asked for time to examine these documents and summon his witnesses in rebuttal, but the learned Subordinate Judge refused the prayer for adjournment and proceeded forthwith to hear arguments. After examining the record and hearing counsel at length, I do not find any substance in this contention. It is quite clear that the defendant had been given full opportunity to summon and produce his evidence, and that he has not been prejudiced in any way by the procedure adopted by the learned Subordinate Judge.

As stated already, the case was remanded by the High Court in 1928 and it took about two years to complete the array of parties by bringing on record the representative of the deceased defendant, Mt. Raja Devi. Issues were finally settled on 22nd August 1930, when the case was adjourned to 6th October 1930 for "the evidence of the parties." Both parties were directed to file lists of their witnesses and pay the process fees within

a week. The plaintiff Bank complied with the order, but the defendant did not file any list of witnesses. The plaintiff had filed with the plaint the mortgage deeds in dispute and a copy of the account from 1918 to 1922. Subsequently on 4th February 1929 a complete copy of the account from 1909 up to date and all other documents on which the plaintiff relied and which are material for the decision of this case, were placed on the record. The defendant thus knew, at any rate, in August 1930, what the case of the Bank was, and by what oral and documentary evidence it sought to support it. He, however, did not summon any witnesses on the date fixed nor did he bring any with him at the hearing. On 6th October 1930, the plaintiff examined five of his witnesses and the case was adjourned to 27th October for the remaining evidence of the plaintiff, and the 3rd November was fixed for the evidence of the defendant. For that date also the defendant did not summon any witnesses. On the 27th of October, another witness for the plaintiff was examined, but the case had to be adjourned to await the return of certain commissions, the next date fixed being the 8th December when the Bank's clerk Mehr Chand and the defendant's evidence were to be examined. The defendant again took no step to summon his witnesses. In the meantime, it appears that one of the plaintiff's witnesses, Raja Joti Parshad Aggarwal died. For this reason the case could not proceed on the date fixed.

In January 1931 the Court was closed for the vacation, and on 16th February 1931 the plaintiff applied that owing to Raja Joti Parshad's death it had become necessary to examine three other persons (in addition to the Bank's clerk Mehr Chand). These witnesses were ordered to be summoned for the 13th March 1931 and the hearing adjourned to that date "for the evidence of both parties." As the commission had not been returned on that date, the case was adjourned again to 25th March 1931. During all this time the defendant did not indicate that he wanted to produce any evidence. At any rate, he did not summon any. On 25th March the plaintiff examined his remaining witnesses and closed the case. The Court called upon the defendant to produce his evidence and his counsel

stated (see order printed at p. 73, Vol. 1 of the paper-book) that the defendant did not wish to produce any evidence except the Government expert on questioned documents, whom he had not summoned, but for whose examination he prayed an adjournment might be granted. The Court declined to adjourn the case and observed that the defendant, if he really wished to produce the hand writing expert, should have summoned him before and that the adjournment had obviously been applied for merely to delay the decision of the case. The Court then heard arguments of counsel for both sides and gave judgment on 31st March 1931.

More than four years after the institution of the appeal in this Court, two affidavits by Pandit Benarsi Das, Pleader, Simla, who was the junior counsel for the defendant in the Court below, sworn on 11th December 1925 and 27th January 1936, were filed. In these affidavits it was stated that a large number of documents had been produced by the plaintiff on that date and that the adjournment was asked for by the senior counsel not merely to summon the handwriting expert as recorded by the lower Court in its order, but for the purpose of "producing the whole evidence." It seems to us that these allegations in the affidavits, sworn several years later, were made under a misapprehension. A perusal of the record shows that it is incorrect to say, as is suggested in the affidavits, that any material documentary evidence was produced on 25th March 1931 and that the defendant was taken by surprise. As already stated, a list of the documents on which the plaintiff relied, had been filed as early as February 1929, and all the documents were placed on the record on that date, except certain insurance policies which were produced on 25th March 1931. It is conceded by Mr. Jagan Nath before us that these insurance policies were not material for the decision of the case, and that his client had no evidence to produce in rebuttal of these policies. Nor is it correct to say that any witness was examined on that date, whose name had not been given by the plaintiff before. The case was originally fixed for the examination of the evidence of both parties; whenever an adjournment became necessary the Court definitely ordered the defendant to be ready with his evidence at the next hearing. The defendant did

not summon the Government handwriting expert or any other person through Court, nor was any witness in attendance at any of these hearings. It is significant that there is no statement or affidavit by Mr. Harish Chandra, who was the leading counsel for the defendant in the lower Court, that he wanted to produce further evidence, and Mr. Jagan Nath was unable to give us the names of witnesses whom his client wished to summon and who might have been in a position to give material evidence bearing on the points involved in the case. I have no doubt that the defendant-appellant has not been prejudiced in any way by the procedure adopted by the Court, that he had really no evidence to produce and, in any case, he was not entitled to an adjournment for the production of the expert whom he had not summoned at the proper time. For all these reasons, I hold that the contention is without any substance and must be rejected.

The claim as laid in the plaint was for recovery of the amount due on foot of the three following deeds: (a) a cash credit mortgage bond (Ex. P-1), dated 29th October 1909 and registered the same day purporting to be executed by Pandit Joti Parshad adopted son of Dwarka Das and his natural father Pandit Ram Chandra in favour of the Punjab Banking Co. in respect of properties described in paragraph 2 (e) of the plaint as Nos. (1) to (11), situate in Simla, whereby the mortgagors could draw upto a limit of Rs. 50,000 bearing interest at $7\frac{1}{2}$ per cent with half-yearly rests; (b) another cash credit mortgage-bond (Ex. P-14), dated 22nd June 1912 and registered on the same date, purporting to be executed by the aforesaid Pandits Joti Parshad and Ram Chandra in favour of the Punjab Banking Co., Ltd., in respect of properties described in para. 2 (e) of the plaint as Nos. (1) to (6) and (8) to (11), situate in Simla, and No. (12) situate in Dagshai Cantonment, whereby the mortgagors were allowed to draw to a further limit of Rs. 25,000, bearing interest at $7\frac{1}{2}$ per cent with half-yearly rests; and (c) a mortgage deed (Ex. P-16) purporting to be executed by Pandit Ram Chandra on behalf of himself and as the certificated guardian of Brij Raj Saran, minor, adopted son of Pandit Joti Parshad deceased, bearing date 6th March 1918 and registered on 17th April 1918 in favour of the

Alliance Bank of Simla, Ltd., (with which the Punjab Banking Co., Ltd., had been incorporated in the meantime) securing a further sum of Rs. 24,203-6-3 and interest on the entire sum of Rs. 99,203-6-3 at 9 per cent from 1st January 1918, with half-yearly rests.

Along with the plaint was filed a copy of the account (Ex. P-17) from 1st January 1918 to 3rd October 1922, the date of the suit, giving the details of the account of the defendants with the plaintiff Bank. Besides debiting the defendant with the annual fire insurance premia, other incidental charges, and interest at 9 per cent with half-yearly rests, it showed a further cash advance of Rs. 25,000 on 10th January 1920. It was stated in the plaint that subsequent to the execution of the third mortgage-bond (Ex. P-16) properties Nos. (2), (4), (9) and (11) had been sold with the consent of the mortgagors and the sale-proceeds credited in the account, as was duly shown in Ex. P-17. It was accordingly alleged that on the date of the suit, the sum due by the defendant to the plaintiff was Rs. 50,007-3-6, for which amount, together with future interest at the stipulated rate, a decree was claimed realizable by sale of the mortgaged properties, with liberty to the plaintiff to apply for a decree for the balance (if any) recoverable from the person and other properties of the defendants.

In the written statement, filed on behalf of Brij Raj Saran, minor, his next friend denied knowledge of the dealings of Joti Parshad and Ram Chandra with the Punjab Banking Co. or the Alliance Bank of Simla. He further pleaded that the property mortgaged had been inherited by Joti Parshad from his adoptive father Dwarka Das, that the money was not required for any ancestral business or the benefit of the family and that, therefore, the first two mortgage-bonds, even if executed by Joti Parshad, were without necessity and not binding on the defendant. With regard to the third mortgage-deed (Ex. P-16) it was denied that it had been executed by Ram Chandra as guardian of the minor or that the minor was bound by his act. It was further averred that the plaintiff was in no case entitled to recover from the properties in dispute any advances made after the execution of Ex. P. 16 as the same were not charged thereon. It was also stated that it appeared from the

account filed by the plaintiff Bank that it had realised the full amount due on the mortgage and that the subsequent advances "do not concern the defendant or his property." On these pleadings the several issues were framed of which the following only are material for the purposes of this appeal :

4. (a) Were the prior mortgages (Exs. P. 1 and P. 14) executed by Joti Parshad and Ram Chandra? (b) If so were they without consideration? 5. Was the third mortgage (Ex. P. 16) executed on behalf of the minor by Ram Chandra, his guardian? 6. Was the money raised on the third mortgage for the benefit of the minor? 7. Can the minor, through his present guardian, repudiate execution, whether consideration has passed to him or not? 8. Had the consideration of the previous mortgages been repaid in full before the advance of Rs. 25,000 was made? 9. Can the subsequent advance be recovered under the mortgage or as simple money debt?

Subsequently, it was ordered that issue 6 be struck off as it did not arise, the mortgage having been effected by the certificated guardian with the leave of the Court under Act 8 of 1890. The trial Court found against the defendant on all the issues and passed a preliminary decree, and later on a final decree, as stated above. Before discussing the various questions which have been argued before us, it will be convenient to state a few facts on which there is no controversy between the parties. It is common ground that the properties in dispute originally belonged to Pandit Dwarka Das of Jagadbari. He had no son but had two daughters, Mt. Raja Devi and Mt. Daropdi. Mt. Raja Devi was married to Ram Chandra, from whom she had a son Joti Parshad. The properties in question eventually came to Joti Parshad, who claimed to be the adopted son of Dwarka Das. Joti Parshad appears to have attained majority about 1907, and in 1909 when, according to the plaintiff, the dealings with the Punjab Banking Company began, he was a student reading in the Government College, Lahore. Joti Parshad died in July 1915 without issue, leaving a widow Mt. Ganpati Devi. His property was taken by his natural sister's son Brij Raj Saran, as his adopted son. Brij Raj Saran was a minor at the time and in 1917 Ram Chandra was appointed his guardian under Act 8 of 1890. Ram Chandra died in December 1922 shortly after the institution of the suit.

The case for the plaintiff is that on 23rd September 1909 Joti Parshad and Ram Chandra borrowed a sum of Rupees 10,000 on a promissory-note from the Punjab Banking Company. Subsequently another promissory-note for Rs. 3,000 was executed on 2nd October 1909. The amount due on these two promissory-notes was secured by deposit of title deeds of some of the properties now in dispute. Later on it was arranged that they be allowed to have a Cash Credit Account upto a limit of Rs. 50,000 on the security of properties Nos. (1) to (11), and accordingly on 29th October 1909 a deed was executed on behalf of Joti Parshad and Ram Chandra and registered at Simla. This deed is Ex. P-1, printed at pp. 8 to 11 of Vol. 2, of the paper-book. It purports to be signed by Ram Chandra for himself and as the attorney of Joti Parshad, acting under a general power of attorney dated 29th January 1908 [Ex. P-5 (a)], printed at p. 1, Vol. 2 of the paper book. This deed is attested by another Joti Parshad, who was an Accountant of the Punjab Banking Company, at that time, and one Lal Ditta, a clerk in the Bank. It was presented for registration by Pandit Ram Chandra in person and was duly registered by the Sub-Registrar of Simla on 29th October 1909. In the lower Court it appears to have been argued that the execution of the power of attorney Ex. P-5 (a) by Joti Parshad in favour of Ram Chandra was not proved, but Mr. Jagannath abandoned that contention and admitted before us the genuineness of that document. He contended, however, that the signatures of Ram Chandra on the bond Ex. P-1 had not been proved and, therefore, that document could not be said to have been duly executed by him either on his own behalf or as the attorney of Joti Parshad. As stated already, Ram Chandra died in 1922 and it is in evidence that the two attesting witnesses Joti Parshad (accountant) and Lal Ditta have also died. The signatures of both these attesting witnesses, however, have been proved by the evidence of P. W. 3, Oldrini, Manager of the Simla Industrial Bank, and Bishambar Das, Clerk, Imperial Bank, who both were for a number of years in the service of the Punjab Banking Company and had occasion to see the signatures of Joti Parshad and Lal Ditta, attesting witnesses, who also

were employed in the same office. The plaintiffs also examined P. W. 8, Mohammad Ali, Accountant, Imperial Bank, Ambala Branch, who was employed in the Punjab Banking Company from 1904 to 1913 and P. W. 9, Mehr Chand, who was in its service since 1908 till its amalgamation with the Alliance Bank and has since the liquidation of that Bank been working under the liquidators. Both these witnesses identified the signatures of Ram Chandra on Ex. P-1 as well as the two other bonds, Ex. P-14 and Ex. P-16, and also on a large number of other documents. The learned Subordinate Judge, who passed the preliminary decree had the benefit of seeing these persons in the witness-box and has accepted their testimony on this point as correct. Mr. Jagan Nath has subjected their statements to minute and detailed examination and had urged that they are not reliable persons. But after giving due weight to his criticism, I do not see any reason to doubt their identification of the signatures of Ram Chandra on the three mortgage-bonds Exs. P-1, P-14 and P-16. The first two of these bonds, Ex. P-1 and Ex. P-14, purports to have been presented for registration by Ram Chandra himself and each of them contains the endorsement of the Sub-Registrar, made at the time, stating that he had satisfied himself as to the identity of the executant. Under S. 60 (2), Registration Act, the facts mentioned in these endorsements are admissible for the purpose of proving that the documents had been duly registered and that the facts mentioned in the endorsements referred to in Ss. 52, 58 and 59 had occurred as mentioned therein. As observed by their Lordships of the Privy Council in 33 Cal 537 (1):

The registration of a document is a solemn act to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present and are competent to act, and are identified to his satisfaction, and all things done before him in his official capacity and verified by his signature will, unless it be shown that a deliberate fraud on him has been successfully committed, be presumed to be done duly and in order.

The Sub-Registrar's endorsements, duly made under S. 60, are relevant evidence for proving the execution of these docu-

ments: 116 I C 911 (2). They therefore lend support to the sworn testimony of Ali Mahommed and Mehr Chand. Further with regard to Ex. P-14 it is stated in the Sub-Registrar's certificate, dated 22nd June 1912, that the person who identified Ram Chandra before the Sub-Registrar was Lala Harish Chandra, Pleader. This gentleman was examined as P. W. 1 in the present case and proved his own signatures under the endorsement of the Sub-Registrar made in token of his having identified the executant, Pandit Ram Chandra, before that officer. He also deposed that Pandit Ram Chandra was present before the Sub-Registrar at the time of the identification. Lala Harish Chandra was the leading counsel for the defendant in this case in the Court below and there is no reason to doubt his veracity. The presence of Ram Chandra before the Sub-Registrar at the time of the registration of Ex. P-14 is therefore proved by unimpeachable testimony. Mohammad Ali is one of the attesting witnesses of Ex. P-14 and has sworn that Ram Chandra signed it in his presence. In addition to this we have on the record numerous letters proved to have been written by Ram Chandra or Joti Parshad or both, admitting their dealings with the Bank under Ex. P-1 confirming the balances due at the end of the various half-years, and asking for indulgence in the re-payment of the loan. In this connexion reference may be made inter alia to the following letters :

(1) Exhibit P-21 (A), dated 25th August 1910; by Ram Chandra; (2) Ex. P-24 (A), dated 29th July 1911 by Ram Chandra and Joti Parshad; (3) Ex. P-25 (A), dated 18th October 1911 by Joti Parshad; (4) Ex. P-28 (A), dated 8th November 1911 by Joti Parshad; (5) Ex. P-30 (A), dated 16th December 1911 by Joti Parshad; (6) Ex. P-31 (A), dated 12th January 1912 by Joti Parshad; (7) Ex. P-32 (A), dated 15th February 1912 by Joti Parshad; (8) Ex. P-33 (A), dated 20th February 1912 by Joti Parshad; (9) Ex. P-36 (A), dated 26th February 1912 by Ram Chandra; (10) Ex. P-40 (A), dated 1st April 1912 by Joti Parshad. These letters are printed at pp. 51 to 58, Vol. 2 of the paper-book. They admit clearly the existence of the Cash Credit

1. Ganga Moyi Debi v. Trollukhya Nath, (1906) 33 Cal 537=33 I A 60 (P O).

2. Piara v. Fathu, 1929 Lah 711=116 I O 911=11 L L J 216.

Account secured on the Simla properties and the genuineness of the plaintiff's account for those years. It also appears from these letters, that Joti Parshad and Ram Chandra had overdrawn the amount of the agreed limit of Rs. 50,000 under Ex. P-1, and the Punjab Banking Company had, through its Pleader, made demands for repayment of the excess, or if that was not possible, to have it secured. Accordingly the mortgagors approached the Bank for raising the Cash Credit limit to Rs. 75,000 agreeing to secure the additional amount by a further mortgage of 10 out of the 11 properties included in Ex. P-1 and a first mortgage of two bungalows at Dagshai. In accordance with this arrangement, Ex. P-14 was executed. All this evidence, unrebutted as it stands on the record, is convincing proof of the genuineness of the signatures of Ram Chandra on Ex. P-1 and Ex. P-14 and I uphold the finding of the lower Court to this effect.

On this finding Mr. Jagan Nath conceded that Ex. P-1 must be taken to have been duly executed, but as regards Ex. P-14 he raised the following further objections: (1) that the registered power of attorney [Ex. P-5 (a)], which had been given by Joti Parshad to Ram Chandra on 29th January 1908 and under which the latter purported to act on Joti Parshad's behalf in signing Ex. P-14 and presenting it for registration had spent itself and was no longer in force in June 1912: (2) that the aforesaid power of attorney gave authority to the agent to act in respect of the properties at Jagadhari and in the town of Simla, and, therefore, the mortgage of the bungalows at Dagshai was unauthorised; and (3) that as some of the properties mortgaged were situate within the limits of Dagshi Cantonment where the Transfer of Property Act is in force, this document required to be attested in accordance with the provisions of S. 59 of the Act, and that as attestation in accordance with the formalities laid down therein has not been proved, this deed could not be admitted in evidence to charge not only the properties in Dagshai but all the properties covered by it.

In support of the first objection the learned counsel drew attention to the opening sentences of the power of attorney [Ex. P 5 (a)] which stated that the executant Joti Parshad was at the time a student and, therefore, could not manage

the properties mentioned therein, and for that reason he was appointing Pandit Ram Chandra as his general agent. The learned counsel pointed out that Joti Parshad had finished his student career in 1910 and at the time of the execution of Ex. P-14 he was practising as a pleader, and consequently the power of attorney had become ineffectual. In my opinion, this contention is devoid of force and I have no hesitation in rejecting it. It is no doubt true that Joti Parshad was a student at the time when the power of attorney was executed, but there is nothing in the document to limit its operation to the period during which he was prosecuting his studies. Admittedly the power of attorney was never cancelled and its existence is admitted in some of the letters by Joti Parshad, written after he had started practice as a pleader, to which reference has already been made. Further, in several letters, written after the execution of Ex. P-14, Joti Prasad clearly admitted the transaction evidenced by Ex. P-14 and, therefore, even if there was any defect in Ram Chandra's authority, he had clearly ratified it [see e.g., Ex. P-41 (A), Ex. P-42 (A) and Ex. P-43 (A)] signed by Ram Chandra and Joti Parshad and bearing date 26th May 1912 (which is obviously a mistake for 26th June 1912), and letters Ex. P-29A, dated 14th November 1914, Ex. P-63 A, dated 10th May 1915 and Ex. P-64 A, dated 11th May 1915, all signed by Joti Parshad.

The second objection is based on an obvious mis-reading of Ex. P-5 (a). By this document the agent was authorised to sell or mortgage properties situate in "Qasba" Jagadhari and in "Koh Simla," which means "Simla Hills" and not "Simla town." Admittedly Dagshai is situate in the "Simla Hills" and, therefore, Ram Chandra had authority to alienate all the properties mentioned in Ex. P-14. As regards the third objection, it is no doubt true that the Transfer of Property Act is in force within the limits of the Cantonment of Dagshai, where property No. 12 is situate. But the mortgage bond (Ex. P-14) was not executed there, but was executed and registered in Simla, where that Act is not in force, and it included, besides the Dagshai properties, ten other properties situate in Simla. The appellant's learned counsel was unable to cite any authority in support of

his proposition that such a transaction even though entered into and carried out at a place where the Act does not apply, must be executed, attested and registered according to the formalities laid down in S. 59 of the Act. In such cases, it is the *lex loci contractus* which determines the form in which the transaction is to be clothed, and not the *lex situs* of every one of the properties comprised in it. It has accordingly been held, that it is not necessary to the validity of an "equitable mortgage" by deposit of title-deeds that the property to which the title-deeds relate should be situate within the territories where such "equitable mortgages" are allowed: See 11 Lah 564 (3) at p. 572, 14 All 238 (4) and 38 Bom 372 (5); see also 51 Cal 86 (6) and 1931 P C 239 (7) where such transactions were recognized as valid. Reference may also be made to the recent case of this Court reported in 35 P L R 249 (8) at p. 255, where it was observed that in such cases the determining factor as to the validity of the mortgage is not the place where the property alleged to have been mortgaged is situate, but the formalities required by the law for the creation of a valid mortgage at the place where the title deeds were alleged to have been delivered to the creditor.

It seems to me that the same principle governs the case before us, and, therefore, it was not necessary for the plaintiff to prove attestation of Ex. P-14 as required by S. 59, T. P. Act. Further, even if it were held otherwise the deed would be unenforceable as regards the Dagshai property only, but will hold good in respect of the properties situate in Simla. In my opinion all the objections against the validity of Ex. P-14 are without substance and must be rejected. Before concluding this part of the case, it seems necessary to point out that Mr. Jagan Nath admitted before us that there was no substance in the plea raised in the

written statement that the mortgages, Ex. P 1 and Ex. P-14, were not binding on Brij Raj Saran, appellant, as the mortgaged properties were ancestral in the hands of Joti Prasad, and that the money raised thereon was not required for any ancestral business or other family necessity. It is no doubt true that the properties in question originally belonged to Dwarka Das and from him they had devolved on his adopted son Joti Parshad, and in this sense they were ancestral in his hands. But in 1909 and 1912, when the mortgage transactions, Ex. P-1 and Ex. P 14, were entered into, Joti Parshad was the sole owner of these properties, which were not held by him in coparcenary with anybody else. At that time he was childless and Brij Raj Saran was not adopted by him until 1913. He had, therefore, full and unrestricted power to mortgage these properties and it is not open to his subsequently-adopted son to impeach his antecedent mortgages on the ground of want of family necessity.

Before dealing with the objections relating to the third mortgage (Ex. P-16) it is necessary to state briefly the circumstances in which that deed came to be executed. As already stated, Joti Parshad died in 1915, and his estate passed to his adopted son, Brij Raj Saran. At the time of Joti Parshad's death the amount due on foot of the two Cash Credit bonds (Exs. P-1 and P. 14) was Rs. 95,620. Soon after Joti Parshad's death, the Agent of the Simla branch of the Punjab Banking Company wrote to Ram Chandra demanding repayment of the loan, suggesting at the same time that if he and the heirs of Joti Parshad could not repay, they might secure the overdraft (Ex. P 17). Ram Chandra replied by letter (Ex. P-68-A) dated 26th August 1915, admitting the correctness of the account and suggesting that as arranged between the Bank and Joti Parshad in his lifetime the rents of the Simla properties would thenceforward be paid to the Bank and that a portion of the properties mortgaged would be sold in order to pay off the debt, or steps taken to secure the overdraft. After some further correspondence Ram Chandra applied to the Senior Subordinate Judge, Simla, for his appointment as guardian of Brij Raj Saran, minor, under Act 8 of 1890, and on 5th April 1917 he was so appointed. In the certificate of appointment (Ex. P-92) issued by the Senior Subordinate Judge

3. Ralli Brothers, Karachi v. Punjab National Bank Ltd., 1930 Lah 920=129 I O 21=11 Lah 564=31 P L R 934.

4. Madho Das v. Ram Kissen, (1892) 14 All 238 =1892 A W N 97.

5. Behram Rashid v. Sorabji Rustomji, 1914 Bom 15=23 I O 140=16 Bom L R 35=38 Bom 372.

6. Imperial Bank of India v. U Rai Gyaw Thu & Co., Ltd., 1923 P O 211=76 I O 910=50 I A 283=1 Rang 637=51 Cal 86 (P C).

7. Papiah Naidu v. Naganathasethupathi, 1931 P O 289=194 I O 328=58 I A 333 (P C).

8. Gurdas Mal v. Punjab & Sind Bank, Ltd., Rawalpindi, 1933 Lah 972=147 I O 942=35 P L R 249.

on 5th April 1917, it was specifically stated that the guardian would have no power to alienate the property of the minor or any part thereof without the sanction of the Court. Accordingly, on 9th October 1917, Ram Chandra made an application to the Court (Ex. P-93) in which he pointed out that, in addition to the sum of Rs. 75,000 secured on Exs. P-1 and P-14, about Rs. 25,000 more was due by Joti Parshad to the Alliance Bank of Simla (with which the Punjab Banking Company had been incorporated in the meantime), that the Bank was making demands and there were no means of paying off the amount and, therefore, he asked for permission to effect a mortgage of the immoveable properties of the minor to the Bank. After satisfying himself as to the correctness of the account, the Subordinate Judge (Mr. H. H. Jenkyns) accorded sanction to Ram Chandra to further mortgage the properties for securing the additional amount. Accordingly the mortgage-deed Ex. P-16 was drawn up. In this deed it was recited that the total amount due by the minor to the Bank was Rs. 99,203-6-3, that out of this amount Rs. 75,000 was secured on the two Cash Credit mortgage-bonds (Exs. P-1 and P-14) which were described as the "principal indentures," and that the 12 properties covered by the aforesaid bonds, were being further mortgaged to secure the overdraft of Rs. 24,203-6-3 and the interest on the entire sum of Rs. 99,203-6-3 calculated at 9 per cent. per annum with half-yearly rests from 1st January 1918.

This mortgage-deed (Ex. P-16) bears the date, 6th March 1918, and purports to be executed by Ram Chandra for himself and also in his capacity as the guardian of Brij Raj Saran minor, and to be attested by two witnesses, namely, Mr. B. L. Kitchlew, Extra Assistant Commissioner, Magistrate, and Mr. Shugan Chand, Assistant Treasurer, Government Treasury, Ambala City, above whose signatures it is stated that it had been signed, sealed and delivered by Pandit Ram Chandra in their presence. The deed was presented for registration at Simla on 17th April 1918 by Hamir Singh, who is described in the Sub-Registrar's endorsement as holding "a duly authenticated special power of attorney on behalf of Pandit Ram Chandra" and was duly registered by that officer on that date. Mr. Jagan Nath raises four objections against the admis-

sibility and the validity of this document: (1) That the signatures of Ram Chandra on this document have not been proved; (2) that it included the Dagshai property and therefore required to be attested in the manner laid down in S. 59, T. P. Act, and that it has not been proved that it was so attested; (3) that Hamir Singh, who presented the document for registration, did not hold a "duly authenticated power of attorney" as required by Ss. 31 and 32, Registration Act, and therefore its registration was invalid; and (4) that the sanction of the Senior Subordinate Judge to mortgage the properties was improperly obtained by Ram Chandra and therefore the minor is not bound by it.

Ram Chandra's signatures on this document are proved by the evidence of Mohammad Ali (P. W. 8) and Mehr Chand (P. W. 9) and for the reasons already given, I accept their evidence as to the identification of Ram Chandra's signatures as correct. The attesting witnesses, Mr. Shugan Chand and Mr. B. L. Kitchlew, were examined on commission: see Vol. 3, pp. 2 to 10 of the paper-book. They admitted their signatures on the deed, but stated that they could not identify the signatures of Ram Chandra. They deposed, contrary to the clear recital in the endorsement appearing above their signatures, that Ram Chandra did not sign the deed in their presence. The story given by Shugan Chand as to how he and Mr. Kitchlew signed the document is, to say the least of it, very curious. He stated that in March 1918, Mr. Kitchlew was the Treasury Officer and Magistrate, First Class, at Ambala and that he was the Deputy Treasurer in the Government Treasury there, working under the Treasurer Raja Joti Prashad of Jagadhri; Raja Joti Parshad sent to Ambala the document (Ex. P-16), signed by the alleged executant with instructions that he (Shugan Chand) should sign it as an "attesting witness" and have it signed by Mr. Kitchlew also. Accordingly both Mr. Kitchlew and he affixed their signatures on it in the absence of the alleged executant, and made it over to Raja Joti Parshad's messenger. Mr. Kitchlew stated that he "did not remember anything, except that he identified his own signatures on the deed."

He stated that he did not know Ram Chandra at all. Now, after carefully reading their evidence the least that I can say is that both these persons appear

to be suffering from a serious lapse of memory. It is incredible that responsible officers of the position of Mr. Kitchlew and Mr. Shugan Chand should have witnessed a document without their knowing Ram Chandra or without his having actually come before them, and solemnly appended their signatures to an endorsement, that it had been "signed, sealed and delivered" by the aforesaid Ram Chandra in their presence. But be that as it may, the matter is not of much importance as Ram Chandra's signatures on the deed are proved aliunde, and the deed having been executed at a place where the Transfer of Property Act was not in force, attestation, according to the formalities laid down in S. 59, T. P. Act, was not necessary. I hold therefore that there is no force in the first two objections raised by Mr. Jagan Nath against the admissibility of this deed.

The third objection relates to the invalidity of the registration of Ex. P-16, and is based on the contention that the document was not presented for registration by a person authorised in accordance with the provisions of Ss. 32 (c) and 33 (a), Registration Act. Under these sections, if the principal at the time of executing the power-of-attorney resides in any part of British India in which the Act is for the time being in force, the power-of-attorney must be executed before, and authenticated by, the Registrar or Sub-Registrar, within whose district or sub-district, the principal resides. As already stated, the mortgage deed (Ex. P-16) was presented before the Sub-Registrar, Simla, by Hamir Singh, and in the Sub-Registrar's endorsement it is stated that Hamir Singh held "an authenticated special power-of-attorney" on behalf of Ram Chandra. This power-of-attorney was not produced at the trial, and Mr. Jagan Nath has suggested that Hamir Singh really acted under the mukhtarinama (Ex. P-78-A), dated 6th March 1918, printed at p. 97, Vol. 2 of the paper-book, which does not purport to have been authenticated by Ram Chandra before the Sub-Registrar of Jagadhari as it should have been under S. 33 (a) of the Act, but before a Magistrate (Mr. B. L. Kitchlew), and therefore it was not presented by a properly authorised person, and its registration is invalid. It is however clear from the correspondence on the record that Ex. 78-A was not the power-

of-attorney under which Hamir Singh presented the mortgage deed Ex. P-16 for registration. It appears that originally Ram Chandra sent from Jagadhari to the Bank at Simla Ex. P-78-A, along with the mortgage deed, under the belief that this was a properly authenticated power-of-attorney.

The legal adviser of the Bank however objected that this was not sufficient and therefore, on 13th March 1918, Ex. P-78-A, was returned to Ram Chandra for having it authenticated before the Sub-Registrar of the place where he resided, or getting another power-of-attorney properly drawn up and authenticated. Ram Chandra then appears to have presented Ex. P-78-A, before the Sub-Registrar, Jagadhari, for authentication, but that officer declined to do this, as the document had already been attested by Mr. Kitchlew. Thereupon Ram Chandra drew up another power-of-attorney in Urdu, and after having it duly authenticated by the Sub-Registrar, Jagadhari, sent it to the Bank. All this is clear from his letter Ex. P-80-A, printed at p. 100, Vol. 2, of the paper-book. This Urdu power-of-attorney appears to have been presented before the Sub-Registrar, Simla, along with the mortgage deed by Hamir Singh, and he, after satisfying himself that it had been properly authenticated and making a note to that effect in his certificate, registered the mortgage deed. Under S. 60 (2), Registration Act, the endorsement of the Registrar is presumptive evidence of the fact that he had so satisfied himself. It therefore lay on the defendant to show that this fact was incorrectly recorded. He has however led no evidence on the point. It is also important to note that no objection as to the invalidity of the registration was raised in the Court below and therefore the plaintiff did not think it necessary to prove any further facts as to the contents of the Urdu power-of-attorney and its due authentication. In these circumstances the defendant cannot be allowed to raise this question, which is a mixed question of fact and law, for the first time in appeal. In any case, in the absence of any materials on the record showing the contrary, the recital in the Sub-Registrar's endorsement must prevail, and the objection must be held to be unsubstantiated.

The third objection to this transaction is that the sanction of the Guardian

Court for entering into this mortgage was improperly obtained by Ram Chandra and, therefore, the minor is not bound by it. It is also contended in this connexion, that this point was covered by issue 6 as originally framed, but the learned trial Judge erroneously struck off that issue. In my opinion both these contentions are devoid of force. It is settled law that a person who advances money to a guardian on a mortgage of the minor's property, effected under sanction of the Guardian Court is entitled to trust the Court's sanction and is not bound to go behind it and enquire as to the expediency or necessity of the loan for the benefit of the minor's estate, unless there was fraud or underhand dealing, to which the mortgagee was a party: 11 Cal 379 (9) at p. 383, 73 P R 1919 (10) and 103 I C 698 (11), 11 C L J 202 (12), 41 IC 302 (13), 47 All 8 (14), 50 Mad 217 (15) and 8 Pat 48 (16). In this case no fraud or underhand dealing on the part of the plaintiff Bank was alleged in the written statement of the defendant-appellant. In the absence of any allegation to this effect, therefore, the Bank was completely protected, and the trial Judge was clearly right in holding that issue 6 did not arise on the pleadings and should be struck off. We expressly asked Mr. Jagannath, if it was his case now that the Bank had been guilty of any fraudulent conduct in this transaction, but he frankly stated that this was not so. Indeed, as already stated, it is clear from the correspondence between the Bank and Ram Chandra, that Ex. P-16 had been executed to secure the overdraft over the sanctioned limit of the two earlier cash credit mortgages, which had been outstanding since Joti Parshad's lifetime, and the interest which had accrued due thereon. There can, therefore,

be no manner of doubt that its repayment was a necessity, for which the Guardian Court was justified in sanctioning a further mortgage of the same properties.

Mr. Jagannath however strenuously objected that the rate of interest fixed in this mortgage was higher than that in Ex. P-1 or Ex. P-14, and urged that it should be reduced accordingly. But it must be borne in mind that this mortgage-deed was executed in 1918, when owing to the Great War and other causes the money market was very tight, and no evidence has been led to show that it was possible for Ram Chandra to raise money at a lower rate. It cannot, therefore, be said that the Guardian Court was wrong in sanctioning the mortgage at 9 per cent per annum with the usual half-yearly rests. As a result of the foregoing discussion it must be held that the various objections raised against the admissibility and validity of Ex. P-16 are unsound, and that this deed evidenced a valid transaction, which is binding on the appellant Brij Raj Saran. The dealings between the parties subsequent to August 1918 were not of a complicated nature. In order to reduce the liabilities of the minor, Ram Chandra, with the sanction of the Guardian Court, sold some of the mortgaged properties and paid the sale proceeds to the Bank. He also continued to pay to the Bank the rents realized from the tenants of the Simla properties. Accordingly on 9th January 1920, the balance due on foot of the three mortgage-deeds Ex. P-1, Ex. P-14 and Ex. P-16, stood at Rupees 19,607-9-6 only. The account shows, however, that on 10th January 1920, a further sum of Rs. 25,000, was debited to the minor, and from that date interest at 9 per cent with half yearly rests has been charged thereon. Mr. Jagan Nath has urged that this loan of Rs. 25,000 was unauthorized and is not binding on the minor, and that in any case it was not covered by any of the three mortgage bonds, Ex. P-1, Ex. P-14 and Ex. P-16, and therefore could not form a valid charge on the properties in dispute. In order to determine the soundness of these objections, it is necessary to set out in some detail the circumstances under which this amount was advanced. It appears that besides the amount due to the Punjab Banking Company and the Alliance Bank of Simla, Joti Parshad

9. Ganga Pershad Sahu v. Maharani Bibi, (1885) 11 Cal 379=12 I A 47=4 Sar 621 (P C).
10. Rahman v. Hussain Bi, 1919 Lah 391=52 I C 841=73 P R 1919.
11. Indar Singh v. Plara Singh, 1927 Lah 665=103 I C 698.
12. Sital Rai v. Nandalal, (1910) 11 C L J 202=1 I C 304=13 C W N 591.
13. Akhil Chandra v. Girish Chandra, 1918 Cal 453=41 I C 802=21 C W N 864.
14. Buddhoo v. Sheo Charan, 1924 All 875=82 I C 328=22 A L J 851=47 All 8.
15. Raman Chettiar v. Tirugnana Sambadam Pillai, 1927 Mad 233=99 I C 660=50 Mad 217=51 M L J 869.
16. Mahabir Das v. Jamuna Prasad, 1928 Pat 543=112 I C 488=8 Pat 48=9 P L T 553.

owed debts to other persons (e. g. Pandit Nanak Chand of Karnal, Pandit Rikhi Ram of Lahore and others), and after his death these creditors were pressing Ram Chandra, as the guardian of Brij Raj Saran, for payment. Ram Chandra however had no money with him to pay, and therefore on 20th October 1919 he applied to the Guardian Court (Ex. P-135) for permission to borrow Rs. 25,000 from the Alliance Bank of Simla in order to liquidate these debts, and to repay the Bank by sale of some of the minor's properties. The Guardian Judge (Mr. Addison) made a lengthy enquiry into the matter and after satisfying himself that Rs. 25,000 was required immediately to pay off the more pressing creditors, granted permission to Ram Chandra to arrange for a further loan of Rs. 25,000 from the Bank on the security of the already mortgaged properties. The Judge carried on correspondence with the Bank with a view to have the rate of interest reduced below 9 per cent but the Bank refused to do so in view of the condition of the money market. The Judge accordingly sanctioned the loan on a mortgage of the minor's immoveable properties on 20th December 1919. It is important to note however that in the sanction accorded by the Judge, or in the correspondence with the Bank, it is not stated that compound interest would be charged on the loan. It must therefore be taken that the sanction of the Court was for raising the loan at 9 per cent simple interest.

Admittedly no formal deed was executed at the time of this fresh advance. It seems that this was not considered necessary as it was understood that the amount would soon be repaid by sale of one or more of the properties which were already mortgaged with the Bank. Accordingly the Bank, with the concurrence of Ram Chandra debited the amount to the account which was running under the third mortgage deed Ex. P-16, and on the aggregate sum thus arrived at, it continued to charge compound interest at 9 per cent in accordance with the terms of that deed. That the sum of Rs. 25,000 was advanced by the Bank to Ram Chandra under the sanction granted by the Guardian Court, is not denied by the appellant's learned counsel. That Ram Chandra paid this amount in liquidation of debts due by Joti Parshad to other creditors is proved beyond doubt on the record.

The Guardian Judge appears to have made careful enquiries into the existence of these debts, and seen that the amount raised from the Bank was paid to the creditors. The Bank advanced the amount in perfect good faith and indeed Mr. Jagan Nath has not suggested that there was any fraud or underhand dealing on its part. The defendant-appellant is therefore clearly liable to repay this loan. The question for decision however is whether it is a charge on the properties in dispute. The learned trial Judge has held that this amount must be taken to have been drawn under the two earlier Cash Credit mortgage bonds (Exs. P-1 and P-14) which had been kept alive by Ex. P-16), and is, therefore, a valid charge on the properties. This conclusion, however, appears to be incorrect, in view of the fact that the Cash Credit accounts, Exs. P-1 and P-14, could be operated by Joti Parshad and Ram Chandra, and though they had not "merged" in the third mortgage-deed (Ex. P-16), they could not be drawn upon by any one after the death of Joti Parshad. There was, however, no legal bar to the guardian of Joti Parshad's adopted son, on whom the estate had devolved, to further hypothecate the same properties for a fresh loan after obtaining the necessary sanction from the Guardian Court, and it was immaterial whether the hypothecation was made orally or by a deed. In the circumstances explained above, and probably with a view to save money on stamp and registration, it appears, that an oral mortgage in terms of the sanction of the Guardian Court was entered into, and the amount debited in the books of the Bank in the same account. Mr. Jagan Nath, however, urges that no such oral mortgage was alleged in the plaint, and, therefore, it should not be allowed to be relied upon now. Technically there is some force in this argument, but in view of the fact that a complete copy of the account, showing the advance of Rupees 25,000 was filed with the plaint, and before the trial of suit, copies of the entire proceedings before the Guardian Court sanctioning the loan of Rs. 25,000 on the same immoveable properties, were placed on the record, the defendant-appellant cannot be said to have been prejudiced in any way by the failure of the plaintiff to expressly plead the oral mortgage in the plaint. Mr. Jagan Nath conceded, that to

* this oral mortgage his client has no other objection to raise, besides the defence already put forward, which has been considered above. I accordingly hold that the sum of Rs. 25,000 advanced on 10th January 1920 is a valid charge on the mortgaged properties, but the Bank can be allowed only simple interest at 9 per cent per annum and not compound interest as has been charged in the account. It is no doubt true that Ram Chandra had agreed to pay interest at 9 per cent with half-yearly rests, but it is clear that in doing so he exceeded his authority. As already stated the sanction of the Guardian Judge did not authorise the guardian to pay compound interest, and Mr. Mehr Chand Mahajan for the Bank frankly conceded that the minor cannot be held liable to pay it. The amount payable on this advance, therefore, must be reduced accordingly. As a result of the foregoing discussion, it must be held that on the date on which the lower Court passed the preliminary decree i. e., 31st March 1931, the amount due to the plaintiff on the transactions in dispute and recoverable from the properties mentioned in para. 2 of the plaint was :

Rs. a. p.

(a) Rs. 19,607-9-6, with compound interest thereon at 9 per cent with half-yearly rests, calculated from 9th January 1920 to 31st March 1931, after giving credit for re-payments, as shown in the account and admitted as correct by the appellant's counsel ... 38,201 4 1

(b) Rs. 25,000 advanced on 10th January 1921, with simple interest at 9 per cent per annum from that date to 31st March 1931 ... 50,243 2 4

Total ... 88,444 6 5

Add costs of the suit in the lower Court ... 2,829 3 10

Grand Total ... 91,273 10 3

The lower Court should therefore have passed a preliminary decree for Rupees 91,273-10-3 and not Rs. 1,07,772-0-2. Adding to the sum found due on the above date, interest at 6 per cent thereon as allowed by the lower Court, the total amount due on 29th February 1936 is as follows :

As due on 31-3-1931 ... 91,273 10 3
Interest at 6 per cent from
1-4-1931 to 29-2-1936 ... 26,918 2 11

Total. 1,18,191 13 2

I would accordingly accept Civil Appeal No. 1201 of 1931 and in lieu of the preliminary decree passed by the lower Court on 31st March 1931, pass a preliminary decree in terms of O. 34, R. 4, declaring that on 29th February 1936 the sum payable to the plaintiff on the mortgages in dispute is Rs. 1,18,191-13-2 and ordering that if the defendants pay to the plaintiff on or before 31st May 1936 the aforesaid amount with simple interest at 6 per cent per annum on Rs. 91,273-10-3, the mortgaged properties described in para. 2 of the plaint shall stand redeemed and the plaintiff shall deliver all the relevant documents to the defendants ; and in default of such payment the plaintiff may apply to the Senior Subordinate Judge, Simla, for a final decree for the sale of the abovementioned properties. In the event of the sale-proceeds being insufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty to apply for recovery of the balance from the other property (but not the person) of Brij Ram Saran and also from the estate of Pandit Ram Chandra deceased in the hands of Hans Raj defendant. As the defendant-appellant Brij Raj Saran has failed on most of the points raised on his behalf he shall pay 3/4ths of the costs of this appeal (Civil Appeal No. 1201 of 1931) to the plaintiff-respondent. The final decree passed by the lower Court on 12th June 1933 must necessarily be set aside. I would accordingly accept Civil Appeal No. 1831 and Civil Appeal No. 1594 of 1933, and leave the parties to bear their own costs of these appeals.

Dalip Singh, J.—I agree.

B.D./R.K. Order accordingly.

A. I. R. 1936 Lahore 958

BHIDE AND CURRIE, JJ.

Fatteh Sher and others—Defendants—Appellants.

v.

Behari Ram and others—Plaintiffs—Respondents.

Second Appeal No. 657 of 1934, Decided on 6th November 1935, from order of Dist. Judge, Mianwali, D/- 11th December 1933.

Sind Sagar Doab Colonization Act (I of 1902)—Reclamation of land during continuance of Act—There could be no acquisition of "Adna Malkiyat" rights.

The reclamation of land during the continuance of the Sind Sagar Doab Act, could not result in the acquisition of any "Adna Malkiyat" rights at any time. [P 960 C 2]

J. N. Aggarwal and Kanwar Bhan—for Appellants.

M. L. Puri and Qabul Chand—for Respondents.

Bhide, J.—This judgment will dispose of the following twenty second appeals in which the facts are similar and the point for decision is the same: Nos. 657 to 674 of 1934 and Nos. 726—727 of 1934. The sole point for decision in these appeals is whether the plaintiffs are entitled to 'adna malkiyat' rights in the lands in dispute as claimed by them. The trial Court decided the point against them, but on appeal the learned District Judge has found it in their favour and decreed their suits. From that decision, the defendants have preferred these appeals. The lands in dispute are situated in different villages in the Bhakkar tahsil of the Mianwali district, but it was admitted before us that the material facts bearing on the only point which requires decision in these appeals are the same. These facts may be shortly stated as follows:

The plaintiffs in all these cases are ala and adna maliks, who claim to have reclaimed the lands in dispute and thus acquired adna malkiyat rights therein in accordance with the provisions of the wajib-ul-arz of 1878. It is admitted that the reclamation was made during the period from 1902 to 1929, when the Sind Sagar Doab Act was in force. It is common ground that during this period the plaintiffs were debarred from acquiring adna malkiyat rights, but plaintiffs claim that with the repeal of the Sind Sagar Doab Act in 1929 the prohibition as regards the acquisition of these rights ceased to operate and they are now entitled to be declared adna maliks on payment of jhuri, which they are and have been willing to pay but which defendants have refused to accept. The defendants on the other hand maintain that any reclamation made during the period when the Sind Sagar Doab Act was in force could not confer any proprietary rights at all, as the conditions relating to the acquisition of such rights were not then in operation. Before proceeding to discuss

the evidence relating to the above question, it may be stated that the Sind Sagar Doab Act was passed in the year 1902, with a view to establish the title of the Government in land to be acquired in connexion with the proposed construction of a canal in certain territories lying between the river Indus and the rivers Chenab and Jhelum, which are included within the limits of the Mianwali, Shahpur, Jhang and Jhelum districts and commonly known as the Sind Sagar Doab. This Act enabled the Government to take agreements from the proprietors of the villages concerned for the surrender of their rights in the land to be acquired, and in pursuance of the Act, agreements in a prescribed form were taken from the proprietors of the villages with which we are now concerned. Para. 2 of the agreement ran as follows:

From the date of this agreement up to the date of such surrender, no one shall, notwithstanding any law or custom to the contrary, acquire or be considered entitled to either proprietary rights or occupancy tenancy rights in the said lands or a part thereof by sinking a well, extending chahi lands, reclaiming barani land or cultivating the water-melon crop therein, as against Government. (Vide translation of the agreement marked as Ex. P-10 on the record of appeals Nos. 657—659.)

In order to give full effect to this agreement the terms thereof were also incorporated in the wajib-ul-arz prepared at the second settlement of 1902. With respect to the shamilat land, the villagers made the following declaration, therein (Vide Ex. P-11, typed paper book in C. A. Nos. 657—659 of 1934):

We, the proprietors of the village, have signed the agreement under the Sind Sagar Doab Act 1 of 1902. The Government shall take possession of the village shamilat on the introduction of the canal and shall return to the proprietors of the village as much area as shall be equal to 1/4th of the shamilat. We shall have powers, similar to the old in the 1/4th area returned to us by the Government. No one can acquire proprietary rights till then.

With regard to the reclamation of barani area, the following provision appears in para. 4 (c) of the same document:

On the barani area reclaimed, four annas per acre shall be charged which sum shall be allowed towards Ghahohari fund. Until the repeal of the agreement under the Sind Sagar Doab Act, the conditions relating to the acquisition of the proprietary rights in the shamilat shall remain in abeyance (saqat rahenge).

The same terms were repeated in the latest wajib-ul-arzes of the villages in 1924. It will be clear from the above that the acquisition of proprietary rights,

while the agreements under the Sind Sagar Doab Act were in force, was distinctly prohibited. The canal project, in connexion with which the Sind Sagar Doab Act was passed, was however eventually abandoned, and as a result the Act itself was repealed in the year 1929 (vide Punjab Act 6 of 1929). It is not disputed that as a result of the repeal of the Sind Sagar Doab Act, the agreements taken thereunder ceased to have any effect. The plaintiffs' contention (which has found favour with the learned District Judge) however was that the conditions as regards the acquisition of proprietary rights which were stated in the wajib-ul-arz of 1878, were only in abeyance or out of use during the period 1902-1929 and that on the repeal of the Sind Sagar Doab Act those conditions revived and the plaintiffs could become adna maliks of the land already reclaimed by them during that period of payments of jhuri, as provided in the earlier wajib-ul-arz of 1878.

'Jhuri' was not offered (and indeed it could not be offered owing to the agreement referred to above) at the time when the land was reclaimed; but the learned District Judge was of opinion that there was nothing in the wajib-ul-arz or any other relevant document to show that the 'jhuri' must be offered at or about the time when the land is reclaimed, and he therefore held that the payment of jhuri after the repeal of the Sind Sagar Doab Act in 1929 was valid for the purpose. It will thus appear that the main point for decision in these cases is the effect of the repeal of the Sind Sagar Doab Act on the rights of the parties in lands in dispute. The learned counsel for the respondents contended that all that was prohibited during the continuance of the agreements taken under the Act was the acquisition of proprietary rights and that all rights short of proprietary rights could be and were acquired during the period when the Act was in force. This contention is not, in my opinion, supported by the terms of the wajib-ul-arz of 1902 and 1924 and does not appear to be consonant with the object of the agreements taken under the Sind Sagar Doab Act. The wajib-ul-arz recites that the conditions with respect to the acquisition of the proprietary rights will be in abeyance [vide para. 4 (c) of the extract from the wajib-ul-arz of 1902-03 marked as Ex. P/11 referred to above]. The vernacular

expression used is "saqat rahenge." The learned District Judge has translated this expression as equivalent to "out of use." I think it will be more appropriate to take the expression as equivalent to "remain abated or cancelled" (vide Dictionaries of the Hindustani language by Fallan and Platts). All the conditions relating to the acquisition were thus inoperative during the period and it is not correct to say that merely the final stage of actual acquisition of proprietary rights was prohibited. If the contention of the learned counsel for the respondents were correct, the plaintiffs would have at least become 'Butamar' occupancy tenants as a result of the reclamation during the period from 1902-1929 (vide wajib-ul-arz of 1878 marked as Ex. P/12 on the record of Civil Appeal No. 657-659 of 1934); but they have been entered in the revenue records as mere tenants-at-will. Moreover, the object of the agreements under the Sind Sagar Doab Act was to prevent the accrual of any new rights during the period when the agreements were in force. According to the agreements, the proprietors of these villages had to surrender the shamilat area to Government and on the construction of the canal the Government was to select and restore one-fourth thereof to the proprietors. The rights of the proprietors (or their legal representatives) in the land so restored were to be identical with those existing at the time when the agreement was entered into (vide para 5 of the agreement Ex. P/10).

There could be no certainty as to what area would be thus restored and it was apparently for this reason that accrual of fresh rights in this area was prohibited. Consequently, even the accrual of rights, other than proprietary rights, e. g., occupancy rights would have been inconsistent with the object in view. The agreement was entered into in order to provide for the situation arising on the construction of the canal and not for the one which has now arisen owing to the unexpected abandonment of the project. It seems to me, therefore, that the reclamation of land during the continuance of the Act, could not result in the acquisition of any 'Adna Malkiyat' rights at any time as none of the conditions, according to which such rights could accrue, were in operation when the land was reclaimed. There is another aspect of the question, which

also deserves notice. According to the conditions of the *wajib-ul-arz* of 1878 the Ala Maliks had the first right to claim *shamilat* and after them the 'Adna Maliks' and these could become 'Adna Maliks' of the land reclaimed by payment of *jhuri*. If any of the Ala Maliks abused this privilege and attempted to appropriate too much of the *shamilat*, the others could have stopped such appropriation by getting the *shamilat* partitioned. But this they could not do during the period when the Sind Sagar Act was in force as the *shamilat* could not be partitioned during that period. If it were held now that those who reclaimed the *shamilat* during the continuance of the Sind Sagar Doab Act, could acquire 'adna milkiyat' rights now by mere payment of *jhuri*, the other proprietors would be obviously prejudiced. It seems to me, therefore, that this could not have been the intention of the parties to the agreement.

The above view receives support from the judgment in *Civil Appeal No. 674 of 1932 (1)*, decided by a Division Bench of this Court on 15th January 1935. The material facts of that case were similar to those of the present case. The learned counsel for the respondents urged that there was no condition in that case as to the payment of any *jhuri* for the acquisition of Adna Malkiyat rights. But that would make that case even stronger from the standpoint of the respondents. For in those circumstances, according to the contention of the respondents, the Adna Malkiyat rights would have automatically materialized on the repeal of the Sind Sagar Doab Act. But it was held that no such rights accrued as a result of reclamation made during the pendency of the Act. In my judgment the learned District Judge's view as regards the effect of the repeal of the Sind Sagar Doab Act cannot be sustained. I would accordingly accept all the appeals and restore the decrees of the trial Court. The point of law involved not being free from difficulty I would leave the parties to bear their costs throughout.

Currie, J.—I agree.

B.D./R.K.

Appeals allowed.

1. Ahmad Khan v. Jiwana Ram, (1935) 163 I C 864=38 P L R 193.

A. I. R. 1936 Lahore 961

ADDISON AND ABDUL RASHID, JJ.

Dhani Ram-Ram Gopal—Assessee—Petitioners.

v.

Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces—Opposite Party.

Civil Ref. No. 8 of 1936, Decided on 22nd April 1936.

Income-tax Act (1922), Ss. 25, 33, 66 (2)—Order setting aside finding of discontinuance and directing inquiry into succession in cases pending against propounded successors is not one prejudicial to predecessor assessee.

An order under S. 33 setting aside a finding of discontinuance [contained in an order under S. 25 (2)] without levy of tax and in absence of refund claim under S. 25 (2) and directing inquiry into succession in cases pending against the propounded successors is not an order prejudicial to the predecessor assessee within the meaning of S. 66 (2). [P 962 C 1]

Mehr Chand Mahajan and Kirpa Ram Bajaj—for Petitioners.

Assa Ram Aggarwal for Jagan Nath Aggarwal—for Opposite Party.

Order.—This is a reference under S. 66 (2), Income-tax Act, regarding an order made by the Commissioner of Income-tax under S. 33 of the Act in the matter of the 1933-34 assessment of Messrs. Dhani Ram-Ram Gopal. The assessee was assessed for several years as a Hindu undivided family and eventually as a registered firm on partition up to 1932-1933. By order dated 31st October 1933 the Income-tax Officer held that the firm had divided up and that there had been discontinuance under S. 25 (2) and that under S. 25 (3) no tax was payable.

On 25th March 1935, this finding came before the Commissioner who issued notice of review before the expiry of 1934-35. An advocate appeared before him and was heard. Thereafter he set aside the order of the Income-tax Officer, holding that discontinuance had not been established and he found accordingly for the purposes of this case, but he was careful to explain at various places in his order that in each of the new assessment cases, which would follow from this, the facts must be found by the Income-tax Officer independently, and that all that he was then doing was to clear out of the way of the Income-tax Officer, the prior order in the original assessee's case as a matter of executive propriety, so that it might not stand to embarrass his findings

in the cases of the other assesseees. The original assessee then moved the Commissioner for a reference to this Court and two questions have been referred:

(1) Is an order under S. 33 setting aside a finding of discontinuance [contained in an order under S. 25 (2)] without levy of tax and in absence of refund claim under S. 25 (2) and directing inquiry into succession in cases pending against the propounded successors, an order prejudicial to the predecessor assessee within the meaning of S. 66 (2)?

(2) If the answer to question 1 is in the affirmative, was there any material on which the order in issue could be passed?

The Commissioner has again been careful to point out in his order of reference that actually assessed successors are the only persons aggrieved and that the findings as regards them will have to stand or fall on the evidence in their own cases and not on the evidence in this case. This seems to us to be undoubtedly correct, and as there was no enhancement of assessment, it also seems to us that the order passed on review by the Commissioner was not otherwise prejudicial to the original assessee, for the successors, if and when assessed, will have every right to be heard independently before the income-tax authorities and to have a reference to this Court on any question of law that may arise in their assessment. There has thus been no prejudice, and all that the learned counsel appearing for the original assesseees was able to claim as prejudicial was the circumstance that the Income-tax Officer might feel himself compelled to follow the reasoning adopted by the Commissioner in his order in review. This however is not so, for the Commissioner has been careful to point out that there must be an independent assessment of the alleged successors who will be entitled to produce whatever evidence they can. For the reasons given we answer the first question in the negative, so that the second question does not require to be answered. This is a case in which we make no order as to costs.

R.M./R.K.

Answer accordingly.

A. I. R. 1936 Lahore 962

ADDISON AND ABDUL RASHID, JJ.

Chandar Bhan and another—Plaintiffs—Appellants.

v.

Mohammad and others—Defendants—Respondents.

Second Appeal No. 465 of 1935, Decided on 30th January 1936, from decree of Dist. Judge, Mianwali, D/- 26th November 1934.

(a) *Wajib-ul-arz*—New one—Old one ceases to be operative.

Where a new *wajib-ul-arz* is framed, the old one ceases to be operative: 1936 *Lah* 958 and 163 *I C* 864, *Rel. on.* [P 963 C 1]

(b) *Sind Sagar Doab Colonization Act* (1 of 1902), S. 5—Agreements under—Surrender of rights not taking place according to proviso in agreements—Merely by this, agreements held did not become inoperative.

Under S. 5, *Sind Sagar Doab Colonization Act*, the Local Government entered into agreement with the owners of land regarding the surrender to the Government of their rights of land subject to the proviso, that the surrender under agreement should take place from date on which the excavation of a permanent flow canal should begin. The surrender did not take effect as excavation never began. It was pleaded that the agreements became inoperative, and so also the subsequent *wajib-ul-arz*, which was framed in pursuance of the Act:

Held: that the agreement between the Government and the landowners became operative from the dates on which they were executed and provisions of the subsequent *wajib-ul-arz* also came into force. Under the proviso to S. 5 the surrender under the agreements had to take effect from the date of the beginning of the excavation of the canal, and the mere fact that the surrender under agreements did not take place did not make the agreements and the *wajib-ul-arz* inoperative. [P 963 C 2]

Mehr Chand Mahajan—for Appellants.

Har Gopal—for Respondents.

Judgment.—This appeal has arisen out of an action brought by the plaintiffs for a declaration to the effect that they were entitled to Adna Malkiat rights in respect of certain portions of the shamilat land in village Saggu Shumali in Mianwali District, described in the plaint, on the condition that they paid a certain due called "jhuri" to the defendants. The plaintiffs and the defendants were both Ala Maliks in the village in question. The plaintiffs broke up the land in suit between the years 1902 and 1928, and their principal contention was that by breaking up this land and by paying or offering to pay "jhuri" to the Ala Maliks under

the terms of the wajib-ul-arz of the year 1878, they became Adna Maliks in the land in suit.

The case of the defendants was that the conditions embodied in the wajib-ul-arz of 1878, to the effect that an Ala Malik by breaking any part of the shamilat land could by offering "jhuri" to the other Ala Malik, which the latter had no right to refuse, acquire Adna Malkiat rights, was abrogated by the provisions of the wajib-ul-arz compiled in the year 1902 in pursuance of the provisions of the Sind Sagar Doab Colonisation Act. The trial Court dismissed the plaintiffs' suit, and their appeal having been dismissed by the learned District Judge, they have preferred a second appeal to this Court. All the questions raised in the grounds of appeal, with the exception of one which will be dealt with later only, have been decided by two Division Benches of this Court in Civil Appeal No. 657 of 1934 (Bhide and Currie, JJ.) (1) and Civil Appeal No. 674 of 1932 (Jai Lal and Coldstream, JJ.) (2) on 6th November and 15th January 1935 respectively. We agree with the conclusions of the learned Judges in those cases, that the provisions of the wajib-ul-arz of 1878 ceased to be operative in 1902 when the new wajib-ul-arz was framed, and that under the provisions of the new wajib-ul-arz no one could acquire Adna Malkiat rights in the village shamilat, merely by breaking up such shamilat and offering "jhuri" to the Ala Maliks.

The only point argued by the learned counsel for the appellants was that under S. 5, Sind Sagar Doab Colonisation Act, 1902, the Local Government was entitled to prescribe the conditions of agreements to be entered into with the owners of land applicable to the surrender to the Government of the rights of land owners, tenants and right holders, respectively, but that these agreements were subject to the proviso that the surrender under the agreement shall take effect on and from the date on which the excavation of a permanent flow canal from the Indus in the Sind Sagar Doab shall begin. It was urged that as the excavation of a permanent flow canal never began, the agreements entered into between the Govern-

ment and the landowners never became operative, and that the provisions of the wajib-ul-arz of 1902 also remained inoperative. According to the learned counsel the failure on the part of the Government to start excavation of a permanent flow canal in the Sind Sagar Doab kept the provisions of the wajib-ul-arz of 1878 intact, and the appellants were therefore entitled to acquire Adna Malkiat rights merely by breaking up the land and offering "jhuri" to the Ala Maliks.

In our opinion this contention is devoid of all force. The agreements between the Government and the landowners became operative from the dates on which they executed, and the provisions of the wajib-ul-arz also came into force in the year 1902. Under the proviso to S. 5 the surrender under the agreements had to take effect from the date of the beginning of the excavation of the canal, and the mere fact that the surrender under agreements did not take place did not make the agreements and the wajib-ul-arz inoperative. In any case, the wajib-ul-arz became binding on the parties to the present litigation from the year 1902, and as the breaking of the land in the present case took place after the year 1902, the provisions of the wajib-ul-arz of 1902 and 1924 would govern the present case. It may be stated that the provisions of the wajib-ul-arz of 1924 were identical with the provisions of the wajib-ul-arz of 1902. For the reasons given above we affirm the decision of the Courts below and dismiss this appeal. Parties will bear their own costs in this Court.

V.B.B./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 963

JAI LAL AND ABDUL RASHID, JJ.

Fateh Din and another—Defendants—Petitioners.

v.

Bal Mukand and others—Plaintiffs—Opposite Parties.

Civil Revn. No. 151 of 1936, Decided on 26th June 1936, from order of Senior Sub-Judge, Sialkot, D/-29th November 1935.

Civil P. C. (1908), S. 115, O. 43, R. 1 (m)—Trial Court holding that there has been compromise between parties—It should record separate order recording compromise and then pass decree in accordance with it—No separate order recorded—Party appealing

1. *Fateh Sher v. Behari Ram*, 1936 Lah 958=17 Lah 502.

2. *Ahmad Khan v. Jewana Ram*, (1936) 163 I O 864=38 P L R 183.

from decree — Appellate Court dismissing appeal holding decree to be consent decree—No finding as to compromise given—Appeal must be assumed to be one under O. 43, R. 1 (m)—Second appeal does not lie from appellate order—It is open to revision.

Where the trial Court holds that a compromise has been arrived at between the parties, the proper procedure is to record a separate order recording the compromise and then to pass a decree in accordance with it. In such a case no appeal would lie against the decree but an appeal should lie against the order recording the compromise and a petition for revision would lie to the High Court against the appellate order. If the appellate Court holds that there was no compromise the decree of the trial Court would automatically be set aside.

[P 964 C 2 ; P 965 C 1]

Where, however, no separate order recording the compromise is passed by the trial Court and an appeal purporting to be from the decree is preferred (full court-fees on the value of the suit being paid) but the first ground of appeal raised is that there had been no compromise and the appellate Court dismisses the appeal holding the decree to be consent decree without giving any finding as to whether there had been a compromise or not, the appeal must be assumed to be one under O. 43, R. 1 (m) and as no second appeal lies from the appellate order, it is open to revision. The petitioner is entitled to an adjudication from the lower appellate Court whether there had been a compromise or whether the terms of the compromise were as incorporated in the decree of the trial Court : 1922 Lah 309, *Disting.* [P 965 C 1, 2]

Bashir Ahmad—for Petitioners.

Shambu Lal Puri—for Opposite Parties.

Jai Lal, J.—A suit was pending in the Court of the Subordinate Judge at Sialkot. It was alleged by one of the parties that there had been a compromise and a prayer was made that the compromise be recorded and a decree be passed according to it. The opposing party denied that there had been a compromise and added that the compromise if arrived at at all could not be recorded by the Court. The trial Judge held that there had been a compromise ; it recorded it and by the order recording the compromise passed a decree in accordance with the compromise. An appeal was preferred to the Senior Subordinate Judge, purporting to be from the decree which had been passed. Full Court fee on the value of the suit was paid but the first ground of appeal was that there had been no compromise. The Senior Subordinate Judge dismissed the appeal holding that the decree being a consent decree no appeal lay from it. He declined to give a finding on the first ground of appeal, apparently holding that there was no

appeal before him from an order recording a compromise. A petition for revision has been presented in this Court against this order of the Senior Subordinate Judge declining to entertain the appeal.

The case came up for hearing before Agha Haidar, J., who was of opinion that 3 Lah 175 (1), which the Senior Subordinate Judge had professed to follow, had been wrongly decided and has referred the case for hearing to a Division Bench. On this petition coming up for hearing before us, a preliminary objection is taken by the respondent that the order of the Senior Subordinate Judge is appealable and therefore no petition for revision lies. But the Senior Subordinate Judge has not decided the case on the merits and he has declined to adjudicate upon the ground taken by the petitioner that there had been no compromise between the parties. This matter can be raised on an appeal preferred under O. 43, R. 1 (m) which allows an appeal from an order under R. 3, O. 23, recording or refusing to record an agreement, compromise or satisfaction. The position before the Senior Subordinate Judge was this : If he had treated the appeal before him as an appeal under O. 43, R. 1 (m), then he had to determine only the question raised by Ground No. 1 which was whether a compromise had been effected between the parties and whether the decree granted by the Court below was in accordance with that compromise. If he found these questions in the affirmative, he was bound to dismiss the appeal. If, on the other hand, he found either of these questions against the respondent, then he was bound to remand the case to the trial Court or to modify the decree of the trial Court. If he found that there had been a compromise but that the terms were not as found by the trial Judge then he should have modified the decree so as to make it conform to the compromise. The proper procedure for the trial Court should have been to record a separate order recording the compromise and then to pass a decree in accordance therewith. In such a case no appeal would lie against the decree but an appeal would lie against the order recording the compromise and a petition

1. Gurucharan v. Shibdev Singh, 1922 Lah 309=66 I C 258=3 Lah 175.

for revision would lie to this Court against the appellate order. If the appellate Court held that there was no compromise the decree passed by the Court below would automatically be set aside.

In my opinion the objection of the respondent which apparently found favour with the learned Senior Subordinate Judge was frivolous. The petitioner was entitled to an adjudication from the lower appellate Court whether there had been a compromise or whether the terms of the compromise were incorporated in the decree passed by the trial Judge. Whether that adjudication should have been given on an appeal separately filed from the order recording a compromise or from the final decree passed by the Court is immaterial in this case because there was no separate order by the trial Court and the court-fee stamp paid by the petitioner exceeded the amount of court-fee which would be payable on an appeal from an order under O. 43, R. 1 (m). Under the circumstances, in my opinion the preliminary objection raised by the learned counsel in this Court that no petition for revision lies must be overruled. I must assume that the appeal to the Senior Subordinate Judge was under O. 43, R. 1 (m) and therefore no second appeal lies from his order on such an appeal.

This practically decides the case on the merits because I have held that it was the duty of the Senior Subordinate Judge to give a finding on the first ground raised before him by the petitioner. It is not necessary for me to express any opinion whether 3 Lah 175 (1) has been wrongly decided. If I may say so with respect the case is clearly distinguishable from the present case. In that case it was held that no appeal lay from the consent decree because it had already been determined by the Chief Court of the Punjab in a previous appeal that there had been a compromise and that the terms of the compromise were as alleged by the appellant before it. It had remanded the case to the lower appellate Court with direction to pass a decree in accordance with the compromise the terms whereof had been determined by the Chief Court. The appeal in which the objection that no appeal lay was allowed by the High Court in 3 Lah 175 (1) was an appeal from the order passed by the lower appellate Court in

pursuance of directions given by the Chief Court.

I would, therefore, accept this petition, set aside the order of the learned Senior Subordinate Judge and send the case back to him with direction to decide first whether there has been a compromise of the subject-matter of the suit between the parties and whether the terms of the compromise are as found by the trial Court. If he decides both these points against the appellant, then the appeal must be dismissed. If, however, he finds that there had been no compromise then the case must be remanded to the trial Judge for trial on the merits. If he finds that there was a compromise but the terms were different to those found by the trial Judge, then he must modify the decree of the trial Judge so as to make it in accordance with the terms found by him to be agreed to between the parties. The costs of this petition shall abide the result. The parties have been directed to appear before the Senior Subordinate Judge on 27th July 1936.

Abdul Rashid, J.—I agree.

R.M./R.K.

Petition allowed.

A. I. R. 1936 Lahore 965

TEK CHAND, J.

Magan Nath and others—Plaintiffs—Appellants.

v.

Harbans Singh and others—Defendants—Respondents.

Second Appeal No. 1962 of 1935, Decided on 1st May 1936, from decree of Dist. Judge, Amritsar, D/- 20th May 1935.

(a) Civil P. C. (1908), S. 11, Expl. 6—Representative suit under O. 1, R. 8—Former suit not in compliance with O. 1, R. 8 and non-compliance not being inadvertent—Decision in former suit cannot operate as res judicata.

In a representative suit, instituted under O. 1, R. 8, the decision in a former suit does not operate as res judicata, unless the former suit was instituted in compliance with this rule, viz. by permission of Court, the Court giving notice to all persons interested. An exception to this principle is where the former suit having been litigated bona fide on behalf of the plaintiff and others with a common right, the omission to comply with the rule has been inadvertent and no injury therefrom has been sustained by the plaintiff in the second suit.

[P 967 O 2]

In a suit the plaintiff did not purport to sue in a representative character and maintained

his individual character ignoring the pleadings of the defendant that if the plaintiff intended to sue in a representative character he ought to have brought the suit under O. 1, R. 8:

Held: that the plaintiff did not comply with the provisions of O. 1, R. 8 and the non-compliance was not inadvertent. Hence the decision in the suit could not operate as res judicata in a subsequent suit brought under O. 1, R. 8: 1933 P C 183, *Rel. on*; 1928 *Mad* 77, *held reversed*; 1936 *Lah* 13, *Disting.*

[P 968 C 1]

(b) Evidence Act (1872), S. 35—No statutory obligation on officials to make enquiries regarding ownership — Register containing report is not admissible.

Where there is no statutory obligation on the official who has prepared certain registers to make enquiries as to the ownership of certain property the entries are not admissible under S. 35 or any other provision of law.

[P 968 C 2]

Shamair Chand—for Appellants.

Dev Raj Sawhny—for Respondents.

Judgment.—This second appeal arises out of a suit instituted by five plaintiffs (appellants), as representatives of the residents of Chauk Darbar Sahib and the neighbouring bazars in Amritsar against the defendant (respondent) for a perpetual injunction requiring him to remove a door which he has constructed in front of a small well situate in Khasra No. 1137. The suit was brought in a representative capacity with the permission of the Court under O. 1, R. 8, Civil P. C., and it is common ground between the parties that all the necessary formalities for a suit under that rule have been fully complied with. The well in question adjoins a shop, now owned by the defendant and is roofed, there being no buildings on the two upper storeys above the well which are admittedly owned by the defendant. The plaintiffs alleged in the plaint that the well is wakf, that the residents of Chauk Darbar Sahib and the neighbouring bazars had been drawing water from it for drinking purposes for over 50 years, that the defendant had purchased the adjoining shop and the rooms above the well about three years before the suit, that lately he had constructed a door in front of the well shutting out access from the bazar, and that he intends to fill up the well and convert it into a shop. In the alternative, they alleged that if the well were not found to be wakf, the plaintiffs and other inhabitants of the locality had acquired an easement to draw water from it. They accordingly asked for an injunction requiring the defendant to re-

move the door and the shutters and directing him not to fill the well and not to obstruct the residents of the bazar and other persons from drawing water from it.

The defendant traversed the allegation that the well was wakf and pleaded that it was his private property. He also denied that the plaintiffs or the inhabitants of the locality had acquired any easement to draw water from it. He further pleaded that the suit was barred by res judicata by reason of the decision of Lala Gokal Chand, Munsif, dated 19th October 1918, in a suit instituted by Mul Chand and others against Thakar Singh (from whom the defendant had purchased the property recently), which was affirmed on appeal by Mr. Brasher, District Judge, on 12th February 1919. The trial Judge held that the decision in the previous suit did not bar this suit, and that it had been proved that the well was wakf for the use of the inhabitants of the Chauk Darbar Sahib and the neighbouring Mohallas, who had been drawing water from it for over 50 years. He accordingly granted the plaintiffs the injunction asked for.

On appeal by the defendant the learned Additional District Judge held that the suit was barred by Expl. (6), S. 11, Civil P. C. He observed that this finding was sufficient to dispose of the appeal and therefore it was unnecessary for him to examine the case any further. He however proceeded "very briefly" to consider the points which arose on the merits and came to the conclusion that the plaintiffs had failed to prove that the well was wakf and it was the private property of the defendant. He held it established that the inhabitants of the locality had been drawing water from the well for more than 50 years, but he found that their user was permissive and not as of right. On these findings he accepted the appeal and dismissed the suit. The plaintiffs have come in second appeal and it has been contended on their behalf that the decision of the learned Additional District Judge on the question of res judicata is erroneous and that his findings that the property is not wakf and that the easement alleged by the plaintiffs has not been established, are vitiated by the improper admission of inadmissible evidence and by the illegal exclusion of important evidence.

It will be convenient to deal first with the plea of *res judicata* upon which the decision of the learned Additional District Judge principally rests. It appears that in 1917 the predecessors in title of the plaintiff, who owned the adjoining shop at the time, had built a staircase to provide access to the rooms above the well, and had also opened a window in the wall of the shop towards the well and constructed a water-spout over the platform close to the well. One Mul Chand and two other persons brought a suit for an injunction directing the then defendant to close the window and the water-spout and remove the staircase. In the plaint, they alleged that the well was wakf for the benefit of the residents of the Chauk Darbar Sahib and that the then plaintiffs, in common with other residents, had the right to draw water from it. A perusal of the plaint and the judgments in that case shows however that the plaintiffs did not purport to sue, or conduct the proceedings on behalf of the residents of the Chauk in a representative capacity. They merely sued to seek relief for an injury done to them individually by infringement of a right which, they alleged, they enjoyed in common with other residents of the locality. The Munsif held that the well had not been proved to have been made wakf and dismissed the suit. On appeal, the District Judge (Mr. Brasher) affirmed the finding of the trial Court that the well was not wakf and also held that even if it was wakf, the opening of the window and a water-spout and the construction of the staircase did not cause any obstruction to the drawing of the water from the well, and therefore no case for issue of a mandatory injunction had been made out. He accordingly dismissed the appeal.

The learned Additional District Judge has held that the decision of Mr. Brasher in the suit above mentioned bars the present suit under S. 11, Expl. (6), Civil P. C. In support of this conclusion the learned Judge has referred to many rulings, the principal of which is a Full Bench decision of the Madras High Court reported in 51 Mad 128 (1). The judgment of the Full Bench in the case however had been reversed on appeal by their Lordships of the Privy Council in

56 Mad 657 (2). Though the judgment of their Lordships had been published two years before the learned Additional District Judge heard the present case, it appears that his attention was not drawn to it. In that case, their Lordships ruled that in a representative suit, instituted under O. 1, R. 8, Civil P. C., 1908, the decision in a former suit does not operate as *res judicata* by force of S. 11, Expl. (6), unless the former suit was instituted in compliance with the above rule, namely, by permission of the Court, the Court giving notice as therein prescribed to all persons interested. Their Lordships however observed that there is possibly an exception, where the former suit having been litigated bona fide on behalf of the plaintiff and others with a common right, the omission to comply with the rule has been inadvertent, and no injury therefrom has been sustained by the plaintiff in the second suit. Applying these rules to the particular case before them, their Lordships found that the former suit had been instituted without the permission of the Court under the corresponding provision of the Code then in force and moreover had not been instituted or conducted as a representative suit, and therefore no *res judicata* arose in the second suit.

It is contended by Mr. Dev Raj Sawhney for the defendant-respondent that this case falls within the "exception" and not the "general rule" as enunciated by their Lordships in the above case. I have no doubt that this contention is without force. Admittedly, the previous suit was not instituted under O. 1, R. 8. As already stated, the plaint and the proceedings of that suit do not show that it was conducted as a representative suit. Nor can it be argued that the omission to comply with the provisions of R. 8 had been inadvertent. It appears that the then defendant had definitely raised the plea that if the plaintiffs were suing on behalf of the residents of the locality in general, they should have brought the suit under O. 1, R. 8, Civil P. C., or with the sanction of the Collector under S. 91. The plaintiffs however ignored this plea and made no attempt to amend the plaint or to comply with the requirements of O. 1, R. 8, or to obtain the sanction of

1. Sonachalam Pillai v. Kumaravelu Chettiar, 1928 Mad 77=107 I O 625=51 Mad 128=54 M L J 8 (F B).

2. Kumaravelu Chettiar v. Ramaswami Iyer, 1939 P O 183=149 I O 665=56 Mad 657=60 I A 278 (P O).

the Collector under S. 91. They preferred to fight out the case in their individual capacity and not on behalf of the numerous other persons who in common with them might have been affected by the acts of the defendant complained of. It cannot therefore be said that the omission to comply with R. 8 was due to "inadvertence." In these circumstances, the case cannot fall within the "possible exception" mentioned in their Lordships' judgment in 56 Mad 657 (2).

Mr. Dev Raj Sawhney for the respondent referred me to a recent decision of a Division Bench of this Court reported in 1936 Lah 13 (3) as an analogous case in which Expl. (6), S. 11 was held applicable. That case however is clearly distinguishable. There the defendant had constructed a wall on a piece of the shamilat which formed part of the abadi, and the lambardar of the village, who was one of the proprietors had sued for the demolition of the wall. In the plaint he had expressly stated that he was claiming the relief "for himself and for all the other persons interested therein." A large number of proprietors appeared as witnesses in support of the claim but the suit was dismissed. Subsequently two other proprietors who had appeared as witnesses in the lambardar's suit brought an action under O. 1, R. 8, for the same relief. The learned Judges held that the former suit had been instituted and conducted as a representative one and the "exception" mentioned by their Lordships in the Privy Council decision above cited applied, and, therefore, they held that the second suit was barred under Expl. (6). Obviously the facts in the case before us are different.

In my opinion to this case the general rule laid down by their Lordships clearly applies, and I hold that the decision of Mr. Brasher in *Mul Chand's* suit does not bar the present suit.

The learned Additional District Judge, after deciding the plea of *res judicata* in favour of the defendant, observed that it "had become unnecessary for him" to examine the case any further. But as already stated he proceeded to refer "very briefly" to the issues on the merits and recorded his findings against the plaintiffs. The discussion of this part

of the case is, therefore, not as full as it ought to have been, and the learned Judge has erroneously relied upon evidence which is legally inadmissible and excluded from consideration important evidence on untenable grounds. In deciding against the plaintiffs on the main point as to whether the well is or is not wakf, he has taken into consideration certain extracts from Municipal records. These extracts form (1) the register of tharas and (2) the register of kharas of Amritsar City. It is difficult to see how these registers are admissible for the purpose of proving the ownership of the well. It has not been shown that there was any statutory obligation on the officials who had prepared these registers to make inquiries as to the ownership of "wells" and, therefore, these entries are not admissible under S. 35, Evidence Act, or any other provision of law for this purpose. It appears from the statement of the Municipal clerk that there was a separate register for wells, but it could not be found, and no extract from entries therein was produced. It is also significant, that in the extract from the register of tharas, the column for the name of the "proprietor" is left blank. In the other register the defendant's predecessor is shown as the owner of the adjoining shop, but there is no dispute on that point between the parties. I hold, therefore, that the learned Judge was in error in admitting these entries into evidence and relying upon them.

The learned Additional Judge is also in error in his reasoning for excluding from consideration the slab, which is stated to have been taken out from the inner wall of the well under the trial Judge's personal supervision and which was exhibited in the case next day, when one Balwant Singh was examined for the purpose of reading the inscription. The trial Judge had relied very largely on the inscription on this slab in proof of the wakf nature of the property. The learned Additional District Judge, however, rejected it on various grounds, the principal of which was that the Subordinate Judge should have himself gone into the witness-box and deposed that the slab actually produced before him in Court was the one which had been taken out from the well in his presence on the previous day. I need hardly say that this reasoning was obviously wrong. No ob-

3. *Bishen Singh v. Bakhshish Singh*, 1936 Lah 13=158 I C 540.

jection as to the identity of the slab appears to have been taken on behalf of the defendant at the time of its production in Court. Indeed, after Balwant Singh had been examined, the defendant asked for an adjournment to produce another expert reader of inscriptions, in order to contradict Balwant Singh's reading of it. The learned Subordinate Judge granted an adjournment for the purpose, but at the next hearing the defendant stated that he had no witness to produce. At the time of arguments, however, the identity of the slab appears to have been questioned for the first time. In the circumstances I do not see how the Subordinate Judge could have been expected to put himself into the witness-box before himself, and depose on oath that the slab before him was the one which had been taken out from the well in his presence the day before. Counsel for the appellant has raised several objections to the other reasons given by the learned District Judge for rejecting the slab. I do not, however, think it necessary to go into them at this stage as I have reached the conclusion that the findings of the learned Additional District Judge on questions of fact are based partly upon inadmissible evidence and partly to the exclusion of legally admissible evidence. In these circumstances the proper course is to set aside the judgment and decree and remand the case for re-hearing and re-decision after a consideration of the entire legal evidence on the record and after excluding from consideration the entries from Municipal records, which I have held to be inadmissible.

I wish to make it clear that anything that I may have said in this judgment should not be taken as any indication of my opinion as to the authenticity of the slab or as to the correctness of the plaintiff's allegations that the property is wakf. These are matters which will be decided by the learned District Judge himself after a consideration of the evidence on the record. I accept the appeal, set aside the judgment and decree of the learned Additional District Judge and remand the case to the District Judge, Amritsar, for re-hearing and re-decision on the merits. Court-fee on this appeal will be refunded; other costs will be costs in the cause. Counsel for both parties have been directed to cause their respective clients to appear before the

District Judge, Amritsar, on 1st June 1936, when the learned Judge will fix a date for arguments. As the case is an old one, it is desirable that as early a date be fixed as may be possible.

D.S./R.K.

Appeal accepted.

*** A. I. R. 1936 Lahore 969**

DIN MOHAMMAD, J.

Mt. Mehr Bano—Appellant.

v.

Sher Mohammad and others—Respondents.

Second Appeal No. 99 of 1936, Decided on 11th May 1936, from order of Addl. Dist. Judge, Lahore, D/- 14th October 1935.

* Civil P. C. (1908), O. 21, R. 90, O. 43, R. 1(j) and Ss. 47 and 104 (2) — Execution sale—Appellate order setting aside sale on grounds of failure of auction-purchaser to make preliminary deposit and officer conducting sale accepting improper bid — Order is under O. 21, R. 90 and not under S. 47 — Second appeal is barred.

Failure by auction-purchaser to make preliminary deposit and the acceptance by the officer conducting the sale of an improper bid are questions which relate to the conduct of sale, inasmuch as they take place before the sale is complete. So where an appellate Court makes an order setting aside sale on these grounds, the order comes within the specific O. 21, R. 90, and not under S. 47 which is general in terms, and therefore a second appeal is barred under S. 104 (2); *Case law discussed.*

[P 970 C 1; P 971 C 1]

Mohammad Alam—for Appellant.

Darbari Lal—for Respondents.

Judgment. — This is a second appeal from the order of the Additional District Judge, Lahore, affirming the order of the Subordinate Judge, dated 25th March 1935, setting aside a sale in execution. The facts are shortly these: In execution of a decree against Sher Mohammad and others the mortgaged property was put to auction on 10th January 1931, and was purchased by one Mohammad Bakhsh for Rs. 4,225. The judgment-debtors preferred objections under O. 21, R. 90, Civil P. C., on which the executing Court set aside the sale. In the meantime, Mohammad Bakhsh died. The property was again put to auction and purchased by the widow of Mohammad Bakhsh. The judgment-debtors again put in an application under O. 21, R. 90, Civil P. C., impugning the sale on various grounds. The Subordinate Judge upheld their objections and set aside the sale. On appeal,

the Additional District Judge did not agree with the Subordinate Judge so far as certain objections to the proclamation and conduct of sale were concerned, but maintained his order on the grounds : (i) that no proper deposit was made under O. 21, R. 84 or O. 21, R. 86, and (ii) that the bid being conditional was not a proper bid within the meaning of the rules. The auction purchaser has appealed. Mr. Darbari Lal has raised a preliminary objection that no second appeal is competent under S. 104, Civil P. C., read with O. 43, R. 1 (j), his contention being that only one appeal is competent under O. 43. The rule referred to by the counsel provides for an appeal against an order under R. 90, O. 21, setting aside or refusing to set aside a sale. S. 104, sub.s. (1), says that

An appeal shall lie from the following orders and from no other orders
(i) any order made under rules from which an appeal is expressly allowed by rules.

To this is added sub.s. (2) which prohibits an appeal from any appellate order under S. 104, Civil P. C. Counsel for the appellant, on the other hand, contends that the order passed by the Additional District Judge is covered by S. 47, Civil P. C., and not by O. 21, R. 90, inasmuch as it was an order disposing of questions arising between the representatives of the decree-holder on the one hand and the judgment-debtor on the other and related to the execution, discharge or satisfaction of the decree. He consequently maintains that a second appeal is competent. The principal point for determination, in my view, is whether the two objections on which the Additional District Judge has relied related to the conduct and publication of the sale or not ; or in other words, whether the failure to deposit 25 per. cent of the purchase money in the first instance and the balance of the purchase money later and the acceptance of an improper bid come within the purview of O. 21, R. 90. Apart from authority, it appears to me that these questions do relate to the conduct of sale, inasmuch as the failure to make the preliminary deposit as well as the acceptance of the improper bid takes place before the sale is complete and is therefore connected with the sale proceedings, and being prior to the completion of the sale would naturally relate to the conduct of the sale. There is a decided case also which supports this

view. In 16 Cal 33 (1) a Division Bench of the Calcutta High Court held that failure on the part of the person declared to be the purchaser at a sale in execution of a decree to make, and on the part of the officer conducting the sale to receive, the deposit of 25 per centum on the amount of the purchase money in the manner required by S. 306, Civil P. C., constitutes a material irregularity in conducting the sale which must be enquired into upon an application under S. 311. As against this, counsel for the appellant has referred me to 96 I C 137 (2), 96 I C 657 (3), 79 I C 636 (4) and 1934 Lah 105 (5).

In 96 I C 137 (2) it was held that a question arising out of an execution proceeding relating to the legality of a sale between the judgment-debtor on the one hand and the decree-holder or the auction-purchaser on the other, is a question relating to the execution, satisfaction or discharge of a decree within the meaning of S. 47, Civil P. C. In 96 I C 657 (3) a Division Bench of the Madras High Court held that a purchaser at Court auction is a representative of the decree-holder within the meaning of S. 47, and the proceedings between him and the judgment-debtor are proceedings relating to the execution, discharge and satisfaction of the decree and consequently orders passed therein come within S. 47, Civil P. C., and are appealable. In 79 I C 636 (4) the Additional Judicial Commissioner remarked that for purposes of S. 47, Civil P. C., an auction-purchaser is the representative of the decree-holder. In 1934 Lah 105 (5), Bhide, J. in the course of his judgment does not appear to have given any clear decision on the point at issue.

The position appears to me to be this : On the one hand it is laid down in O. 21, R. 90, that where any immoveable property has been sold in execution of a decree, the decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are

1. Bhim Singh v. Sarwan Singh, (1889) 16 Cal 33.
2. Nand Kishore v. Shadi Ram, 1926 All 457 = 96 I C 137 = 24 A L J 519.
3. Sornam Pillai v. Tiruvazeiperumal Pillai, 1926 Mad 857 = 96 I C 657 = 51 M L J 126.
4. Sunderbai v. Shri Kishen Ramdhan, 1924 Nag 328 = 79 I C 636 = 20 N L R 170.
5. Shiv Ram v. Kehr Singh, 1934 Lah 105 = 148 I C 901.

affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it and this provision is to be read along with O. 43, R. 1 (j) and S. 104, sub-s. (2), Civil P. C. The combined effect of all these provisions of law is to prohibit a second appeal. On the other hand, some authorities lay down that an auction-purchaser is in certain circumstances a representative of the decree-holder; consequently any question arising between him and the judgment-debtor relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree, and would therefore be covered by S. 47, in which case a second appeal will be competent. With a view to reconcile this apparent conflict, I am disposed to think that S. 47 is general in its terms and O. 21, R. 90, is specific in its character and therefore, if a sale is attacked on the ground of material irregularity in the conduct or publication of the sale, this provision of law would come into operation, and in case an appellate order is passed against the order of the executing Court, no second appeal will be competent. Otherwise, the prohibition laid down in S. 104 (2) would be rendered nugatory so far as it relates to O. 43, R. 1 (j) read with O. 21, R. 90. I cannot imagine that this prohibition applies only to those persons who are not contemplated by S. 47. The words "whose interests are affected by the sale" used in R. 90 are wide enough to cover every person whether he is a party to the suit or a stranger. I would therefore hold that this appeal is barred by S. 104 (2), Civil P. C.

The question however is not free from difficulty and consequently I do not allow any costs to the respondents. I would further certify that it is a fit case for an appeal under Cl. 10, Letters Patent (Lahore High Court).

D.S./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 971

MONROE, J.

Sohan Lal and another — Plaintiffs — Appellants.

v.

Teja Singh and others — Defendants — Respondents.

Second Appeal No. 977 of 1935, Decided on 2nd January 1936.

Practice — Some defendants contesting claim—Others confessing judgment — Plaintiff should be given advantage of the confession.

Where in a suit some of the defendants contest the suit while others confess judgment in plaintiff's favour and ultimately the suit is dismissed, the plaintiff should be given advantage of the confessed judgment in his favour. [P 971 C 2]

Ram Lal Anand—for Appellants.

Nihal Singh—for Respondents.

Judgment.—The plaintiffs' claim is for a declaration that they are entitled as owners to part of the shamilat of which they are in possession. They based their claim originally on a deed of gift, but both the trial Court and the District Judge were not satisfied with the genuineness of this document and on an alternative plea of adverse possession for more than twelve years they succeeded at the trial: on appeal to the District Judge, the suit was dismissed on the ground that the plaintiffs were tenants at will. With this finding I agree, but Mr. Ram Lal Anand has raised the point that the plaintiffs are entitled to the benefit of the original decree in his favour, so far as the shares of certain defendants who confessed judgment in their favour are concerned.

There is no material on the record for ascertaining to what shares these defendants are entitled or for determining what amount of property should be declared to belong to the plaintiffs: they should not, however, lose the benefit of the admission which has been made in their favour, if the rights of the contesting defendants (1, 2, 10, 14, 17, 27, 28, 33, 34, 35, 36, 40, 41, 42, 47, 48, 49 and 50) are protected. I, therefore, allow the appeal, but in place of the declaration given by the trial Judge I substitute the following declaration:

"The plaintiffs have acquired the shares of the defendants other than the contesting defendants in the land in suit and after partition they will be entitled to stand in the place of those defendants in respect of these shares provided that effect is given to all rights of the contesting defendants over or in respect of the land in suit on such partition without regard to the plaintiffs' claim." There will be no costs of this appeal.

B.D./R.K.

Order accordingly.

* A. I. R. 1936 Lahore 972

TEK CHAND AND DALIP SINGH, JJ.

(Firm) Amrik Singh-Daya Singh —
Plaintiffs—Appellants.

v.

Municipal Committee, Jhelum—Defen-
dant and others—Plaintiffs—Respondents.

Second Appeal No. 244 of 1936, De-
cided on 8th July 1936, from decree of
Dist. Judge, Jhelum, D/- 23rd November
1935.

* (a) Punjab Municipal Act (3 of 1911)
Ss. 84 and 86—Word "tax" in S. 84 and
word "assessment" in S. 86 mean respec-
tively tax and assessment under Act—Word
"liability" in S. 86 means liability to pay
particular tax imposed—Where tax and as-
sessment are ultra vires of Act, jurisdiction
of civil Court is not barred—Words taking
away civil Court's jurisdiction should be
plain and capable of no other interpretation.

Before an interpretation could be given to a
statute that it had taken away the ordinary
civil right of a subject without even providing a
remedy by recourse to a Court of special juris-
diction, the words would have to be extremely
plain and capable of no other interpretation.
S. 84 refers to a tax under the Act. Word "as-
sessment" in S. 86 means assessment under the
Act. The word "liability" in S. 86 is also not
used in the widest sense of which it is capable
but is used in the more limited sense of liability
to pay a particular tax which has been imposed.
So where a tax is alleged to be imposed and as-
sessment made ultra vires of Act, ordinary civil
Court has jurisdiction to try dispute regarding
such tax and assessment: 1935 Lah 970, Dissent.;
1935 Lah 632, Foll.; Case law referred.

[P 975 C 1, 2]

(b) Punjab Municipal Act (3 of 1911), S. 70
—Municipality by resolution contracting to
exempt certain market from tax—Conditions
of S. 70 not observed—Contract held ultra
vires and could not bind Municipality.

The question of exempting from taxation is a
very special right only to be considered as
granted by express words in the statute and
only to be considered as exercised where and
when express words in the statute gave the
right to exempt from taxing. S. 70 is the only
section which confers any right on the Muni-
cipality to exempt from taxation under certain
conditions.

[P 976 C 1]

The Municipality by a resolution contracted
with some traders to exempt certain market
from terminal tax, but the resolution was not
passed at a special meeting nor had the sanc-
tion of the Local Government been obtained:

Held: that as the conditions under S. 70 did
not exist, the action of the Municipality was
ultra vires and therefore could not constitute a
valid contract nor could it bind the Municipa-
lity.

[P 976 C 1, 2]

Achhru Ram, Dev Raj Sawhney and
S. L. Puri—for Appellants.

Mehr Chand Mahajan—for Respon-
dents.

Dalip Singh, J.—On 7th June 1921,
certain traders of Jhelum presented an
application, Ex. P.8, to the Municipality
of Jhelum through its President, the
Deputy Commissioner. In this applica-
tion they alleged that owing to the exis-
tence of the market within octroi limits,
octroi was levied on goods coming into
the market which then were not sold
within the Municipality but were sold
outside and hence the parties had a claim
to refund of the octroi previously levied.
The application alleged that the obtain-
ing of this refund was a matter of great
difficulty or trouble, and hence trade had
drifted to other mandis. Moreover the
accommodation in the existing mandi was
limited and hence there had been a great
rise in the rents of the shops in the mar-
ket with corresponding hindrance to
trades. They stated that therefore they
had resolved to found a new market, to
be called the Crump Market, outside the
octroi limits near the Grand Trunk Road.
They asked the Municipal Committee for
an assurance by a resolution of the Com-
mittee that the new market would not be
included in the octroi limits or otherwise
subjected to a similar tax, e. g., the ter-
minal tax. They claimed that no loss
would be suffered by the Municipal Com-
mittee owing to loss of octroi. On the
other hand, they pointed out that the in-
crease of trade would benefit the town
and hence in all probability increase the
income of the Municipal Committee, and,
in any case, there would be a reduction
of expenditure on the collection and re-
fund of octroi. On 17th September 1921,
the Committee by a resolution (Ex. P.7)
resolved that they had no objection, they
anticipated no loss of octroi income, and
the new market was to be outside the oc-
troi limits. On 22nd September 1921,
the Secretary of the Municipal Committee
informed the Secretary of the Grain Mar-
ket that the application regarding the
construction of a new grain market out-
side octroi limits had been sanctioned.
Accordingly in 1922, it is alleged, that a
market was built at a cost of about three
lacs outside the then existing octroi
limits but within the municipal limits of
Jhelum.

In 1927 a proposal was placed before
the Municipality to substitute a terminal
tax for octroi tax and include the Crump
Market in its incidence. A representa-
tion was made by the traders concerned

to the Local Government. On 5th August 1927, the Local Government wrote Exhibit P-1 to the Commissioner. In para. 4 of that letter the Local Government pointed out that the Municipality had no right to exempt the market from taxation in perpetuity, but in view of the resolution that they had passed and the fact that the traders had built the market, it would only be right to exclude the market from the terminal tax and make up any loss suffered by the Municipal Committee by imposing a professional tax on traders. On 1st January 1928, the Municipal Committee resolved by resolution No. 30, Ex. P-5, that the terminal tax, as proposed by the Local Government, should be adopted and the Crump Market should be included in its incidence, but that para. 4 of the letter of the Local Government should be brought to the notice of the traders and they might make any representations they wished to with reference to the imposition of a professional tax in lieu of the terminal tax by 20th February 1928. On 27th February 1928, for the first time, the Secretary of the Grain Market was informed by the Secretary of the Municipal Committee of this resolution and the traders were given one week to state if they preferred the terminal tax or the professional tax. It was further stated that if no reply was received within one week, the terminal tax would be imposed on the new market.

On 2nd March 1928, the Secretary of the Crump Market submitted a reply, (Ex. P-3) agreeing to supply the loss of income by imposition of a professional tax. On 30th April 1928 however the Municipal Committee decided to include the Crump Market in the terminal tax. They considered that it was advisable to place the two markets, namely, the Crump Market and the City Bazar Market, on a level as regards the incidence of terminal tax, and they appeared to have ignored the offer that they had made to substitute a professional tax for a terminal tax if the proprietors would prefer that. In 1932 the terminal tax was imposed and the present suit was brought on 1st February 1933 for an injunction restraining the Municipal Committee from bringing the Crump Market within the limits of the terminal tax area. The suit was tried and certain issues were framed. Out of those which concern us are: (1) Whether the civil Court had jurisdiction to try a

suit of this nature. (2) Whether there had been a valid contract between the parties; and (3) Whether the Municipal Committee were estopped by their conduct from imposing the tax in question.

As regards the second issue the main point was that under S. 70, Municipal Act, as the resolution of the Committee was not passed at a special meeting nor had the sanction of the Local Government been obtained, the resolution was invalid and could not amount to the acceptance of an offer, thereby constituting a binding contract. The trial Court held that the civil Court had jurisdiction to try this suit. It held that there had been a promise by the Municipal Committee in perpetuity to exempt the Crump Market from the terminal tax or octroi tax, but that the contract was not valid or binding: (1) because the contract was without consideration, and (2) because the provisions of S. 70 had not been complied with. It therefore dismissed the suit.

On appeal it appears to have been argued for the first time on behalf of the respondent, Municipality, that the contract was also invalid by reason of non-compliance with the provisions of S. 47, Municipal Act. The appellate Court accordingly framed an issue on this point, and remanded the case to the trial Court under O. 41, R. 25 for taking evidence and for giving a finding on this issue. The trial Court again came to the conclusion that there was no contract for lack of consideration and also held that it was invalid for lack of compliance with the provisions of S. 47, Municipal Act.

On the appeal being heard by the District Judge, he dismissed the appeal on the ground (1) that the civil Court had no jurisdiction to try a suit of this nature following a Division Bench ruling of this Court reported in 16 Lah 529 (1). He also held that there was no valid contract because neither the provisions of S. 47 nor those of S. 70 had been complied with, and that there was no benefit to the Municipal Committee from this contract, if any had been entered into. He appears to have proceeded also to hold, though this is not very clear, that there was no consideration for the contract. He also held that there was no promise in perpetuity on behalf of the

1. Naubahar Hussain v. Municipal Committee, Batala, 1935 Lah 970=159 I O 1059=36 P L R 301=16 Lah 529.

Municipal Committee on the terms of the resolution and that there was no estoppel. He therefore dismissed the appeal. The plaintiffs have come in second appeal and the case was referred to a Division Bench in view of the apparent conflict between 16 Lah 529 (1) and another Division Bench ruling reported in 1935 Lah 632 (2).

The first question that arises for decision in the appeal is the question of jurisdiction. The learned counsel for the appellants contended that the facts in 16 Lah 529 (1) are quite distinct, whereas the facts in 1935 Lah 632 (2) are on all fours with the present case. Secondly, he has contended that 16 Lah 529 (1) does not lay down the law correctly if the somewhat general expressions used in that judgment are to be read in their strict meaning without reference to the facts of that particular case. He has relied on 1924 Lah 619 (3), a Single Bench ruling of this Court, and the rulings cited therein. He has also relied on Aiyanger's Law of Corporations in India at p. 291, 1935 Lah 980 (4) another Single Bench ruling and 53 Cal 453 (5). On the other hand, the learned counsel for the respondent has relied on 16 Lah 529 (1) and on the words of Ss. 84 and 86, Municipal Act, particularly on S. 86. He has contended strongly that 1935 Lah 632 (2) lays down wrong law and he points out that even conceding that an assessment which was wholly ultra vires might form the subject of a civil suit, yet in this case there is no question of ultra vires as the Municipal Committee are by law, under S. 188, Municipal Act, entitled to extend the limits of any terminal tax imposed and, therefore, as the question is solely one of the liability of the persons to be taxed by the said terminal tax, the clear words of S. 86 bar the jurisdiction of a civil Court.

After considering the point, I am of opinion that there is no force in these contentions of the learned counsel for the

respondent. The question here is not whether a person is liable or not to any tax; the question is whether a civil suit lies to enforce a contract entered into by the Municipality, or, in other words, whether the Municipality can be restrained from infringing the terms of a contract into which they have entered. The question of jurisdiction must be decided on the allegations contained in the plaint and I may here dispose of the further contention urged by the learned counsel for the respondent that the plaint, if properly construed was nothing more than a plaint declaring that the person or persons were not liable to pay the terminal tax. I am not able to read this plaint in this manner at all. It appears to me clear from the plaint read as a whole, as well as from the prayer at the end of the plaint, that the plaintiffs were asserting that the Municipal Committee having entered into a contract to exempt them from all taxation of this nature whatsoever should be restrained from infringing that contract. A little consideration will show that the nature of this suit is totally different from the nature of a suit merely to claim a refund of a tax already paid, or from a suit which alleges that a certain tax, that has been imposed, should not have been imposed. For one thing, the causes of action of the two suits may be entirely different. In one case, namely in the class of suits which I consider are contemplated by Ss. 84 and 86, there must have been an assessment or a tax imposed before any remedy could arise by way of appeal to the Deputy Commissioner. In the present case, if I am right in my interpretation of the plaint, the cause of action might be afforded without there having been any assessment or imposition of a tax at all. When faced with this difficulty the learned counsel for the respondent contended that the right to bring such a suit has been taken away by the terms of S. 86. When asked what was the special remedy provided in lieu of this right to bring such a suit, he stated that no remedy at all had been provided either by way of suit or by recourse to a Court of special jurisdiction.

It seems to me clear that before an interpretation could be given to a statute that it had taken away the ordinary civil rights of a subject without even providing a remedy by recourse to a Court of

2. Municipal Committee, Sonapat v. Dharam Chand, 1935 Lah 632=162 I C 59=37 P L R 289.

3. Municipal Committee, Pind-Dadan Khan v. Bhagwan Singh, 1924 Lah 619=75 I C 737.

4. Abdul Hamid v. Municipal Committee, Delhi, 1935 Lah 980=160 I C 524.

5. Bhuban Mohan Basak v. Chairman, Dacca Municipality, 1926 Cal 607=94 I C 231=53 Cal 453=30 C W N 405.

special jurisdiction, the words would have to be extremely plain and capable of no other interpretation. I do not see that reading the words of Ss. 84 and 86, any such necessary result must be held to follow. S. 84 clearly refers to a tax "under this Act." That appears to me ipso facto to imply, that where it is alleged that the tax has been levied ultra vires and not under the Act, the jurisdiction of the Court of special jurisdiction is ousted, or, at any rate, the jurisdiction of the Court of general jurisdiction is not ousted. S. 86 no doubt does not contain the words "under the Act," but then it goes on to state that the "liability of any person . . . (shall not) be questioned in any other manner or by any other authority than is provided in this Act." These words appear to me clearly to imply that the word "assessment" is to be read as an 'assessment under the Act,' for it is clear that no "authority" would be provided for an assessment which was not under the Act. If, therefore, 16 Lah 529 (1) intended to hold that even an assessment which was ultra vires of the Act could not be made the subject of a civil suit, then with the greatest respect to the learned Judges who decided that case, I must humbly venture to dissent from that view. There are a number of rulings on similar sections which have always so construed the sections in question, and the learned counsel for the respondent admitted that 16 Lah 529 (1) was the only ruling which appears to have held to the contrary. He endeavoured to justify the decision by reason of the clear words of S. 86, but as I have already pointed out, this is by no means so clear.

The learned counsel then relied on the words "the liability of any person to be taxed" and he claimed that the present suit raised this question. As pointed out already this may be a result of the present suit, and it is not the form of the present suit at all. But, in any case, I am further of opinion that the words "liability of any person to be assessed or taxed," read in conjunction with the remaining words of the section, imply that the word "liability" is not used in the widest sense of which it is capable, but is used in the more limited sense of liability to pay a particular tax which has been imposed. I therefore do not consider that 1935 Lah 632 (2) was wrongly decided and, following that rul-

ing, I would hold that the civil Court has jurisdiction to try the suit. The next question that arises is whether there was a contract at all between the parties. The learned counsel for the respondent contends that there were no mutual promises in this case at all, and that on a proper construction of the application there was no proper offer to build in consideration of exemption from taxation. Rather the application stated that the traders had already resolved to build the market and asked for a concession from the Municipal Committee in view of the fact that the Municipality stood to lose nothing and might gain by it. It appears to me that there is force in this contention, but it is not necessary to decide the point.

The learned counsel for the respondent further contends that the contract was clearly of more value than Rs. 50 and, therefore, the provisions of S. 47 had not been complied with in case the Court held that there was a valid contract between the parties. The learned counsel for the appellants, on the other hand, contended that the contract in question was incapable of monetary valuation and hence S. 47 did not apply. The words "value" or "amount of the contract" create no doubt some difficulty. It is not clear whether, as contended by the learned counsel for the respondent, the definition of value of a contract should be gain to be derived or expected to be derived by the parties from the transaction, or whether, as contended by the learned counsel for the appellants, the value of the contract is the monetary equivalent of the subject-matter of the contract. In this particular case whichever definition is accepted, it appears to me that it would follow that the contract was of the value of more than Rs. 50, but here again it is not necessary to express a final opinion on the point, because it appears to me that the matter can be decided from another point of view altogether. The appellate Court held that the contract was void for lack of compliance with the provisions of S. 70. In this Court, the learned counsel for the respondent has supported this finding by a two-fold argument. It is contended that the contract is within the terms of S. 70, but he has further contended that if it is not within the terms of S. 70 then the contract was ultra vires of the

Municipality and he has challenged the other side to show under what provisions of the Municipal Act, the Municipality was empowered to enter into such a contract, which implied a promise to exempt in perpetuity a future building from the incidence of a future tax which might be imposed on it or from the incidence of a tax which might fall on it by reason of the extension of the octroi or terminal tax limits.

It appears to me, without deciding the question one way or the other, that the appellants are here on the horns of a dilemma. If they contend that the contract was within the terms of S. 70, then the contract is clearly invalid for non-compliance with its terms. If they contend that the contract is not within the terms of S. 70, they are unable to show under what provisions of the Act the Municipality could enter into such a contract. The learned counsel endeavoured to contend that the contract was merely not to extend the boundaries of the octroi or the terminal tax which the Municipal Committee were by law empowered to do. But it appears to me that this does not alter the nature of the contract at all. It is obvious that the consideration, assuming that there was a contract on the part of the traders, was the assurance of the Municipality that they would not be taxed; this would be merely equivalent to saying that the consideration was non-extension of the terminal tax limits so as to include the Crump Market. In fact in the application itself the traders stated that if the boundaries were so extended they should be exempted from the incidence of the tax. It appears to me clear, therefore, that the essence of the contract was the escape from the imposition of the tax. It is also clear that this question of exempting from taxation has always been regarded as a very special right only to be considered as granted by express words in the statute and only to be considered as exercised where and when express words in the statute gave the right to exempt from taxing. Therefore, as S. 70 is the only section which confers any right on the Municipality to exempt from taxation under certain conditions, and as these conditions do not exist here, the action of the Municipal Committee, if it did not fall within the terms of S. 70, was ultra vires and therefore cannot constitute a

valid contract nor bind the Municipality. The question of estoppel was finally not pressed before us by the learned counsel for the appellants, who also did not press the point whether the agreement to levy a professional tax was also a binding contract on the Municipality. The result is that the appeal must be dismissed, but in view of all the circumstances of the case I would leave the parties to bear their own costs throughout.

Tek Chand, J.—I agree.

D.S./R.K.

Appeal dismissed.

*** * A. I. R. 1936 Lahore 976**

AGHA HAIDAR, J.

Kahn Chand—Plaintiff—Appellant.

v.

Gurdit Singh — Defendant — Respondent.

Second Appeal No. 1294 of 1935, Decided on 22nd October 1935, from decree of Addl. Dist. Judge, Amritsar, D/- 13th May 1935.

*** * Limitation—Appeal—Computation of period—Exclusion of time in obtaining copies—Decree not drawn up within period of limitation — Time commences to run from date on which decree is drawn up.**

Where the law creates a limitation and a party is disabled to conform to that limitation without any default in him, and he has no remedy over it, the law will ordinarily excuse him. There can be no legal obligation on a litigant to apply for a copy of the decree which is non-existent; the existence of a decree is a necessary condition precedent to the accrual of even the right or obligation to apply for a copy. Where a decree is not drawn up within the period of limitation prescribed for preferring an appeal against the decree, the suit must be deemed to be pending upto the date on which the decree is actually drawn up, and limitation for preferring an appeal will commence to run only from that date: 13 Cal 104 (F B); 1916 Pat 267 and 1924 Nag 271, Foll. [P 978 C 1]

Mukand Lal Puri and Qabul Chand—for Appellant.

L. C. Mehra and Charan Singh — for Respondent.

Judgment.—This case has taken about two hours of the Court's time and I do not blame the counsel who represented the parties before me. I dare say a considerable time must have been taken up in arguing the appeal before the lower appellate Court also. This is entirely due to the extremely unsatisfactory and complicated rules regarding the obtaining of copies which prevail in this Province. In the neighbouring Province of the United Provinces the price of obtaining copies is

fixed at a modest and uniform rate and the poor illiterate villager has no difficulty in obtaining copies by filing along with his application the requisite number of stamp folios. Here elaborate calculations have to be made from time to time and various amounts have to be deposited before the litigant gets copies. The essence of a good law is that it should be simple and easily comprehensible by the ordinary people for whose benefit it is framed.

The same observations apply to rules like these before us. With profound respect for the authorities who were responsible for framing these rules, it is submitted that the time has come when some reasonably simple and easily intelligible rules for obtaining copies should be framed for the benefit of the ignorant masses who constitute the vast and overwhelming majority of the litigating public. This however is by the way. The judgment in the present case was delivered on 28th August 1934 by the Subordinate Judge dismissing the plaintiff's suit. Very promptly, on 29th August 1934, the plaintiff applied for copies of judgment and decree. At the same time he deposited a sum of Rs. 2 which, I understand, has to be paid over and above the ordinary copying charges for the purposes of obtaining urgent copies. On 29th August the Copying Department made a report that the files had not been received and were therefore not available, and that the decree-sheet had not been prepared. A similar report was made on 30th August 1934, and again on 31st August 1934. The long vacation of the District Court commenced on 1st September and terminated on 30th September 1934, and the Courts were closed during this period. On 1st October 1934, when the Courts reopened the record of the case was received by the Copying Department. The decree appears to have been drawn up on that date because we know that there was no decree-sheet in existence on 31st August 1934, the date on which the Courts closed. On 1st October the plaintiff deposited the amount which was necessary for obtaining the copies.

On 2nd October 1934 these copies were ready and delivered. The appeal was filed on 9th October 1934 before the District Judge. The District Judge has held that the appeal was timebarred and that no case had been made out under

S. 5, Lim. Act, for extending the period of limitation. On this ground he dismissed the appeal. The plaintiff has come up to this Court in second appeal and it was argued before me with considerable force that the appellant was entitled to a deduction of the time between 29th August 1934, when he made the application, and 1st October 1934, when the decree sheet was drafted, and he deposited the cost of obtaining copies. He relies upon S. 12, sub-s. (2), Lim. Act. The relevant portion of this section is that, in computing the period of limitation, the time requisite for obtaining a copy of the decree appealed from shall be excluded. When a decree has not come into existence, it is idle to argue that a party should suffer because of its non-existence. This view is supported by a Full Bench decision, 13 Cal 104 (1). The head-note brings out the point clearly. It says that where a suitor is unable to obtain a copy of a decree from which he desires to appeal, by reason of the decree being unsigned, he is entitled under S. 12, Lim. Act, to deduct the time between the delivery of the judgment and that of the signing of the decree in computing the time taken in presenting his appeal. A Full Bench decision of the Patna High Court in 35 I C 863 (2) lays down that in appeals the period of limitation should be calculated from the date on which the decree was actually signed. This case follows the Full Bench decision quoted above.

I am fully aware of the provisions of law that the decree bears the same date as the judgment, but I am also aware of the fact that decrees in many cases are actually prepared and signed long after the date on which the judgments are pronounced and signed. Under these circumstances I cannot understand on what principle a litigant should be penalized when he has done all that lay in his power in the way of making an application promptly and depositing the copying fee on the date on which the decree sheet had been drawn up. I unhesitatingly follow the decision of a learned single Judge of the Court of the Judicial Commissioner at Nagpur which is to be found

1. Bani Madhub Mitter v. Matungini Dassi, (1886) 18 Cal 104 (F B).
2. Ram Asray Singh v. Sheonandan Singh, 1916 Pat 267=35 I C 863=1 Pat L J 573 (F B).

in 78 I C 996 (3). The learned Judge observed that the right of appeal does not come into existence until a proper decree comes into existence, and until a decree has been drawn up there can be no appeal. It was also held that, where the law creates a limitation and a party is disabled to conform to that limitation without any default in him, and he has no remedy over it, the law will ordinarily excuse him.

There can be no legal obligation on a litigant to apply for a copy of the decree which is non-existent: the existence of a decree is a necessary condition precedent to the accrual of even the right or obligation to apply for a copy. Where a decree is not drawn up within the period of limitation prescribed for preferring an appeal against the decree, the suit must be deemed to be pending upto the date on which the decree is actually drawn up, and limitation for preferring an appeal will commence to run only from that date. These judgments are based upon sound principles and completely cover the case put forward by the plaintiff-appellant in this Court. I hold therefore that the appeal filed in the Court below was well within the period of limitation. A point was raised by the learned counsel for the appellant that, inasmuch as the plaintiff had deposited the sum of Rs. 2 along with his application for obtaining copies of judgment and decree he could at least have been supplied with a copy of the decree out of this sum of Rs. 2 since, it was stated, that the copy of the decree would have cost only Re. 1-2-0. Reliance was placed on 30 C W N 926 (4). As the point of limitation can be decided on the first contention I do not consider it necessary to go into this matter. I am referred to certain rules in Ch. 14-B, para. (2), of the Rules and Orders of the High Court, Vol. 1, as showing that the application for obtaining copies was infructuous until the full amount of the cost was deposited.

A learned Judge of this Court sitting singly has discussed this point in Civil Appeal No. 405 of 1935, decided on 14th May 1935 (5). His opinion carries consi-

derable weight, but I would prefer to base my judgment on the broad question of law that when the decree itself was not in existence the applicant could not be punished because he deposited the cost of the application on the date when the decree sheet was actually drawn up and the record was received in the Copying Department. I would therefore allow the appeal, and setting aside the order of the Court below remand the case under O. 41, R. 23, Civil P. C. I further direct that the Court below shall fix an early date and dispose of the appeal according to law. The court-fee paid by the appellant in this Court should be refunded. Costs to abide the result.

B.D./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 978

AGHA HAIDAR, J.

Siraj Ud-Din—Plaintiff—Appellant.

v.

Mt. Rahiman and others — Defendants—Respondents.

Second Appeal No. 1317 of 1935, decided on 17th March 1936, from order of Dist. Judge, Ambala, D/- 28th May 1935.

(a) **Mahomedan Law—Succession—Daughter is co-sharer with brothers in property left by father—She is entitled to possession unless her claim is barred by some law—Even after marriage she retains her possession in such property till loss of her title by ouster and adverse possession—Her residence in father's house is in her own right as heir and not as a mere visitor to family.**

Under the Mahomedan law, a daughter, though her share is half of her brothers, is just as much a co-sharer in the property left by her father as her brothers. Her title is quite as solid and substantial in the heritage of her father as that of the sons, and she is entitled to possession unless her claim is barred by some rule of law which applies equally to the sons and other heirs themselves. If after her marriage she begins to live with her husband then being a co-sharer, the possession of her brothers would be deemed to be her possession unless she loses her title by ouster and adverse possession. If at any time she is in possession of her father's house and resides in it then that possession must primarily be attributed to her own right as the heir of her father and not as a mere visitor to the family home who stays in it on the sufferance of her co-heirs. [P 980 C 2]

(b) **Deed—Binding—Non-parties to transaction are not bound by it even if they are relatives of transferor and have not protested against it and no estoppel or acquiescence arises.**

Persons who are not parties to transactions cannot be bound by them simply because they are relations of the transferors and that they may be taken to have had knowledge of those

3. *Pandu v. Rajeshwar*, 1924 Nag 271=78 I C 996=20 N L R 131.

4. *Adarpriya Choudharani v. Ramprotap Agarwalla*, 1926 Cal 1105=98 I C 748=44 C L J 44=30 C W N 926.

5. *Ghulam Hussain v. Mangat Ram*, (1935) 37 P L R 794.

transactions, and did not protest, they could not be debarred from claiming their share by any rule of estoppel or acquiescence especially where their possession had not been interfered with in consequence of these transactions.

[P 981 C 1, 2]

(c) **Second Appeal**—Findings of fact not based upon evidence are not binding in second appeal.

In a second appeal findings of fact based upon legal evidence must be accepted. But where such findings are not based upon evidence, but are based upon conjectures, they are not binding, as conjecture can never take the place of judicial proof.

[P 981 C 2]

(d) **Attestation**—Attesting witness signing documents—No proof of his knowledge of their contents nor is he consenting party to transactions embodied therein—Onus lies on persons who rely on documents to prove such knowledge and consent.

The mere fact that a person signs the documents as an attesting witness does not establish that he was aware of their contents. The

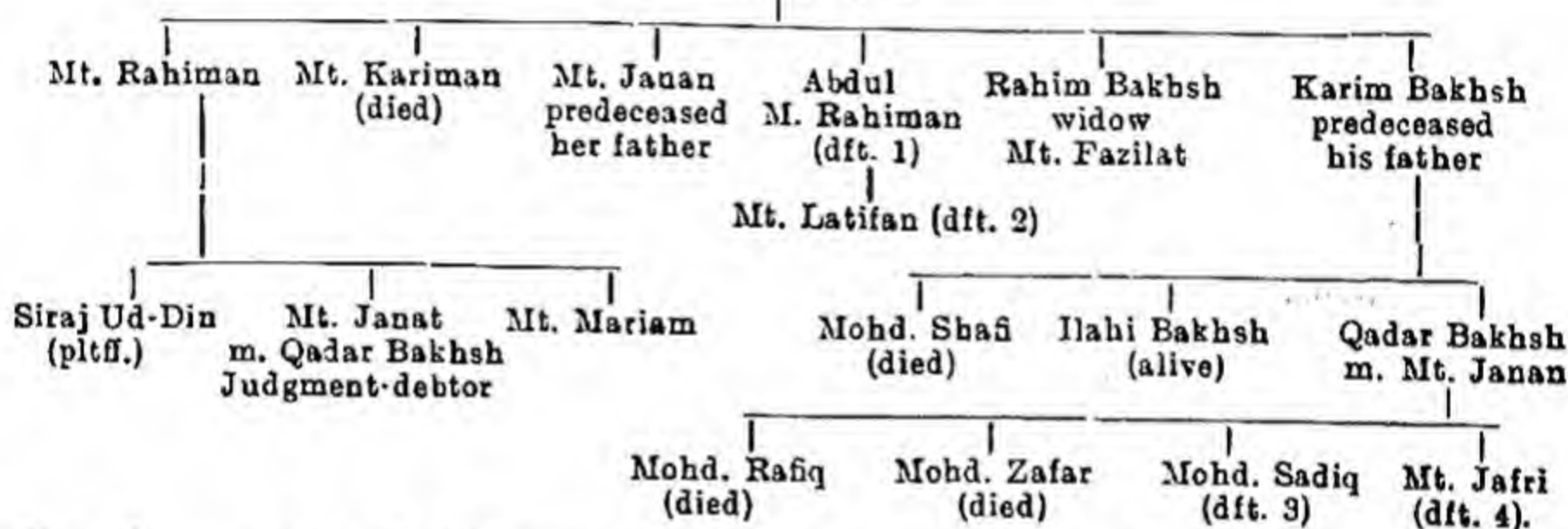
burden of proving that he had such knowledge and was a consenting party to the transactions embodied in them lies upon the parties who rely upon these documents: 1922 P C 20 and *Corea v. Appuhamy*, (1912) A C 230, *Rel. on*. [P 981 C 2]

Ghulam Rasul Khan—for Appellant.

Tek Chand—for Respondents.

Judgment.—This appeal arises out of a suit for possession by partition in respect of 3/10th share of a house No. 1096 and of 21/40th share of a vacant khola No. 2251. Both the Courts below have dismissed the plaintiff's claim. The plaintiff has come up to this Court in second appeal. The following pedigree table would be helpful in understanding the position of the various members of the family and also throws light upon the somewhat complicated dealings with the property in dispute by some of them:

MOHD. BAKHSH



For the purpose of this case house No. 1096 (old No. 828) should be kept separate from the khola bearing No. 2251. These two items of property are in dispute in the present suit and defendants outside the pedigree are the transferees from the members of the family. It may be stated at the outset that according to the concurrent findings of the Courts below the family is governed by Mahomedan law. In fact the learned District Judge has definitely held that the Mahomedan law applied, though in two places in his judgment he has created confusion; in one place he has introduced the point of custom by clearly relying upon it and in another place he seems to have applied some rules of custom by implication.

In the year 1913 one Karim Khan attached the house No. 828 in execution of a decree against Qadir Bakhsh and Ilahi Bakhsh. Qadir Bakhsh and Ilahi Bakhsh are the sons of Karim Bakhsh who died

during the lifetime of his father Mohammad Bakhsh and therefore they could not have inherited anything from Mohammad Bakhsh under the Mahomedan law in the presence of their uncles and aunts. This being so, Karim Khan attached the property in which his judgment-debtors had no right. Mt. Fazilat, the widow of Rahim Bakhsh, seems to have put in some objections claiming 1/3rd share which on the death of Mohammad Bakhsh would devolve upon her husband, with the result that only 2/3rd share in the house was put up for sale and purchased by the decree-holder, Karim Khan. Karim Khan transferred his rights to Barkat Ullah. Barkat Ullah must have realized that Abdul was alive and was entitled to 1/3rd share. He accordingly obtained a transfer of 1/3rd share from Abdul. On 9th March 1921 Barkat Ullah sold the 2/3rd share to Qadir Bakhsh with the result that ultimately the property returned to the family through Qadir Bakhsh, grandson of Mohammad Bakhsh.

On 1st April 1928 Mohammad Sadiq, defendant 3, brought a suit for possession of the whole house claiming to have received 1/3rd share from Mt. Fazilat under a gift and 2/3rds as the son of Qadir Bakhsh, the transferee of 2/3rd share from Barkat Ullah. The gift in his favour by Mt. Fazilat was not proved and his claim was decreed for joint possession for 2/3rd share only. On 16th February 1929, Mohammad Sadiq mortgaged for a sum of Rs. 50 one kothri and a portion of *sehn* in the house in dispute to Karim Shah. On the same date he executed a rent deed (Ex. P-11) of the mortgaged property in favour of the mortgagee, Karim Shah. Ex. P-11 has become important because it bears the signatures of Siraj Ud Din, plaintiff, as attesting witness. On 15th July 1929 Mohammad Sadiq mortgaged the whole of the house to Mohammad Ramzan, defendant 7, for a sum of Rupees 250. The mortgage-deed is Ex. D-12 and bears the signatures of the plaintiff as a marginal witness. Mohammad Ramzan brought a suit on the basis of his mortgage and purchased the whole house at an auction sale. Coming to the khola No. 2251, 1/3rd share in it was gifted by Abdul to his daughter Mt. Latifan, defendant 2. On 30th January 1928, Mohammad Sadiq mortgaged the khola in suit to one Shadi.

The mortgage-deed is Ex. D-13 and also bears the signatures of the plaintiff as a marginal witness. On 17th December 1931 Mohammad Sadiq sold 2/3rd share in the khola to Abdul Wahid, defendant 5, for a sum of Rs. 400. The plaintiff has brought the present suit claiming the fractional shares mentioned in the relief as one of the heirs of Mt. Rahiman, one of the daughters of Mohammad Bakhsh. Mt. Rahiman, it may be mentioned, has died on 31st January 1928. No less than eight issues were framed on the pleadings of the parties by the trial Court. With the exception of issue 7 all the other issues which really dealt with the merits of the case were decided in favour of the plaintiff by the trial Court. It was also found that Mt. Rahiman had lived in the house and also died there and the plaintiff himself had been living in it. It however dismissed the plaintiff's claim on the finding on issue 7 that the plaintiff was estopped by his conduct from maintaining the present suit. This finding was affirmed by the learned District

Judge on appeal by the plaintiff. Without in the least meaning any disrespect to the learned District Judge I cannot help observing that the learned Judge, who, by the way, is a Hindu gentleman of undoubted probity, has not been able to disembarass himself of considerations which apply normally to a joint Hindu family in which a daughter receives no share in the property left by her father in the presence of her brothers so that when once she is married she ceases to have any concern with the family property and visits the family house merely as an honoured guest.

It is an unconscious mental obsession, otherwise a lawyer occupying the highly responsible position of a District Judge ought to know very clearly that under the Mahomedan law, by which the family is governed, a daughter, though her share is half of her brothers, is just as much a co-sharer in the property left by her father as her brothers. Her title is quite as solid and substantial in the heritage of her father as that of the sons and she is entitled to possession unless her claim is barred by some rule of law which applies equally to the sons and other heirs themselves. If after her marriage she begins to live with her husband then being a co-sharer, the possession of her brothers would be deemed to be her possession unless she loses her title by ouster and adverse possession. If at any time she is in possession of her father's house and resides in it then that possession must primarily be attributed to her own right as the heir of her father and not as a mere visitor to the family home who stays in it on the sufferance of her co-heirs. There are indications in the judgment which go to show that this legal aspect of the matter had not been kept by the learned Judge in his mind. For instance, he observed as follows :

Mohammad Bakhsh died 40 or 50 years ago. If it is held that Mt. Rahiman, mother of the plaintiff, lived in the house merely as a relation of Abdul, Rahim Bakhsh and the sons of Karim Bakhsh after the death of Mohammad Bakhsh, then certainly plaintiff has got no share now in the properties in suit, as she abandoned it 40 or 50 years ago.

There is no evidence of abandonment on the record which must be proved like any other fact and I fail to see why it should be held that Mt. Rahiman lived in the house as a relation of Abdul, Rahim Bakhsh and the sons of Karim Bakhsh

after the death of her father. She had just as much right to live in the house as Abdul, Rahim Bakhsh and a better right than the sons of Karim Bakhsh who had predeceased his father. She could retort by saying that they were living with her as her relations, a proposition which would be equally untenable. The learned Judge has again remarked in the course of his judgment as follows :

It appears that at the time of the death of Mohammad Bakhsh his two sons and the sons of his third son Karim Bakhsh considered themselves to be entitled to succeed to his property according to custom to the exclusion of the sisters who had presumably been married and were living with their husbands.

The learned Judge forgot to note that the sons of Karim Bakhsh, who predeceased his father, were not entitled to succeed to Mohammad Bakhsh at all and the fact that they and the two sons of Mohammad Bakhsh considered themselves entitled to succeed cannot possibly prejudice the claim of Mt. Rahiman, the mother of the plaintiff, as one of the heirs of Mohammad Bakhsh.

The reference to custom, as already pointed out, is wholly inappropriate on the concurrent findings of the Courts below and there is no reason whatsoever to suppose that the daughters had been excluded from inheritance merely because they were married and had been living with their husbands. Again the learned Judge has observed that the plaintiff's mother lived in another Mohalla and had a house of her own, that she used to come to see her relations in the house in suit, but it could not be presumed that she used to come and live there as a co-sharer. I fail to understand why the position of a daughter, who was undoubtedly a co-sharer, should be taken to have been that of a mere guest who was visiting the family house in which she had a share. There are other passages in the judgment in which the learned Judge has fallen into a similar error, but it is not necessary to reproduce them for the purpose of fresh criticism.

The plaintiff's suit has been thrown out on the ground that the plaintiff's mother could not challenge the various transfers which had been made by certain members of the family and of which she must have had knowledge. This is a strange line of argument: it comes to this, that persons who are not parties to transactions can be bound by them simply

because they are relations of the transferors and the learned Judge considers that they may be taken to have had knowledge of those transactions and did not protest. I fully realize that in a second appeal, findings of fact based upon legal evidence must be accepted. But these are not findings based upon evidence; they are based upon conjectures, and it is a well-known proposition of law that a conjecture can never take the place of judicial proof. If people choose to amuse themselves by transferring property belonging to others behind their backs and without their definite knowledge the real owners cannot be affected. In my opinion, the plaintiff's mother could not be held to be debarred from claiming her share by any rule of estoppel or acquiescence as relied upon by the District Judge especially in view of the fact that her possession had not been interfered with in consequence of these transactions. So far as the plaintiff himself is concerned apart from imputing knowledge of the various transfers to him on account of near relationship with some of the transferors the learned Judge has further held that by signing Exs. P-11, P-12 and P-13 the plaintiff must be deemed to have been estopped from claiming his title. His reasoning is that by his conduct he must have led the outside world to believe that he had no title. Now, the mere fact that the plaintiff signed these documents as an attesting witness does not establish that he was aware of their contents and was a consenting party to the transactions embodied in them. The burden of proving that he had such knowledge and was a consenting party to the transactions lay upon the parties who rely upon these documents. The law is fully discussed by their Lordships of the Privy Council in 49 Cal 334 (1). The following passages should always be kept in mind by the Courts when dealing with the question of the alleged estoppel resulting from the signing of documents by a person as a marginal witness:

Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to

1. Pandurang Krishanaji v. Markandeya Tukaram, 1922 P O 20=65 I O 954=49 I A 16=49 Cal 334 (P O).

the transaction which the document effects. Estoppel does not arise from any such circumstance. As already stated, attestation itself does not effect it, nor does the belief of other parties as to the meaning of attestation affect the man who has placed his signature as a witness, unless it can be established that he knew that that belief would arise, and signed with that intent.

In my opinion the findings of the Court below on the question of estoppel are contrary to the rule of law laid down by their Lordships of the Privy Council for the guidance of Courts in India. I hold that there was no estoppel either against Mt. Rahiman, the mother of the plaintiff, or the plaintiff himself and the case falls within the principle in (1912) A C 230 (2). I would, therefore, allow the appeal, set aside the decrees of the Courts below and decree the plaintiff's claim. In the trial Court the fractional shares claimed by the plaintiff in the house and the khola were accepted as correct and it is not necessary to work them out over again or to remand the case to the Court below for the determination of those shares. The result, therefore, is that the plaintiff's suit shall be decreed to the extent of the shares claimed by him. The plaintiff shall get his costs throughout.

R.W./R.K. *Appeal allowed.*

2. *Corea v. Appuhamy*, (1912) A C 230=105 L T 886=81 L J P C 151.

A. I. R. 1936 Lahore 982

TEK CHAND AND DALIP SINGH, JJ.

Ahmad Sayyed Khan — Defendant — Appellant.

v.

Narain Singh—Plaintiff and others—Defendants—Respondents.

First Appeal No. 2157 of 1935, Decided on 17th June 1936, from the preliminary decree of Senior Sub-Judge, Delhi, D/-27th February 1934.

(a) Bengal Land Redemption and Foreclosure Regulation (17 of 1806), Ss. 7 and 8 — Proceedings under, carried out—Foreclosure automatic and title passed to mortgagee—Any suit brought thereafter is not foreclosure suit under Civil Procedure Code, but is one for possession as owner.—(Obiter).

Obiter.—Once proceedings have been taken under the Bengal Regulation and they have been duly carried out, foreclosure takes place automatically and title passes by virtue of the clause in the mortgage deed to the mortgagee. Any suit brought thereafter is not a suit for foreclosure under the Civil Procedure Code, but is a suit for possession as owner: 1921 Lah 9, Rel. on. [P 982 C 2; P 983 C 1]

(b) Civil P. C. (1908), O. 34, R. 2 — Applicability — Some portion of property with mortgagor and another with mortgagee—Terms of Bengal Regulation do not apply and hence no foreclosure under it — General remedy under O. 34, R. 2, Civil P. C., applies.

Where a portion of the property is in possession of the mortgagors, whereas another portion of the property is in possession of the mortgagee, it is impossible to apply the terms of the Regulation or to take action for foreclosure under it; the only remedy provided is the general remedy given by O. 34, R. 2: 1920 Lah 345, *Disting.*

[P 983 C 1]

Mohsin Shah—for Appellant.

Kirpa Narain and Bhagwat Dayal—for Respondent (Narain Singh).

Dalip Singh, J.—The only question arising for decision in this appeal is whether on the terms of the present mortgage, which contained a clause for conditional sale and on which the mortgagee brought a suit for foreclosure under O. 34, R. 2, Civil P. C., the suit did not lie because the only remedy is that provided under Bengal Regulation 17 of 1806 and the remedy under the Civil Procedure Code is excluded. The learned counsel for the appellant has contended that in all the cases from 1909 to 1936, and in the previous cases as well, proceedings under the Regulation were always taken, and after the Civil Procedure Code came into operation on 1st January 1909 it was only after the termination of proceedings under the Bengal Regulation that a suit for foreclosure under O. 34, R. 2, Civil P. C., was brought. The only ruling which supports this somewhat remarkable contention is 1 Lah 292 (1), where it is stated that a suit by way of foreclosure was brought after proceedings under the Regulation. We sent for the original records. It appears that the suit actually brought was a suit for possession as owner on the allegation that by virtue of the proceedings under the Bengal Regulation foreclosure had taken place and title had passed on the expiry of the year of grace prescribed by the Regulation.

It is obvious on a consideration of the Regulation itself as well as from other considerations that once proceedings have been taken under the Bengal Regulation, and they have been duly carried out, foreclosure takes place automatically and title passes by virtue of the clause in the

1. *Gordhan Das v. Mt. Rukman*, 1920 Lah 345 =58 I C 11=1 Lah 292.

mortgage deed to the mortgagee. Any suit brought thereafter is not a suit for foreclosure under the Civil Procedure Code, but is a suit for possession as owner, and this was pointed out in 2 Lah 53 (2), at p. 55. Other rulings cited by the learned counsel for the appellant do not advance the proposition any further than this.

On the other hand the learned counsel for the respondents has contended that whether the Civil Procedure Code and the procedure provided by the Bengal Regulation 17 of 1806 are or are not mutually exclusive, the terms of the present mortgage deed are such that the Regulation cannot apply. He contends that under Ss. 7 and 8 of the Regulation it is clear that the Regulation only applies in two cases: (i) where possession has passed to the mortgagee and foreclosure can duly take place in default of the payment of the sum lent, and (ii) where possession has not passed to the mortgagee and where foreclosure can duly take place in default of payment of the principal and interest. He contends that in the present case this is not so, and by virtue of the clause which provides that the mortgagee shall pay Rs. 400 per month by way of maintenance of the mortgagors and by virtue of the fact that a portion of the property is in possession of the mortgagors, whereas another portion of the property is in possession of the mortgagee, it is impossible to apply the terms of the Regulation or to take action for foreclosure under it. He, therefore, contends that the only remedy provided is the general remedy given by O. 34, R. 2, Civil P. C. I consider that there is force in this contention and the learned counsel for the appellant has not been able to show us that the mortgage in question would come within the terms of the Regulation. In this view it becomes unnecessary to decide whether if the mortgage had come within the terms of the Regulation the procedure under the Regulation would be obligatory and would bar the more general provisions of the Civil Procedure Code. In the circumstances I would dismiss the appeal with costs.

Tek Chand, J.—I agree.

R.W./R.K.

Appeal dismissed.

2. Karori Mal v. Ramji Lal, 1921 Lah 9=59
I O 812=2 Lah 53 (F B).

A. I. R. 1936 Lahore 983

ADDISON AND ABDUL RASHID, JJ.

Municipal Committee, Simla—Defendant—Appellant.

v.

Puran Mal & Sons—Plaintiffs—Respondents.

First Appeal No. 1755 of 1935, Decided on 19th May 1936, from decree of Senior Sub-Judge, Simla, D/- 17th May 1935.

(a) Punjab Municipal Act (3 of 1911 as amended by Act 3 of 1933), S. 193—Undoubted right of owner of land to erect building thereon restricted by S. 193—S. 193 does not create any vested rights by granting sanction to owner to erect buildings.

Every owner of land has the right to erect buildings thereon. The Punjab Municipal Act merely restricts the undoubted right of the owner of erecting a building on his own land by providing that the owner of the land can erect buildings only with the sanction of Municipal Committee and subject to the conditions laid down in the resolution conveying the sanction. S. 193 of the Act by granting sanction to the owner of the land to erect buildings thereon does not create any vested rights.

[P 984 C 2; P 985 C 1]

(b) Punjab Municipal Act (3 of 1911 as amended by Act 3 of 1933), S. 193-A—Plan of building sanctioned—Municipal Committee is empowered to modify such plan at any time before completion of building but not after completion.

The plan of any building whether sanctioned before the date on which the Amending Act (3 of 1933) came into force or after that date is liable to be modified by the Municipal Committee under S. 193-A, at any time before the completion of the building. After the completion of such building the Municipal Committee cannot in any way modify or alter the sanctioned plan.

[P 985 C 1]

*Mehr Chand Mahajan, Jindra Lal and Yeshpal Gandhi—*for Appellant.

*J. N. Aggarwal and Nawal Kishore—*for Respondents.

Abdul Rashid, J.—The facts of the case, bearing on the question of law involved in this appeal, may be shortly stated. Puran Mal & Son's plaintiffs, owned shops Nos. 125 to 127 in the Lower Bazar, Simla. In the year 1921, the plaintiffs got a plan prepared for the rebuilding of these shops as the old building had become dilapidated and uninhabitable. According to the new plan, the plaintiffs meant to erect a five storeyed building, two storeys being above the level of the Bazar on the south side. This plan was rejected by the Municipal Committee. From 1921 to 1933, four other applications made by the plaintiffs for erecting a five-storeyed building were

also rejected. On 14th March 1933, the plaintiffs submitted a sixth application for putting up a five-storeyed building. On 30th March, the Secretary of the Municipal Committee informed the plaintiffs that their application dated 14th March, to rebuild shops Nos. 125 to 127, Lower Bazar, had been sanctioned. It appears that this sanction was conveyed by the Secretary, Municipal Committee, to the plaintiffs in anticipation of a resolution of the Committee to that effect. This action taken by the Secretary, under the instructions of the Senior Vice-President, was confirmed by the Committee by means of a resolution on 7th April 1933. Major Mukand, I.M.S., Health Officer of Simla, was a tenant of the plaintiffs, and it was on his recommendation that the plan submitted by the plaintiffs for the sixth time for the erection of a five storeyed building was ultimately sanctioned. On 16th November, a number of shopkeepers of Simla submitted an application to the Secretary of the Municipal Committee raising objections to the sanction granted to the plaintiffs whereby they were authorized to build an additional storey on shops Nos. 125 to 127. This application pointed out that if the plaintiffs were permitted to build an additional storey, the applicants would be deprived of most of the light, air and sunshine that they were enjoying and that the locality would become highly insanitary. At the time of the making of this application the plaintiffs had not yet demolished their old building, and consequently no building operations had been started with respect to the new building.

On 8th December, the Simla Municipal Committee passed a resolution to the effect that, in pursuance of the provisions of S. 193-A, Punjab Municipal Act, 1911, the topmost storey of shops Nos. 125 to 127, Lower Bazar, sanctioned by the Municipal Committee on 7th April 1933, be disallowed, and that the sanctioned plan be modified accordingly. On 11th December, a copy of this resolution was sent to the plaintiffs by the Secretary. It may be mentioned that the Punjab Municipal Act, 1911, was amended by Act 3 of 1933, and the amended Act had come into force on 17th July 1933. S. 193-A referred to in this resolution was introduced into the Punjab Municipal Act by the Amending Act of 1933. The plaintiffs preferred an appeal to the Com-

missioner, Ambala Division, against the resolution of the Municipal Committee dated 8th December 1933, whereby the building of the topmost storey had been disallowed. This appeal was rejected on 17th March 1934. On 29th May 1934, the plaintiffs instituted the present suit for a declaration that the action of the Municipal Committee in modifying the plan by its resolution dated 8th December 1933, was illegal and ultra vires and not binding on the plaintiffs, and for an injunction restraining the Municipal Committee from preventing the plaintiffs from building the topmost storey, and in the alternative the plaintiffs claimed Rs. 10,000 by way of compensation for the loss that they would suffer on account of the disallowance of the building of the topmost storey. The trial Court gave the plaintiffs a declaration to the effect that the action of the Municipal Committee in modifying the sanction already given by its resolution dated 8th December 1933, was illegal and ultra vires. The suit, regarding compensation and injunction, was dismissed. Against this decision the Municipal Committee of Simla has preferred an appeal to this Court. The sole question for consideration in this appeal is whether S. 193-A empowers the Municipal Committee to modify the plans which had been sanctioned before 17th July 1933, the date on which the Amending Act (Act 3 of 1933) came into force. S. 193-A which was inserted by the Amending Act runs as follows:

If at any time before the completion of a building of which the erection has been sanctioned under S. 193, the Committee finds that any modification of the sanctioned plan is necessary, the Committee may subject to compensation for any loss to which the owner may be put direct that the building be modified accordingly.

The trial Court has held that as this section did not exist in the Punjab Municipal Act as it stood before 17th July 1933, this section does not apply to plans that were sanctioned before 17th July 1933. The basis of the decision of the trial Court is that legislation which affects vested rights must be held to be prospective and not retrospective in its operation, and that S. 193-A cannot therefore affect vested rights that had come into being before 17th July 1933. In our opinion, the decision of the trial Court is unsustainable. Every owner of land has the right to erect buildings thereon.

The Punjab Municipal Act merely restricts the undoubted right of the owner of erecting a building on his own land by providing that the owner of the land can erect buildings only with the sanction of the Municipal Committee and subject to the conditions laid down in the resolution conveying the sanction. S. 193 of the Act by granting sanction to the owner of the land to erect buildings thereon does not create any vested rights. S. 194, Punjab Municipal Act lays down that every sanction for the erection or re-erection of any building given by the Municipal Committee shall remain in force for one year from the date of such sanction. The sanction lapses one year after the grant thereof. It cannot be said that a vested right had been created by the grant of sanction and that that vested right disappeared by lapse of time.

In our opinion, the opening words of S. 193-A make it perfectly clear that the Municipal Committee has the power to modify any plan that has been sanctioned up to the time of the completion of the building of which the erection has been sanctioned under S. 193. As the Act stood before the amendment, S. 193 dealt with the sanctioning of plans. After the amendments made in 1933, S. 193 continues to deal with sanctions regarding the erection of buildings. A reference in S. 193-A to S. 193 does not therefore show that S. 193-A is restricted in its applicability to plans sanctioned under S. 193 as amended in 1933. In this view of the matter no question arises as to the retrospective or prospective operation of S. 193-A. In our opinion therefore the plan of any building whether sanctioned before 17th July 1933, or after that date is liable to be modified by the Municipal Committee under S. 193-A, at any time before the completion of the building. After the completion of such building the Municipal Committee cannot in any way modify or alter the sanctioned plan.

Reference was made by the learned counsel for the respondents to Maxwell on the Interpretation of Statutes, and (1905) A C 369 (1) and 1934 Lah 1013 (2). The two rulings relied upon by the learned counsel merely lay down that the

right of appeal is a vested right and cannot be taken away by legislation which comes into operation after the right has accrued unless there is a definite provision in the new legislation to that effect. These rulings and the observations in Maxwell relied upon by the learned counsel for the respondents have no applicability to the facts of the present case. For the reasons given above, we hold that the resolution of the Municipal Committee dated 8th December 1933, modifying the previously sanctioned plan was not illegal or ultra vires. We therefore accept this appeal, set aside the judgment and the decree of the Court below, and dismiss the plaintiffs' suit. The plaintiffs-respondents will pay the costs incurred by the defendant-appellant in the trial Court. Parties will bear their own costs in this Court.

R.W./R.K.

Appeal accepted.

A. I. R. 1936 Lahore 985

JAI LAL, J.

Ujjal Singh-Sunder Singh — Plaintiff
—Petitioner.

v.

Ahmad Yar Khan — Defendant — Opposite Party.

Civil Revn. No. 64 of 1936, Decided on 18th April 1936, from order of Senior Sub-Judge, Shabpur, D/- 29th November 1935.

Stamp Act (1899), S. 33—Mere filing of document without attempt to tender it in evidence or prove it does not attract provisions of S. 33.

Mere production of a copy of a document or its transliteration without an attempt to prove it or without an attempt to tender it formally in evidence does not amount to the production of document before person concerned nor does the document under such circumstances come before the person concerned in the performances of his function so as to attract the provisions of S. 33. [P 986 C 1, 2]

Jai Gopal Sethi—for Petitioner.

Order. — The petitioner instituted a suit for recovery of money from the respondent who is neither present nor represented before me. The suit was based on a writing which was signed by the defendant. The writing in question is that Rs. 7,687-12-6 is due to the plaintiff from the respondent on account of previous accounts. This document is signed by the defendant. When the plaintiff presented the plaint he also filed, along with the transliteration of the writing mentioned above, the transliteration of

1. Colonial Sugar Refining Co. v. Irwin, (1905) A C 369=74 L J P C 77=92 L T 738=91 T L R 513.

2. *Ata-ur-Rahman v. Income-tax Commissioner, Lahore*, 1934 Lah 1013.

two other writings which are of a previous date and relate to different amounts but are substantially in the same terms. It appears that the Stamp Examiner inspected the record and formed an opinion that the three writings in question amounted to three bonds and as each of them bore a stamp of one anna, they were insufficiently stamped and could be admitted only on payment of penalty and the requisite deficiency in stamp duty. This matter having been brought to the notice of the trial Judge he directed the plaintiff to produce the original book in which the writings were contained, tore off the relevant pages of the book and impounded the documents directing the plaintiff to pay penalty and the balance of the stamp duty, holding that each document was a bond.

With regard to the writing for Rupees 7,687-12-6, the petitioner's counsel states that he has already presented this document in Court; he does rely upon it and has paid the penalty but has moved the Financial Commissioner to remit the penalty. With regard to the other two documents, he says that he has never tendered them in evidence and he does not intend to tender them. Their translations were merely filed with the plaint to be used in case of necessity and this necessity has not and would not arise. He therefore says that the learned Senior Subordinate Judge was not competent to impound the document and to direct the payment of duty and penalty under S. 33, Stamp Act. That section provides that every person having by law or consent of parties authority to receive evidence and person in charge of a public office except an Officer of Police before whom any instrument chargeable, in his opinion, with duty is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

The question is whether under the circumstances mentioned above the two documents, other than the document for Rs. 7,687-12-6 were produced or came before the Senior Subordinate Judge in the performance of his functions. In my opinion, they did not. The mere production of a copy of the document without an attempt to prove it or without an attempt to tender it formally in evidence does not amount to the production of the document before the person concerned.

Nor does the document under such circumstances come before the person concerned in the performance of his functions. I also consider that all the three documents mentioned do not fall within the definition of "bond." They are merely acknowledgments of liability for the purposes of the Stamp Act. They do not contain any express promise to pay, they are not attested by witnesses, but they merely record the fact that the amounts mentioned in them were due from the plaintiff to the defendant on account of previous accounts; they are nothing more than acknowledgments and are liable to duty as such. The duty on an acknowledgment is one anna and consequently if the documents in question bear a stamp of one anna each, they must be held to be duly stamped. The question relating to the documents mentioned first above is not before me. It is before the learned Financial Commissioner. I therefore pass no orders about it. With regard to the other two documents, I accept the petition and set aside the order of the Senior Subordinate Judge holding that they are bonds and direct that the penalty and the deficiency in stamp duty, if recovered from the petitioner, be refunded to him. There will be no order as to the costs of this petition.

V.B./R.K.

Petition accepted.

A. I. R. 1936 Lahore 986

ADDISON AND ABDUL RASHID, JJ.
Rama Shah—Plaintiff—Appellant.

v.

Kuldip Singh and others — Defendants
—Respondents.

First Appeal No. 1228 of 1935, Decided on 3rd February 1936 from decree of Senior Sub-Judge, Jhelum, D/- 25th March 1935.

(a) Custom (Punjab)—Agriculturist—Main source of livelihood agriculture—Some members supplementing income by Government service—Family retains status of agriculturist and is bound by customary law.

Where agricultural income is the main source of livelihood of the members of the family if a few members of the family supplement their income by salaries derived from Government service it does not show that the family has given up agricultural pursuits and that such a family cannot be held to be bound by customary law. [P 988 C 2]

(b) Custom (Punjab)—Succession—Khatris and Brahmins of Gujrat District—Succession and inheritance governed by custom and not by Hindu law.

Singh was born in the same year, and when he was two years old Gurmukh Singh was appointed to be his play-fellow and companion. During Ranjit Singh's reign Gurmukh Singh was appointed a military commander and distinguished himself in a number of campaigns. He was granted jagirs worth about Rs. 50,000 and it appears that with this money two villages, which ultimately came to be known as Qilla Attar Singh and Rakh Gurmukh Singh, were acquired. Sardar Hari Singh died without male issue. His estate is in possession of his widow, Mt. Parbati, and his two daughters have not inherited any portion of his estate. Gian Singh is alive. During his lifetime he got all his lands mutated in favour of his two sons, Tara Singh and Harkishen Singh, in equal shares. Harkishen Singh is alive. Tara Singh died two years before the institution of the suit. The male members of the family at this time, therefore, are Gian Singh, Harkishen Singh and the five defendants. As mentioned above, the members of this family are the exclusive owners of two villages, namely, Qilla Attar Singh and Rakh Gurmukh Singh. In Pindi Lala village the family owns 40 or 50 squares; in Chak Basawa about 15 squares and three squares in village Dinga. All these villages are situate in the Gujrat District. The family also owns some urban property at Gujrat, Jhelum and Lahore. The land revenue of various villages is assigned to Sardar Gian Singh who has a jagir of about Rs. 10,000.

It is amply established that the family has been in possession of extensive landed property in the five villages alluded to above since long before the settlement of 1857. The settlement record of 1857 shows that in Qilla Attar Singh 130 acres 5 kanals and 16 marlas of land were under the personal cultivation of Sardar Attar Singh out of an area of 560 acres 2 kanals and 6 marlas. The settlement record of 1868 shows that in Qilla Attar Singh 4301 kanals and 10 marlas were under the personal cultivation of Sardar Attar Singh, and the area under the personal cultivation of Sardar Hari Singh and Gian Singh, sons of Sardar Attar Singh in 1891-92 was 3198 kanals 14 marlas. The settlement of 1914-15 shows 1196 kanals and 19 marlas under the personal cultivation of the proprietors in this village. Similarly in Rakh Gurmukh Singh, Pindi Lala, Chak Basawa and Dinga extensive areas

have been under the personal cultivation of the members of this family from the year 1857 to the year 1914-15. It is clearly established, therefore, that ever since the advent of the British Rule the family of the defendants has been living either in Qilla Attar Singh or Rakh Sardar Gurmukh Singh and that in the different villages in which they hold extensive lands large areas have been under the personal cultivation of the proprietors. It may be that the members of the family have not been tilling the land with their own hands, but the members must be held to follow agricultural pursuits even if they get their lands cultivated by their servants so long as the land is khudkasht (under personal cultivation).

The evidence on the record amply establishes that agricultural income is the principal source of the livelihood of the members of this family. Master Narain Das (D. W. 1) stated that he had known the family of Sardar Gian Singh for about 40 years and that the members of this family lived on agriculture. Ghulam Mohammed (D. W. 2) stated that the principal source of income of the defendants was agriculture, that they had their own bullocks and ploughs and that they derived much income from their lands. Mirza (D. W. 3) stated that the defendants mainly lived on agriculture, that the members of the family of Sardar Gian Singh did not carry on any trade or business. To the same effect is the testimony of several other witnesses. It is true that Sardar Hari Singh was a Naib Tehsildar for a short period, that Sardar Sampuran Singh was a Sub-Inspector of Police, and Sardar Balwant Singh is now a Captain in the army. Service is, however, not the main occupation of the members of the family. If a few members of the family supplement their income by salaries derived from Government service it does not show that the family has given up agricultural pursuits and that such a family cannot be held to be bound by customary law.

Qilla Attar Singh and Rakh Sardar Gurmukh Singh were acquired by members of this family considerably before the year 1857, and lands in Pindi Lala, Chak Basawa and Dinga were also purchased by the members of the family before 1857. The members of the family have continued to reside in Qilla Attar Singh and Rakh Sardar Gurmukh Singh

ever since the advent of the British Rule. The members of this family have lived amongst zamindars and agriculturists for about 80 years. They have also furnished Lambardars and Zaildars, and Kuldip Singh, defendant 1, is even now a Lambardar and Zaildar.

Another very important piece of evidence showing that the family follows custom is furnished by the *Riwaj-i-am* compiled at the settlement of the year 1868. It appears from the Urdu copy of the *Riwaj-i-am* compiled in 1868 that Sardar Attar Singh, the father of the defendants, and other members of this family, were consulted at the time of the compilation of the *Riwaj-i-am*. The Hindu tribes consulted at the time of the compilation of this *Riwaj-i-am* were separated into four classes. One of these classes consisted of Brahmans and Khatriis. Throughout the *Riwaj-i-am* the customs of Khatriis and Brahmans of Gujrat District are recorded in a separate column. In several respects customs of Brahmans and Khatriis differ from the customs of the other Hindu tribes. These differences are carefully recorded in the requisite column in the *Riwaj-i-am*. The fact that Khatriis of Gujrat District were consulted at the time of the compilation of the *Riwaj-i-am* of 1868 is a very strong indication of the fact that Khatriis of Gujrat District follow customary law. So far as succession and alienation are concerned, the Khatriis and Brahmans gave the same replies as the other Hindu tribes of the district. The *Riwaj-i-am* of Gujrat District compiled in 1892 also shows that Khatriis and Brahmans were consulted at the time of the compilation of this *Riwaj-i-am*.

At p. 2 of the customary law of Gujrat District relating to the settlement of 1892, it is definitely stated that Hindu Khatriis and Brahmans were included amongst the tribes whose replies were recorded at the time of the settlement. The Manual of customary law compiled in 1922 does not give a list of the tribes consulted at the time of the preparation of the Manual but the answers to different questions show that in some instances the replies of the Khatriis were recorded. The fact that the Khatriis of Gujrat District were consulted at the time of the preparation of the different *Riwaj-i-ams* is good *prima facie* evidence of their being governed by customary law.

It was held in 5 P R 1915 (1) that Sobti Khatriis of village Alamgarh, Gujrat District, followed agricultural custom in matters of inheritance to ancestral property. In 1927 Lah 345 (2), it was held that the onus of proving that a party is governed by custom and not by personal law, in case of high caste Hindus, such as Khatriis, lay on the person alleging it, but that it had been established that Wadhwan Khatriis of Mauza Ara in the Gujrat District were governed by custom in matters of alienation of property. In 116 P R 1893 (3) and 1929 Lah 261 (4), Brahmans in the Gujrat District were held to be governed by customary law. In the *Riwaj-i-am* of 1868 the replies of Khatriis and Brahmans of the Gujrat District were identical. The above-mentioned four rulings, therefore, constitute judicial instances of the fact that Khatriis and Brahmans of different villages in the Gujrat District follow customary law in matters of inheritance and succession and that they are not governed by the provisions of Hindu law.

The learned counsel for the parties quoted a large number of rulings in support of their respective contentions as to whether the Khatriis of Gujrat should be held to be governed by custom or Hindu law. It is unnecessary to refer to these rulings as the matters which may be taken into consideration in deciding the question whether a particular community is governed by personal law or custom are exhaustively summarized in 1931 Lah 491 (5). The evidence in the present case, in our opinion, conclusively shows that Hindu law has never been followed by the members of this family in social matters or in matters relating to succession or alienation. The different members of the family have been living separately. The family has therefore never been a joint Hindu family, nor has the property ever descended by means of survivorship. On the other hand the members of the family have been living on agriculture for over 80 years; there have been extensive

1. Ishar Devi v. Bindraban, 1914 Lah 212 = 26 I C 686 = 5 P R 1915 = 197 P L R 1915.
2. Ramrakhi v. Mula Singh, 1927 Lah 345 = 101 I C 194.
3. Prab Dial v. Devi Dial, (1893) 116 P R 1893.
4. Maya Devi v. Badri Nath, 1929 Lah 261 = 114 I C 49 = 11 L L J 125.
5. Bhagwani v. Sitaram, 1931 Lah 491 = 134 I C 302 = 32 P L R 284.

areas under their personal cultivation ; they were consulted at the time of the compilation of the *Riwaj i-am* of 1868 ; and they have always followed agricultural pursuits and never indulged in trade or business. We therefore affirm the decision of the trial Court that the family of the defendants is governed by custom. It may be mentioned that, though we have held the family of the defendants to be governed by customary law, it would be for the executing Court to determine as to what property can be attached in the execution of the plaintiff's decree and the manner of dealing with such property. For the reasons given above, we affirm the decision of the trial Court and dismiss this appeal with costs.

B.D./R.K. *Appeal dismissed.*

A. I. R. 1936 Lahore 990

ADDISON AND ABDUL RASHID, JJ.

Diwan Chand—Plaintiff—Appellant.

v.

Sant Ram and others—Defendants—Respondents.

Second Appeal No. 1627 of 1935, Decided on 25th February 1936, from decree of Dist. Judge, Sialkot, D/- 10th July 1935.

(a) Interpretation of Statutes—Fiscal statute.

Courts should put a liberal interpretation upon a fiscal statute, such as would lessen the burdens of litigation and not add to them.

[P 990 C 2]

(b) Court-fees — Suit for declaration and injunction—Jurisdiction value and value for purposes of court-fee are same.

In a suit for declaration and injunction court-fee should be paid on the suit as valued for purposes of jurisdiction, as the value of the suit for purposes of court-fee and for purposes of jurisdiction should be the same : C. A. No. 603 of 1931, *Approved*.

[P 990 C 2]

R. C. Manchanda—for Appellant.

Mehr Chand Sud—for Respondents.

Order of Reference.

The question raised in this appeal is not free from difficulty. Mr. Manchanda, counsel for the appellant, relies upon a Full Bench decision reported in 111 P R 1913 (1) in support of his contention. The Court below has relied upon a judgment of Addison, J., as a Taxing Judge, dated 24th March 1931, in *Civil Appeal No. 603 of 1931* (2). The District Judge has observed that :

The clear exposition of law by Addison, J., in this judgment, leaves no room for doubt that the plaintiff in this case was bound to make up the court-fee on the jurisdictional value, that is to say on Rs. 1,650. All the reasons for such a finding and for disregarding 111 P R 1913 (1) are contained in the order of the learned Judge.

The point is not an easy one to decide in view of the state of authorities. My own view is that, generally speaking, Courts should put a liberal interpretation upon a fiscal statute such as would lessen the burdens of litigation and not to add to them. The question is of general importance as cases of valuation for the purposes of court-fee and jurisdiction are coming up before the Courts every day. It would, I think, be desirable if the matter were to be laid before a larger Bench and decided once and for all so that the litigants and the Courts below may know exactly how the law stands. I would therefore order that the papers should be laid before the Hon'ble Chief Justice so that His Lordship may be pleased to refer the matter to a larger Bench.

Opinion of Division Bench

Addison, J.—The plaintiff instituted a suit against the defendants, combining in the suit six different causes of action. It will be sufficient to set forth the first and second of these as they fairly represent the rest. The first relief claimed was for declaration of title with respect to a wall and for an injunction for its demolition, while the second was for a declaration of title with respect to three parnalas and four water spouts and for an injunction for their removal. The first relief was valued at Rs. 5 for purposes of court-fee and at Rs. 110 for purposes of jurisdiction, while the second was valued at Rs. 35 for purposes of court-fee and at Rs. 770 for purposes of jurisdiction. The trial Judge ordered that court-fee should be paid on the suit as valued for purposes of jurisdiction on the ground that the value of the suit for purposes of court-fee and for purposes of jurisdiction should be the same. The plaintiff did not comply with this order and the plaint was rejected, the appeal being dismissed by the District Judge of Sialkot. Against this decision this second appeal has been preferred to this Court.

The subject came before the Taxing Judge in *Civil Appeal No. 603 of 1931* (2) and his decision has been followed by the lower Courts. We have heard counsel

1. *Barru v. Lachhman*, 1914 Lah 214=22 I C 503=111 P R 1913 (F B).

2. *Kathu v. Pohlu*, Civil Appeal No. 603 of 1931, Decided on 24th March 1931.

and are of opinion that the decision of the Taxing Judge referred to is correct, and we so hold. Counsel for the appellant, however, asked to be allowed to amend his plaint, giving as his reason that his client was misled and was willing to pay such court fees as were necessary. It was agreed before us that value for purposes of court-fee and jurisdiction with respect to the first relief should be Rs. 110, that the value for both purposes with respect to the second relief should be Rs. 110, that the value for both purposes with respect to the third relief should be Rs. 110, that the value with respect to the fourth relief for both purposes should be Rs. 110 and that the value for both purposes with respect to the sixth relief should be Rs. 110, while the value with respect to the fifth relief should be the market value of the land. It was stated that with respect to the fifth relief the necessary court-fee had already been paid. We accordingly accept this appeal and allow the plaint to be amended as set out above. This amendment should be made and the necessary court-fee paid in the trial Court on or before 24th April 1936. If this is done, the trial Court will proceed with the trial of the suit and the defendants will be allowed Rs. 32 as costs in all the Courts up to date. If this amendment is not made and the court-fees not paid on or before the fixed date, the appeal must stand dismissed with costs throughout.

V.B.B./R.K. *Appeal accepted.*

A. I. R. 1936 Lahore 991

BHIDE AND CURRIE, JJ.

Ujagar Singh and others—Plaintiffs—Appellants.

v.

Mt. Dyal Kaur and others—Defendant and another—Plaintiff—Respondents.

Second Appeal No. 2159 of 1934, Decided on 11th November 1935, from decree of Addl. Dist. Judge, Amritsar, D/- 31st August 1934.

(a) Custom (Punjab) — Succession — Kaler Jats—Daughters succeed in preference to collaterals.

In the Kaler subdivision of the Jats tribe a daughter succeeds to the father in preference to collaterals. [P 991 C 2]

(b) Custom (Punjab) — Riwaj-i-am — No direct question on point of custom—There should be no presumption

Custom cannot be deduced by mere inference, and in the absence of any direct questions in a riwaj-i-am on a point of custom it would not be safe to make any presumption. [P 992 C 2]

Mehr Chand—for Appellants.

Mehr Chand Mahajan—for Respondents.

Bhide, J.—This second appeal arises out of a suit by collaterals of the 7th degree to challenge an alienation made by a widow named Mt. Dial Kaur in favour of her daughter. The defence was that the property was non-ancestral and Mt. Kartar Kaur was entitled to succeed to it according to custom. The trial Court found the issue as to custom in favour of the daughter and dismissed the suit, and the decision was affirmed by the learned District Judge on appeal. From this decision the collaterals have preferred a second appeal on a certificate granted by the learned District Judge on the point of custom.

It is common ground that the entry in the riwaj-i-am on the point of custom involved in the case was in favour of the plaintiffs and the initial burden of proof was rightly laid on the defendants. The trial Court, after a consideration of the instances produced in evidence and the authorities cited before it, came to the conclusion that the initial presumption raised by the riwaj-i-am had been rebutted. The learned District Judge however proceeded on a different line. He held that no representatives of the Kaler subdivision of the Jat tribe, to which the parties to the present case belong, had been consulted at the time of the preparation of the riwaj-i-am of 1914 on which the plaintiffs had relied and that the entry could not therefore be taken to represent the custom of that particular subdivision of the tribe. He further found that there were no instances on record relating to this particular subdivision, and consequently, as there was no evidence relating to any special custom governing the parties, he applied the 'general' custom as laid down in para. 23 of Rattigan's Digest according to which a daughter would appear to be entitled to succeed to the property of her father as against collaterals of the 7th degree, whether the property is ancestral or otherwise, and affirmed the decision of the trial Court.

The learned counsel for the appellants has contended that the learned District

Judge, in adopting the above reasoning, had virtually shifted the onus of proof to the plaintiffs, and as they had no opportunity to produce evidence on that basis the case should be remanded for re-trial. It was also pointed out that the learned District Judge had given no finding on the question whether the property was ancestral or self-acquired. After considering the facts on the record, I do not think that there is any force in this contention. It is true that the learned District Judge has ignored the *Riwaj-i-am* inasmuch as it was, in his opinion, not applicable to Kaler Jats, but the initial onus having been placed on the defendants, it was open to them to show that the *Riwaj-i-am* did not in fact apply to Kaler Jats and thus re-shift the onus to the plaintiffs. The plaintiffs, moreover, raised no objection in this respect in the District Judge's Court, and although a copy of the judgment in *Civil Appeal No. 1959 of 1919* (1) of this Court in support of the view taken by the learned District Judge was produced before him, they did not ask for any further opportunity to produce evidence. The point has not even been taken up in the grounds of appeal in this Court. Both the parties appear to have produced such evidence as they had on the point of custom and there seems to be no justification for ordering a fresh trial on the issue of custom at this stage. As regards the question whether the property was self-acquired or ancestral, the learned District Judge has pointed out that the entry in the *Riwaj-i-am* makes no distinction in this respect between acquired and ancestral properties and consequently a finding on this question was not material, so far as the entry in the *Riwaj-i-am* was concerned. On the other hand, according to general custom, as stated in para. 23 of Rattigan's Digest of Customary Law on which the learned District Judge has based his decision, it would appear that the plaintiffs as collaterals of the 7th degree cannot succeed to the property in dispute in the presence of a daughter, whether the property is ancestral or self-acquired.

The decision of the learned District Judge is fully supported by the judgment in *Civil Appeal No. 1959 of 1919* [now reported as 1935 *Lah* 408 (1)] which he

has followed. The author of the Customary Law of the Amritsar District prepared in 1914 has stated in his preface the various sub-divisions of the Jat tribe, whose representatives were consulted in the course of the preparation of the *Riwaj-i-am*, and amongst them Kaler Jats are not included. The learned counsel for the appellants conceded that the customs of all the sub-divisions of the Jat tribe are not necessarily the same, and as no representatives of the Kaler sub-division were consulted it cannot be assumed that the answers to question 60 and question 61 would necessarily apply to this sub-division or raise any presumption in plaintiff's favour. The case might have been different if the preface had not mentioned the subdivisions whose representatives were consulted, for in that case it could have been argued that the presumption applied generally to the whole of the Jat tribe and onus would then have been on the person belonging to any particular sub-division of the tribe who alleged that a different custom governed that sub-division. But as the various sub-divisions, whose representatives were consulted, are specifically mentioned in the preface, the fact cannot be ignored.

The learned counsel for the appellants attempted to rely on the *riwaj-i-am* of 1865, though it was apparently not relied on in the Courts below. But a careful perusal of the questions and answers in that *riwaj-i-am* shows that no direct question as regards the succession of daughters was put to the representatives of the tribes. The learned counsel for the appellants wanted to infer from some of the answers that succession of daughters was not recognized in any circumstances by the Kaler Jats. But custom cannot be deduced by mere inference and in the absence of any direct questions on the point, it seems to me that it would not be safe to make any presumption in favour of the plaintiffs even on the basis of the *riwaj-i-am* of 1865. The position then is that neither the *riwaj-i-am* of 1865 nor that of 1914 helps the plaintiffs inasmuch as neither states the custom applicable to the Kaler Sub-Divisions of the Jat tribe on the point now at issue. The plaintiffs produced no instances. The oral evidence was worthless and their learned counsel made no attempt to rely on it. The learned counsel for the plaintiffs relied in the end on three rulings

1. *Thakar Singh v. Mt. Dhan Kaur*, 1935 *Lah* 408=157 I C 114=37 P L R 225.

of this Court reported in 8 Lah 281 (2), 1925 Lah 556 (3) and 1933 Lah 893 (4). These cases do not relate to Kaler Jats and were moreover decided merely on the basis of presumption of the *riwaj-i-am*. But this presumption, as already pointed out above, cannot help the plaintiffs, who are Kaler Jats.

The result is that the plaintiffs have failed to produce any evidence to establish the custom relied upon by them. The respondents have produced a certain number of instances and also relied on some reported cases, but these also do not relate to Kaler Jats. There is therefore no direct evidence to establish the custom of Kaler Jats on the point at issue. According to S. 5, Punjab Laws Act, the Court has to ascertain the "custom governing the parties" and in the absence of such custom personal law will apply. The learned District Judge following the case reported in 1935 Lah 408 (1), has applied the rule of "general custom" as stated in para. 23 of Rattigan's Digest. With all deference to the learned Judges, who decided that case, I must say that I do not see why this was done. Para. 23 merely states a custom which has been found to govern in any tribes in this Province. It cannot raise any presumption in this case of a particular tribe in the absence of instances. It seems to me that when no rule of custom governing the parties to this case was held to be proved, the personal law of the parties, viz., Hindu law, should have been applied: cf. 110 P R 1906 (5) and S. 5, Punjab Laws Act. It is not disputed that according to Hindu law, plaintiffs cannot succeed.

It is however significant that both parties have produced instances and relied on reported cases relating to other subdivisions of Jats. If it were assumed from this fact that their customs are really not different from those of the majority of the sub-divisions of the Jat tribe, whose answers are embodied in the *riwaj-i-am* of 1914, even then it seems to me that the evidence on the record is sufficient to rebut the presumption raised by the entry in the *riwaj-i-am*. As stated already,

the plaintiffs have no evidence of any value to support the entry in the *riwaj-i-am* and the three rulings relied upon by them were decided merely on the basis of the presumption raised by the *riwaj-i-am*, there being no other evidence to rebut the same. The respondents have been, on the other hand, able to produce instances, in which daughters have succeeded in spite of the opposition of collaterals. The learned Judge of the trial Court has discussed these instances Exs. D/A to D/F. It appears that in Ex. D/B, there were no collaterals in existence while Ex. D/C was a case of a gift by a male proprietor and is thus not in point. But leaving out these two, the others are clearly in favour of the respondents. The learned counsel for the respondents has further cited the following cases relating to Jats of the Amritsar district in which daughters were allowed to succeed in preference to collaterals, viz: 3 Lah 257 (6) and 9 Lah 352 (7), 1935 Lah 408 (1) 1935 Lah 419 (8) and Civil Appeal No. 1179 of 1933 (9) recently decided on 11th June 1935. The last two cases were decided after a detailed discussion of a number of instances produced by the parties. It seems remarkable that the collaterals have not been able to produce a single instance to support their case. In the reported cases also the collaterals seem to have been able to produce little or no evidence to support the entry in the *riwaj-i-am*. These facts seem to justify the remarks of the author of the *riwaj-i-am* of 1914 appended to the answers to questions 60 and 61 to the effect that the answers do not represent the real custom prevailing in the Amritsar district correctly.

In the present instance, the learned District Judge has given no finding on the question whether the land in suit is ancestral, but the trial Court has discussed the relevant evidence and found in their favour and the reasons given by him in support of the finding appear to be sound. But apart from this the plaintiffs are remote collaterals of the seventh degree and even if the land were ances-

2. Labh Singh v. Mango, 1927 Lah 241=100 I C 924=8 Lah 281.
3. Nadhan Singh v. Mt. Rajo, 1925 Lah 556=85 I C 783.
4. Santa Singh v. Mt. Santi, 1933 Lah 893=144 I C 483.
5. Dayaram v. Sahel Singh, (1906) 110 P R 1906=31 P L R 1907 (F B).

6. Gurdit Singh v. Mt. Ishar Kaur, 1922 Lah 392=68 I C 551=3 Lah 257.
7. Pir Bakhsh v. Ghulam Bibi, 1928 Lah 305=107 I C 280=9 Lah 352=29 P L R 475.
8. Narain Singh v. Mt. Basant Kaur, 1935 Lah 419=158 I C 976=37 P L R 229.
9. Jawala Singh v. Thakar Singh, 1936 Lah 88=162 I C 934.

tral, it would have been for them to prove that collaterals of the seventh degree are entitled to succeed in preference to a daughter, but they have failed to adduce any such evidence except the entry in the *riwaj-i-am*. For reasons given above, I would hold that even if the *riwaj-i-am* were held to create some presumption in favour of the plaintiffs in this case, that presumption is sufficiently rebutted by the evidence relied on by the defendants. I would accordingly affirm the decree of the learned District Judge and dismiss the appeal with costs.

Currie, J.—I agree.

B.D./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 994

JAI LAL, J.

Ude Singh and another — Plaintiffs — Appellants.

v.

Chittar and others— Defendants—Respondents.

Second Appeal No. 45 of 1936, Decided on 13th March 1936, from decree of Dist. Judge, Ambala, D/- 19th August 1935.

Adverse possession — Three branches becoming entitled each to certain share in property — Branch previously in possession of entire property does not hold in representative capacity subsequently — Its possession becomes adverse to other branches — Right barred by adverse possession — Subsequent entry in record of rights about rights of branches does not affect.

Each of three branches became entitled to certain share in property. Before accrual of this right, one of the branches was in possession of entire property and subsequent to the accrual also it continued to be so in possession : [P 995 C 1, 2]

Held : that its possession subsequently was not in a representative capacity on behalf of the other branches but adverse to them and that the principle that possession of one co-sharer in possession on behalf of the others had no application ;

Held also : that a mutation entry in revenue records that each branch is entitled to certain share after the rights of the two branches have been extinguished by adverse possession did not affect the question. [P 995 C 2]

Shamair Chand and Sri Ram Gupta— for Appellants.

Mukand Lal Puri—for Respondents.

Judgment. — Ram Saran, Rai Chand, Bishen Chand and Kishen Chand were four brothers. It appears that in 1852 Bishen Chand was separate from the other brothers and the remaining three held their lands jointly, Bishen Chand

being recorded as in possession of a one-fourth share in the ancestral property. About 1882 Rai Chand's branch was represented by a widow of Rai Chand's son, Mt. Barwalo, but she was not shown in actual possession of her share. It was shown in possession of Kishen Chand's descendants. Some time between 1882 and 1884 there was partition between the remaining three branches, i. e., Ram Saran's branch, Rai Chand's branch and Kishen Chand's branch, and Mt. Barwalo's share was entered in possession of Kishen Chand's branch.

In fact the land was shown to be in joint possession of Mt. Barwalo and Kishen Chand's branch, though as a fact Mt. Barwalo was not in actual possession. She, it appears, was living in another village. Subsequently there was a partition between two branches of Kishen Chand's descendants, and Mt. Barwalo's share in the ancestral land was shown half and half in possession of each branch. Mt. Barwalo died in 1906 and her share was entered in the names of the descendants of Ram Saran, Bishen Chand and Kishen Chand in equal shares, but actual possession remained with Kishen Chand's descendants. The descendants of Ram Saran and Bishen Chand admittedly never got possession of their share in Mt. Barwalo's estate. It remained throughout in possession of the heirs of Kishen Chand. In 1919 a report was made that the entries in the revenue records were not in accordance with actual facts, that the share of Mt. Barwalo was in possession of Kishen Chand's heirs who had been paying the land revenue in respect thereof, and it was suggested that correction be made with regard to the person who had been making payment of land revenue. A correction was accordingly made and it was noted that the revenue was paid by the descendants of Kishen Chand alone. There was no alteration in the records so far as the ownership of Mt. Barwalo's share in the ancestral estate is concerned.

Subsequently there was an application made for partition of the share of Mt. Barwalo and this led to three suits being filed. One suit was filed in the Court of the Assistant Collector, first grade, who had proceeded to decide the question of title himself as a result of the partition proceedings. The other two suits were filed in the Court of the Subordinate

Judge. The plaintiffs in these three suits were the descendants of Kishen Chand. They sought declarations that the descendants of Ram Saran and Bishen Chand had lost their share in the estate of Mt. Barwalo or that they did not have any share in the estate of Mt. Barwalo. The Assistant Collector, first grade, decreed the suit. The Subordinate Judge dismissed the two suits which were filed in his Court. Appeals were presented by the unsuccessful parties to the District Judge of Ambala, who has held that the descendants of Kishen Chand were not solely entitled to the estate of Mt. Barwalo, that they had not established title by adverse possession thereto, and therefore that the entries in the revenue records represented the true state of affairs so far as the title of Mt. Barwalo's share in the estate is concerned. He has consequently dismissed the appeal of the heirs of Kishen Chand and has accepted the appeal by the descendants of Ram Saran and Bishen Chand as against the decree of the Assistant Collector, first grade. Three second appeals have been filed in this Court by the descendants of Kishen Chand and I have heard counsel on both sides. In my opinion all these appeals must succeed. The short question for decision in this case is whether the descendants of Kishen Chand have been holding the land in dispute adversely to the descendants of Ram Saran and Bishen Chand for more than twelve years.

Assuming that the possession of the descendants of Kishen Chand during the lifetime of Mt. Barwalo was with her permission—a matter on which there is considerable doubt and which I refrain from deciding—it is obvious that when Mt. Barwalo died in 1906 the descendants of Ram Saran, Bishen Chand and Kishen Chand respectively became entitled in equal shares to the property left by her. The descendants of Kishen Chand were already in possession of the entire property. It cannot therefore be asserted that from the date of the death of Mt. Barwalo they held the property as co-sharers on behalf of Ram Saran and Bishen Chand. It is not even alleged, much less proved, that Ram Saran and Bishen Chand ever permitted them to keep in their possession their respective shares. The position in 1906 was this, that though the property was in actual possession of Kishen Chand's descendants

the descendants of Ram Saran and Bishen Chand also were entitled to shares in it, but it cannot be said that Kishen Chand's heirs held the property as co-sharers on behalf of the descendants of Ram Saran and Bishen Chand. The rule, therefore, that possession of one co-sharer must be deemed to be permissive and on behalf of the other co-sharers, has no application to the facts of this case. The case appears to be analogous to possession by one heir of a deceased Muhammadan, who has died leaving a number of heirs; in such a case the possession of the heir, who is in possession of the property of the deceased, cannot be held to be in a representative capacity but must be deemed to be in his own right and the other heirs must come to Court within the prescribed time in order to succeed in getting possession of their shares. They cannot succeed merely by alleging that one heir, who is in possession of the estate, was in such possession in a representative capacity; they must prove the representative nature of possession.

In my opinion, therefore, in the present case the possession of the heirs of Kishen Chand became adverse to the descendants of Ram Saran and Bishen Chand from the year 1906 when Mt. Barwalo died. The fact that in the revenue records the mutation was effected in the names of the descendants of the three brothers in equal shares does not affect the question, because in this case the undoubted title of the respondents was extinguished by adverse possession for more than 12 years by the descendants of Kishen Chand. It has not been shown that when the mutation entries were made in favour of the respondents in 1906 the descendants of Kishen Chand consented to them. I, therefore, accept these appeals, set aside the decrees of the District Judge and restore the decree of the Assistant Collector, first grade, and decree the two suits instituted in the Court of the Subordinate Judge. The result will be that it must be held that the property left by Mt. Barwalo has become the property of the descendants of Kishen Chand by adverse possession. The appellants will have their costs against the respondents throughout.

P.R./R.K.

Appeal allowed.

A. I. R. 1936 Lahore 996

COLDSTREAM AND BHIDE, JJ.

Chhaju Mal and others—Defendants — Appellants.

v.

Multan Singh and others—Plaintiffs — Respondents.

First Appeal No. 1902 of 1933, Decided on 8th June 1936, from decree of Sub-Judge, 1st Class, Gurgaon, D/- 30th October 1933.

(a) Hindu Law — Joint family — Manager mortgaging co-parcenary property for necessity—As manager he is competent to do so and mere fact that he did not describe himself as guardian of minor co-parceners will not render mortgage void.

The manager of the Hindu family is the manager of the whole family property whether his co-parceners are minors or majors. He is competent to alienate the joint property for necessary purposes and the mere fact that he did not describe himself as guardian of the minors will not render the mortgage a void tran-

saction. Even if there is a change of status the mortgage will be binding on the minors as long as it was for consideration and legal necessity. [P 997 C 1,2]

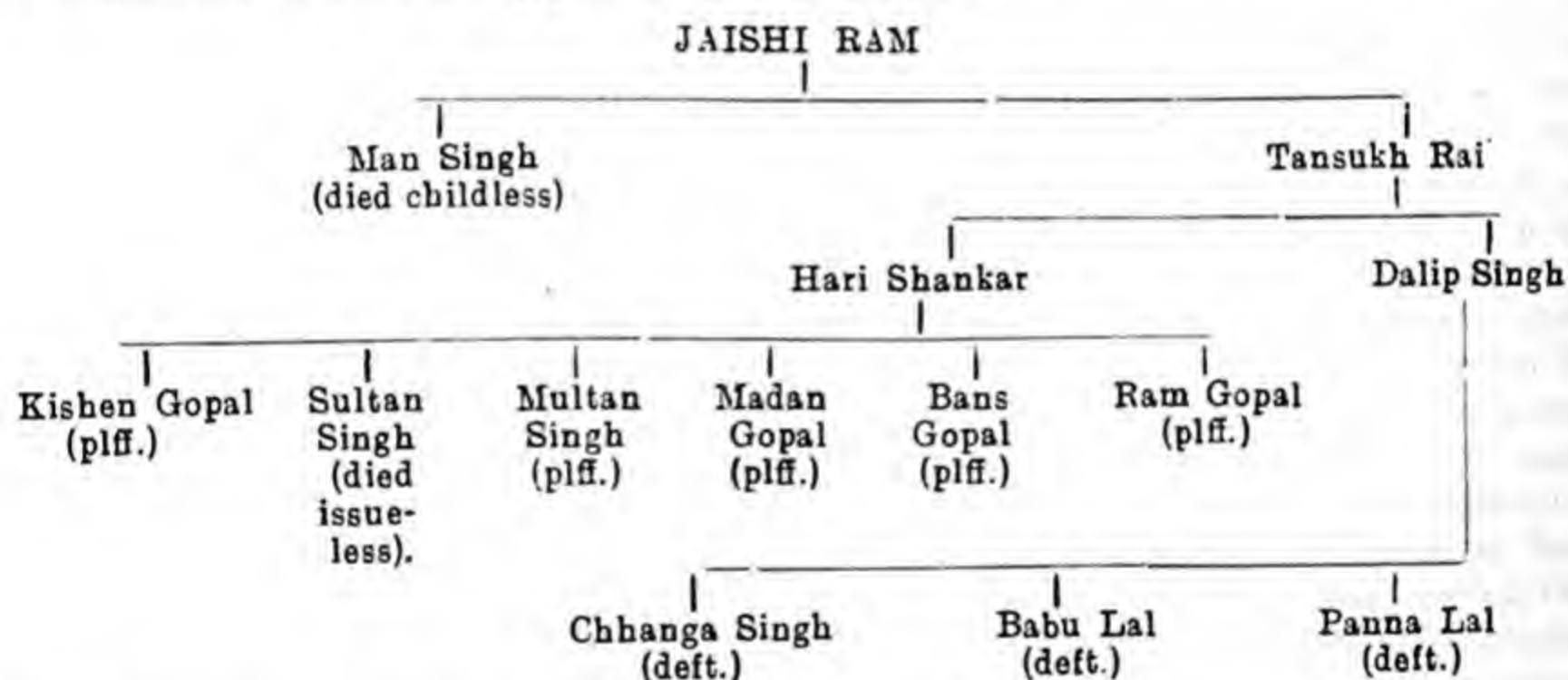
(b) Limitation Act (1908), Art. 144—Alienation by manager—Suit by minor co-parceners on attaining majority for possession of property is governed by Art. 144 and not by Art. 44 or Art. 91.

The members of a co-parcenary have individual rights, separately enforceable, and in a suit for possession by the minor co-parceners on attaining majority, the relief for cancellation of the deed of alienation by the manager, so far it affects their rights is a relief ancillary to their claim for possession and the suit is governed by Art. 144, and not by Art. 44 or Art. 91, Lim. Act. [P 998 C 1]

J. N. Aggarwal, M. C. Mahajan, J. L. Kapur and Krishna Swarup—for Appellants.

Nawal Kishore and Bhagwat Dayal—for Respondents.

Coldstream, J.—The following pedigree table will help to explain the dispute in this case.



Man Singh and his brother Tansukh Rai were a joint Hindu family doing business at Faridabad in Gurgaon district. Tansukh Rai died before April 1913. On 1st April 1913 Man Singh made a will, which was registered on the same day, containing instructions for the management of the family property of which Dalip Singh and Hari Shankar were according to the will to be the owners in equal shares. Man Singh died on 1st June 1914. Meanwhile Dalip Singh had died and the property passed to Hari Shankar and Dalip Singh, his sons. Hari Shankar was insane and the family affairs were managed by Chhanga Singh and later when Sultan Singh, the eldest of Hari Singh's sons, came of age about the year 1918, by Chhanga Singh and Sultan Singh together. On 9th March

1920, by which time Panna Lal and Babu Lal had attained majority, a deed was executed by Chhanga Singh, Panna Lal, Babu Lal and Sultan Singh mortgaging the rights of all the members of the family in 257 bighas and some biswas of land in Mauza Basewa and four shops in Faridabad in favour of Chhaju Mal and his nephew Shankar Lal of Faridabad for Rs. 12,000 of which sum Rs. 9,000 was made a charge on the land and Rs. 3,000 on the shops. In the deed Chhanga Singh described himself as attorney for Panna Lal (who however also signed the document) and Sultan Singh as acting on behalf of his five minor brothers as well as for himself.

Sultan Singh died in November 1922. In April 1925 a suit was filed in the Court of the Senior Subordinate Judge, Gurgaon

by Hari Shankar, and his sons, Multan Singh representing his insane father as next friend, against Chhanga Singh and Babu Lal for rendition of accounts of the family property. This suit was settled by an agreement signed on 22nd September 1925 by which the estate was partitioned, the culturable land including the mortgaged property now in suit being divided equally between Hari Shankar and his sons on the one side and the sons of Dalip Singh on the other. Hari Shankar died in 1926. In 1930 Chhajju Mal transferred his mortgagee rights to Shankar Lal.

On 10th January 1931 Multan Singh, Madan Gopal and their minor brothers, represented by Multan Singh, instituted a suit in the same Court against the mortgagees Chhajju Lal and Shankar Lal for possession of half of the mortgaged property, alleging that they were not bound by the mortgage, because Chhanga Mal and Sultan Singh had no authority to alienate it as it then belonged to Hari Shankar and because the mortgage was not for consideration and necessity. The plaint also asked for mesne profits. The suit was resisted on the pleas inter alia that the mortgaged property belonged to the joint family of which Dalip Singh's and Hari Shankar's sons were the only members, Hari Shankar having been rendered incapable of inheriting a share by his lunacy, that Chhanga Singh a karta of the joint family had full power to alienate for family purposes and that the mortgage was for consideration and necessity. It was also pleaded that the suit was barred by limitation. The question of limitation was decided by Lala Munshi Ram, Subordinate Judge, First Class, in favour of the plaintiffs as a preliminary issue. His successor, who concluded the trial, held it proved that the mortgaged property had first belonged to Man Singh alone and not to the family and that half of it passed to Hari Shankar by virtue of Man Singh's will and was his property when it was mortgaged, that Chhanga Singh and Sultan Singh had no right to alienate Hari Shankar's share and that the mortgage was therefore a void transaction. He held it not proved that the mortgage was for necessity or for the benefit of the minor sons of Hari Shankar. Concluding on these findings that the defendants had been in wrongful possession of the suit

property since the time of the mortgage he gave the plaintiffs a decree for possession and for Rs. 7,860, the estimated net income for the whole period between the date of the mortgage and the date of the decree.

The defendants have appealed. It is contended on their behalf that the evidence proves that the mortgaged property was joint family property, that Chhanga Mal was competent to alienate it for a proper purpose being the manager of the family, that the evidence proves that the mortgage was for legal necessity, that the suit as a whole was wrongly held to be within time and that in any case the claim was barred in respect of mesne profits for a longer period than three years. That the family was joint until after the death of Man Singh was admitted by Multan Singh at the trial. We have been taken through the whole evidence by counsel who have criticised it at length and discussed the points of law to be decided. It is not disputed before us that the mortgaged land was acquired by Man Singh and there is no clear evidence showing that it was acquired as joint family property, and as there is no good evidence that there was a nucleus of joint family property with which the mortgaged property could have been acquired there is no basis for a presumption that the property was joint of the family. The lower Court has held that the mortgaged property was the separate estate of Hari Shankar mainly on the evidence of the will the making of which was not consistent with it being joint family property, and on the entries in the revenue records, which show that on the death of Man Singh the whole of his landed estate was recorded by mutation as belonging to Hari Shankar and the sons of Dalip Singh. (His Lordship then considered the evidence and proceeded.) After carefully considering all this evidence my conclusion is that the suit property was part of the coparcenary property when it was mortgaged, that Chhanga Singh was in law and fact the manager, and that he procured the signatures of all the adult members of the family on the deed as a precautionary measure. As manager he was competent to alienate joint property for necessary purposes and the mere fact that he did not describe himself as guardian of the minors will not render the mortgage a

void transaction. Assuming however that the sons of Dalip Singh became separate in status from Hari Shanker after Man Singh's death the property that devolved upon Hari Shankar presumably remained joint of his family. Hari Shankar, the legal manager, was incapable of acting and Sultan Singh became the lawful manager and was competent to deal with the property of himself and his minor brothers. I think that it may properly be held that even if there was such change of status, the mortgage was binding on the minors until it was shown to have been effected without consideration and legal necessity. I come now to the question of necessity. (His Lordship discussed the evidence regarding this and held that there was necessity. The judgment then proceeded.) The suit in my opinion was instituted within limitation being one governed by Art. 144, Limitation Act. It is contended for the appellants that the article applicable is either Art. 44 or Art. 91. The alienation has, however, been found to have been made not by a guardian but by the manager of a joint Hindu family. There can be no guardian in respect of an infant's interest in the property of a joint Hindu family. It has frequently been pointed out that Art. 91 binds only the parties to the instrument or persons claiming under or through such parties and has no applicability to suits like this one. The members of a co-parcenary have individual rights, separately enforceable, and in a suit of this kind the cancellation of the deed of alienation, so far as it affects their rights, is a relief ancillary to their claim for possession. A large number of rulings have been cited before us by both sides in argument upon the point of limitation. I do not think it necessary to refer to others than 14 Mad 26 (1); 32 I C 242 (2) and 84 P L R 1916 (3), where it was held that the article applicable in such cases is Art. 144. We have not been referred to any judgment questioning the correctness of these rulings.

For all these reasons, I would accept this appeal and setting aside the judgment of the lower Court grant the plaintiffs a decree declaring that the charge on the plaintiffs' half of the property on 30th

October 1930 was Rs. 4,980. Parties will bear their own costs throughout.

Bhide, J.—I agree.

P.R./R.K.

Appeal accepted.

*** A. I. R. 1936 Lahore 998**

COLDSTREAM AND BHIDE, JJ.

Sultan Asad Jan—Defendant—Appellant.

v.

Secy. of State—Plaintiff and others—
—Defendants—Respondents.

First Appeal No. 1097 of 1935, Decided on 29th June 1936, from decree of Sub-Judge, First Class, Lahore, D/- 20th March 1935.

*** (a) Civil P. C. (1908), S. 11—Representative character—Decree against Municipality in respect of Government land transferred in trust and vested in Municipality—Decree held operated as res judicata in subsequent suit by Government.**

Government land was transferred in trust and vested in the Municipal Committee. According to the provisions of S. 74, Punjab Municipal Act, 1884, the land not only vested but also belonged to the Municipality. A decree was passed against the Municipality granting plaintiffs a declaration that they had obtained indefeasible title by adverse possession of the land :

Held : that the Municipal Committee being constituted a trustee, it represented the title for the time being and the decree obtained against it operated as res judicata in subsequent suit by the Government. [P 999 C 1, 2]

*** (b) Civil P. C. (1908), S. 11—Property identical in two suits—Mere fact that its value has arisen in interval between two suits cannot affect question of res judicata.**

Where property in two suits is identical, the mere fact that its value has arisen in the interval between the two suits cannot affect the question of res judicata : 1928 Lah 929 and 1935 Lah 391, *Rel. on.* [P 1000 C 1, 2]

M. C. Mahajan and S. M. Saddozai—for Appellant.

Anant Ram Khosla and Ratan Lal Chawala—for Respondent (Plaintiff).

Bhide, J.—This appeal arises out of a suit by the Secretary of State for India in Council for possession of certain land alleged to have been encroached upon by defendants 1 to 4. The land used to be under the old 'fasil' or rampart round the city of Lahore and was transferred 'in trust' and 'vested' in the Municipal Committee of Lahore (defendant 5) in the year 1888. Thereafter the land was gradually encroached upon by the defendants, but the Municipal Committee took no effective action in the matter till 1925 when a notice (Ex. P-20) was served

1. Unni v. Kunchi Amma, (1891) 14 Mad 26.

2. Asa Ram v. Ratan Singh, 1915 Nag 52=32 I C 242=12 N L R 12.

3. Saidam Shah v. Mt. Durani, (1916) 84 P L R 1916.

upon defendant 1 under S. 172, Municipal Act, 1911, asking him to remove the encroachment. Defendant 1 thereupon instituted a suit on 1st June 1925 against the Municipal Committee Lahore, for a declaration that he and his brothers were the owners of the land and had been in any case in adverse possession for many years and had thus acquired an indefeasible title. The latter plea was upheld and the plaintiff was granted the declaration prayed for. The Secretary of State for India, who was not made a party to that suit, thereafter resumed the land which had been made over to the Municipal Committee in trust in 1888, as stated above, and instituted the present suit for possession in the year 1933. Defendants 1 to 4 resisted the suit inter alia on the ground that the decision in the previous suit against the Municipal Committee operated as *res judicata*, as the land had been transferred in trust to the Municipal Committee and the Municipal Committee represented the estate at the time. This plea was rejected by the trial Court and the suit was decreed. From this decision defendant 1 has appealed.

The sole point argued on behalf of the appellant was that of '*res judicata*' and in support of the appellant's contention in this respect reliance was placed mainly upon, (i) the letter dated 21st April 1888 (Ex. P.W.2/1) by which the land was transferred to the Municipal Committee Lahore, and (ii) on the provisions of the Punjab Municipal Act, 1884, which was in force at the time of the transfer. According to the terms of the letter, the land was transferred 'in trust' and 'vested' in the Municipal Committee. According to the provisions of S. 74, Punjab Municipal Act, 1884 also, the same result would seem to follow as such land not only vests "but belongs to the Municipal Committee." The learned counsel for the plaintiff respondent contended that the intention of the parties was that the land was to be transferred to the Municipal Committee merely for management and the title was to remain with the plaintiff. The learned counsel relied in this connexion on the Punjab Government Resolution No. 940 dated 3rd April 1884 which gives certain general directions according to which 'Nazul' lands in possession of the Government were to be transferred to local bodies for management. It was

urged that according to those directions the title to the land always remained with the Government and the Municipal Committee acquired no rights beyond that of management. This resolution was not relied upon by the plaintiff in the Court below and the defendant had no opportunity of producing any evidence in rebuttal and meeting the position now taken up. Apart from this, the letter by which the land in question was transferred to the Municipal Committee makes no reference whatever to the resolution and there is nothing in that document to show that the transfer was intended to be governed by any conditions not stated in the document itself. In the circumstances, the letter of transfer must be interpreted according to its plain language. That letter clearly states that the land was transferred 'in trust' and 'vested in the Municipal Committee.'

The learned counsel referred to the concluding portion of para. 1 of the letter, but that only shows that the Government did not admit any pre-existing rights of the Municipal Committee and made the transfer only as an act of grace. It does not show that the Government meant to transfer the land only for management and not "in trust" as clearly stated in the preceding portion of the letter.

If the Municipal Committee was constituted a 'trustee' there can be no doubt that it represented the title for the time being and any decree obtained against the Committee would bind the plaintiff also: 46 Cal 566 (1) and 46 All 651 (2). This point was not disputed by the learned counsel for the plaintiff, but he contended that the Municipal Committee did not become a "trustee" at all. In support of this contention he relied on the interpretation placed upon the word "vested" in 25 Mad 635 (3). The Madras case, related to a 'street' which fact introduced different consideration and is sufficient to distinguish the case. The decision in the Madras case was, moreover, based on the provisions of the Madras Municipal Act, 1884. The latter Act

1. Gur Narayan v. Sheo Lal Singh, 1918 P O 140=49 I O 1=46 I A 1=46 Cal 566 (P O).
2. Sri Gat Aghram Naramji v. Madho Acharya, 1924 All 504=80 I C 406=46 All 651=22 A L J 641.
3. Sundaram Ayyar v. Municipal Council, Madurai, (1902) 25 Mad 635=12 M L J 37.

was not produced before us, but from the discussion thereof in the judgment cited the language of the Act appears to be different from that of the Punjab Act. The words "belong to the Municipal Committee" which occur in the Punjab Act were presumably not used in the corresponding section of the Madras Act, as there is no discussion thereof in the judgment cited. If the word "vested" alone had been used in the Punjab Act, there might have been perhaps some force in the argument of the learned counsel; but in addition to that word, the words "belongs to" are also used in the Punjab Act of 1884 which governs the present case. These words have been removed from the corresponding section of the Punjab Municipal Act, 1911, but the present case must be decided on the basis of the Act of 1884. Further the letter by which the land was transferred to the Municipal Committee clearly recites, as stated above, that the land was transferred "in trust" to the Municipal Committee. In the circumstances, the learned counsel's contention that the Municipal Committee did not become a "trustee" appears to be untenable.

The learned counsel for the plaintiff-respondent next urged that according to the entries in the Record of Rights prepared in 1932 the plaintiff was the owner of the land. But this record was admittedly prepared after the decision of the previous suit against the Municipal Committee and the resumption of the land thereafter by the Government. If the previous decision was binding on the plaintiff there was nothing left to resume and these entries are, therefore, of no assistance.

In the end, the learned counsel for the plaintiff urged that the previous decision could not operate as *res judicata* because (1) the present suit could not be tried by Subordinate Judge, Fourth Class, who decided the previous suit, (2) because the previous suit was undervalued and was beyond the jurisdiction of the Subordinate Judge, Fourth Class, who tried it, and (3) lastly because, the properties in dispute were not identical. There seems to be no force in any of these contentions. A perusal of paras. 3 and 4 of the plaint shows that the identity of the properties in dispute in the two suits was admitted. The properties being identical, the mere fact that the value has risen in the inter-

val between the two suits cannot affect the question of *res judicata*: see 10 Lah 528 (4) and 1935 Lah 391 (5). The contention that the previous suit was undervalued was never raised in the Court below. The previous suit was valued at Rs. 110 apparently on account of an injunction which was claimed therein in addition to the declaratory relief. Besides, whether this valuation was correct or not, the question whether the value of the property in the previous suit was beyond the jurisdiction of the Court which tried it is obviously one of fact and cannot be allowed to be raised for the first time in appeal.

For reasons given above it seems to me that the present appeal must succeed. I would, therefore, accept the appeal and dismiss the suit. As the appeal has succeeded on a purely technical ground, I would leave the parties to bear their costs throughout.

Coldstream, J.—I agree.

D.S./R.K.

Appeal accepted.

4. Sarupa v. Khem Lal, 1928 Lah 929=113 I C 90=10 Lah 528.

5. Inder Singh v. Mian Singh, 1935 Lah 391=161 I C 869=17 Lah 20=38 P L R 252.

A. I. R. 1936 Lahore 1000

AGHA HAIDAR, J.

Ghulam Haidar—Plaintiff—Appellant.
v.

Diwan Iqbal Nath and others—Defendants—Respondents.

Misc. First Appeal No. 1882 of 1935, Decided on 17th January 1936, from order of Senior Sub-Judge, Gujranwala, D/- 23rd July 1935.

(a) Practice—Hearing—Reader adjourning cases—Getting order signed by Judge not seized of case—Practice is wholly irregular and should be immediately stopped.

Where a case has been adjourned a number of times and successive dates have been fixed by the reader who has the altered dates signed by Subordinate Judge, not seized of the case, this practice is wholly irregular and should be put an end to at once: 33 P L R 804, *Rel. on.* [P 1001 C 1]

(b) Practice—Pleader telling Court that he has no instruction tantamounts to default of appearance by party.

When the pleaders appear and intimate to the Court that they have no instructions from their client, it is tantamount to default of appearance by the party: 22 All 66 (F B), *Foll.* [P 1001 C 1]

Shuja-ud din—for Appellant.

Achhru Ram and Chuni Lal Vohra—for Respondents.

Judgment.—After hearing Dr. Shuja-uddin on behalf of the appellant and Mr. Achhru Ram counsel for the respondents, I am satisfied that the plaintiff-appellant was not bound to wait upon the reader of the Court when he fixed the next date of hearing, namely, 29th April 1935, on 2nd March 1935. The case had been adjourned a number of times and successive dates had been fixed by the reader who had the altered dates signed by a Subordinate Judge not seized of the case. This practice is wholly irregular and should be put an end to at once. I entirely agree with the remarks of Jai Lal, J., in 33 P L R 804 (1). The result is that the plaintiff had no legal means of knowing that 29th of April 1935 had been fixed for the hearing. The proper thing would have been to inform him by means of notice that on account of the changes in the personnel of the Court a particular date had been fixed. This has not been done. The pleaders for the plaintiff appeared on 29th April 1935 but they intimated to the Court that they had no instructions from their client. This is tantamount to default of appearance by the plaintiff as laid down in a Full Bench decision of the Allahabad High Court in 22 All 66 (2).

In my opinion, under these circumstances the Court should have restored the case to its original number. At the same time I cannot help observing that if the plaintiff had been more vigilant, it would not have been difficult for him to remain in touch with what was going on in the Court below. He should have instructed his counsel at least to see how the case was proceeding. This he apparently did not do with the result that this counsel had no interest in the case and when called by the Court on 29th April 1935, merely stated that they had no instructions from the client. I therefore allow the appeal and set aside the order of the Court below, but under the circumstances, make no order as to costs.

B.D./R.K.

Appeal allowed.

1. Jowala Sahai Dhera Shah v. Maya Das, (1932) 33 P L R 804.

2. Lalta Prasad v. Nand Kishore, (1899) 22 All 66=1899 A W N 176 (F B).

A. I. R. 1936 Lahore 1001

ADDISON AND ABDUL RASHID, JJ.

A. C. MacNabb—Assessee—Petitioner.
v.

Commissioner of Income tax Punjab, North-West Frontier & Delhi Provinces — Respondent.

Civil Ref. No. 1 of 1936, Decided on 18th March 1936, from Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, Lahore, D/- 18th December 1935.

Income-tax Act (1922), S. 10 (2) (iii) — Assessee getting income by way of interest on fixed deposit — Capital borrowed for investment outside British India—Interest on such capital is not deductible under S. 10 (2) (iii).

Where an assessee raises capital in British India to invest it outside British India and the interest he has to pay is an expense incurred in connexion with his outside investment, he is not entitled to deduct such interest from his income in British India, the said income comprising or including interest income paid to him on fixed deposit: 1932 Bom 94 and 1928 Mad 487, Rel. on. [P 1002 C 1]

H. J. Rustomji—for Petitioner.

J. N. Aggarwal—for Respondent.

Addison, J.—The following question of law has been referred for the opinion of this Court by the Commissioner of Income-tax Punjab:

The assessee having incurred expenditure by way of interest upon monies borrowed for the purpose of foreign investments, was that expenditure to be deducted from his income assessed in British India, the said income comprising or including interest income paid on a fixed deposit by the same bank?

The facts are simple. The assessee is a civil servant whose main source of income is salary. In 1929 and 1930 he deposited with the Sargodha Central Co-operative Bank sums on fixed deposit, aggregating Rs. 74,000, on which he was paid interest at the rate of $7\frac{1}{2}$ per cent per annum. In October 1930 he wished to purchase industrial shares etc. in England. The fixed deposits were not mature and he borrowed from the same bank Rs. 66,600 which he converted into sterling and remitted to England. The assessee cannot be said to be engaged in the business of stock-dealing nor could he engage in such. The dividends, etc., derived from his investments in England, were not taxable in India. In the assessment year in question he earned a certain sum as interest on his fixed deposits and he had to pay a certain sum as interest on his over-draft, the latter sum

being slightly less than the former. His claim is that he is entitled to set off the interest on his over-draft against the interest on his fixed deposits on which the bank had a lien in consequence of the over-draft granted to him.

Even if it be presumed that he was engaged on a foreign business there is authority for the view that the interest paid on sums borrowed in British India to purchase sterling securities, retaining those securities and the interest therefrom outside British India, has to be treated as a charge on the interest from those securities which are not liable to Indian income-tax and is not deductible under S. 10 (2) (iii), Income-tax Act from the other income of the assessee liable to tax as accruing and arising in British India. This was laid down in 6 I T C 21 (1) by a Bench of the Bombay High Court and there is a similar decision by the Madras High Court reported in 2 I T C 505 (2). The only distinction between the two cases is that in the latter case the business in India had a Branch in the Federated Malay States while in the former case the Indian business was purchasing securities outside British India through bankers or brokers in Bombay. In both the cases it was held that the interest payable on the borrowed sums for the foreign business could not be deducted from the other income. The case of the assessee before us is even worse as it cannot be held that he is carrying on business. All that he did was to raise capital in British India to invest it outside British India and the interest he had to pay on the borrowed capital was an expense incurred in connexion with his outside investment and had nothing to do with anything else. It is only in case he is carrying on business that such a deduction can be claimed and from the authorities quoted it is clear that the borrowing must be for the purpose of carrying on a business the profits of which accrue in British India. The paragraph in the Income-tax Manual relied upon by the assessee in no way helps him. For the reasons given we answer the

question in the negative and allow the Commissioner of Income-tax his costs.

V.B.B./R.K.

Petition dismissed.

A. I. R. 1936 Lahore 1002

ADDISON AND ABDUL RASHID, JJ.

Mt. Ram Pati — Defendant—Appellant.

v.

Santa Singh and others—Plaintiffs—Respondents.

Second Appeal No. 1394 of 1935, Decided on 15th February 1936, from order of Addl. Dist. Judge, Amritsar, D/- 10th May 1935.

Registration Act (1908), Ss. 17 (1) (b), 49—Agreements entered into mutually between husband and wife—Plot of land purchased by wife for Rs. 255—Agreements providing that husband would build house on site and on consideration thereof would be entitled to live in house for his life-time—Both husband and wife to have right of residence and on their death their daughter to inherit it—Agreements held to create contingent interest in immoveable property and held inadmissible in evidence for want of registration.

Two agreements were entered into mutually between a husband and his wife. The agreement executed by the wife in favour of her husband was to the effect that she had purchased a plot of land for Rs. 255 but as she had no money to erect a house thereon she had induced her husband to build a house on the site at his cost and in consideration of the money spent by him, he would be entitled to live with her in the house for his lifetime. Neither of them would have the right to alienate the house. Both would have a right of residence in the house and on their death the house would become the property of their daughter. In case both wished to sell or mortgage the house they would do so jointly. The agreement executed by the husband was also substantially to the same effect. The agreements were not registered. The husband constructed a house on the site and subsequently brought a suit claiming joint possession of the house as a joint owner, relying on the agreements in support of his claim:

Held: that the agreements purported to create a contingent interest in immoveable property and were compulsorily registrable under Cl. (b), S. 17 (1) and not being registered were inadmissible in evidence: 1919 P C 79, *Foll.*; 16 P R 1895 and 51 P R 1898, *Dissent.*

[P 1003 C 2; P 1005 C 1]

Din Dayal Khanna—for Appellant.

Ajit Ram—for Respondents.

Abdul Rashid, J.—This appeal has arisen out of an action brought by Santa Singh, plaintiff for joint possession of a house. The allegations of the plaintiff were that Mt. Ram Pati, defendant 1, was his wife, that the site of the house in dispute

1. Provident Investment Co. v. Commissioner of Income-tax, Bombay, 1932 Bom 94=135 I C 810=56 Bom 92=33 Bom L R 1587=6 I T C 21.

2. Somasundaram Chettiar v. Commissioner of Income-tax, 1928 Mad 487=109 I C 369=54 M L J 436=2 I T C 505.

was purchased by him in the name of Mt. Ram Pati, and that subsequently he had built the house by spending Rupees 1,000 on its construction. It was further stated in the plaint that the plaintiff had built the house in accordance with the terms of two agreements dated 16th May 1928, one executed by himself in favour of his wife and the other by Mt. Ram Pati in his favour. Udho, the son-in-law of Mt. Ram Pati was impleaded as a pro forma defendant as he was living in the house with his mother-in-law. Mt. Ram Pati, defendant 1, pleaded inter alia, that she purchased the site of the house for Rs. 255 and built the house by spending over Rs. 1,500 and that the plaintiff had no concern either with the site or the house. She denied that she had executed any agreement in favour of the plaintiff and further pleaded that, in any case, the agreements referred to in the plaint were inadmissible in evidence as they had not been registered.

The trial Court held that the agreements (Exhibits P. W. 6-A and P. W. 6-B) were inadmissible in evidence for want of registration except for the collateral purposes of showing that Mt. Ram Pati was the wife of Santa Singh, plaintiff. It was further held by the trial Court that the site in dispute was purchased by the plaintiff and that he had built the house in dispute by spending Rs. 1,000 on its construction and that he was therefore entitled to joint possession thereof. On these findings, the plaintiff was awarded a decree for joint possession of the house in dispute. The learned Additional District Judge held that the agreements did not fall within the purview of S. 17 (1) (b), Registration Act, and did not, therefore, require registration. It was further held by the learned Additional District Judge that the site under the house in dispute had been purchased by Mt. Ram Patti but that the house was built by the plaintiff out of his own funds and that in accordance with the terms of the agreements, the plaintiff was entitled to joint possession of the house in dispute. The appeal of Mt. Ram Patti having been dismissed by the learned Additional District Judge, she has preferred a second appeal to this Court. The sole question for consideration in this case is whether the agreements Exs. P. W. 6/A and P. W. 6/B are compulsorily registrable. Exs. P. W. 6/A was executed by Mt. Ram Patti

in favour of her husband and runs as follows:

I have purchased one plot of land for rupees 255 but I have no money to erect a house thereon. I have induced my husband to build a house on the site purchased by me at his own cost and in consideration of the money spent by my husband he will be entitled to live with me in this house for his life-time. I will have no right to alienate the house nor will my husband possess such a right. Both of us will have the right of residence in this house and after our death, the house will become the property of our daughter. If, however, both, I and my husband, wish to sell or mortgage the house, we will be entitled to do so jointly.

The agreement executed by the husband was to the effect that he would build the house on the site purchased by his wife by spending Rs. 1,000 from his own pocket, that both he and his wife will have right of residence in this house during their life-time, and that their daughter will be the owner of the house after their death. It was further stated that the executant will have no connection with the site if he did not build the house within one year of the execution of the agreement (Ex. P. W. 6/B). It was contended by the learned counsel for the appellant that the agreements in question fell within the purview of S. 17 (1) (b), Registration Act as they were non-testamentary instruments which purported to create, declare, assign and limit in future a contingent right, title and interest in immoveable property of the value of over Rs. 100. It was urged that as the plaintiff's suit was based on the allegation that he had become a joint owner of the house with Mt. Ram Patti by building a house worth Rs. 1,000 in virtue of the agreements, the agreements must be held to have created a contingent interest in the property in dispute at the time of their execution. In 16 P R 1895 (1), plaintiffs sued for a declaration of proprietary right to a one-sixth of certain land and based his claim on a document executed by defendants on 23rd January 1886, wherein it was stated that defendants had put plaintiff in possession of 500 bighas of land which he was to bring under cultivation and in which he was to sink certain wells. The document further declared that when plaintiff had cleared the ground he would be proprietor of a one-sixth share of it. Plaintiff alleged that he had performed his part of the contract and had spent

1. Imam Baksh v. Karim Shah, (1895) 16 P R 1895 (FB).

Rs. 3,000 in breaking up the waste. The defendants pleaded *inter alia* that the document relied on by plaintiff required registration and being unregistered could not affect the property in suit, the value of which exceeded Rs. 100.

It was held by two of the Judges constituting the Full Bench that inasmuch as the document did not convey to plaintiff one-sixth share of the estate, but merely gave him a right to demand a conveyance thereof at a future time if he could show that he had fulfilled the conditions agreed upon, the document relied upon by plaintiff did not require registration and was admissible in evidence. Benton, J. however, dissented from the opinion of the other two Judges and was of the opinion that the document in question created a contingent interest in property exceeding Rs. 100, in value and that accordingly the document was inadmissible in evidence without registration. In 51 P R 1898 (2), plaintiffs sued for an account of the income and expenditure of a certain Kul (or water course) jointly excavated by the parties under an agreement in writing whereby it was agreed, *inter alia*, that, in consideration of half the outlay in excavating the Kul, which originally belonged to defendant and his ancestors but had fallen into disrepair and become useless, the plaintiff was to become a half-sharer therein: that thenceforth the income and expenditure on the Kul was to be shared in the same proportion, and that in the event of a sharer failing to pay the expenses of repairs, he was to be debarred from participating in the income of that year. It was held that the written agreement did not require registration inasmuch as, taken as a whole, it meant nothing more than that the defendant agreed to give plaintiff a half share in the Kul provided that the latter paid half a share of the expenses of excavation, and that such a condition did not create a present right in the Kul, but merely one that would come into operation in the event of plaintiff fulfilling the said condition. It was further observed that even if a present right be said to have been created by the agreement it was not established that the right was worth Rs. 100 or more. The soundness of the two decisions referred to above was doubted by a Division Bench of the

Punjab Chief Court in 71 P R 1906 (3). These decisions were, however, approved of in 1919 Lah 60 (4). It appears to us that in view of the observations of their Lordships of the Privy Council in 47 Cal 485 (5), the decisions of the Punjab Chief Court referred to above do not lay down the law correctly. The facts of the Privy Council case were as follows:

In 1895, Hemanta Kumari Debi, appellant, instituted two suits in the Court of the Subordinate Judge of Nadia, the one against the Government (No. 72 of 1895) and the other against Robert Watson & Co., (73 of 1895). The object of each of these suits was to obtain possession of land claimed by the appellant. The land had been diluviated owing to encroachments of the river Padma and had then subsequently re-appeared and formed the areas which were the subject of controversy. The suit No. 73 of 1895 was compromised, the terms of the compromise being that Robert Watson & Co., Ltd. were to retain possession of the land they occupied, but that the ownership of the appellant was to be recognized and Watson & Co.'s possession was to be upon certain agreed terms as to payment of rent and otherwise. It was also provided that if in suit No. 72 the appellant succeeded in obtaining a decree against the Government, she should grant a jote settlement of the lands in such suit to Robert Watson & Co., upon the same conditions as those agreed with regard to the land that was in their possession. This agreement was reduced in writing, a petition of compromise based upon it was filed by the appellant in suit No. 73 and on 20th September 1897, judgment was given in terms of the compromise and a decree was drawn up in pursuance of the judgment on the same date. This decree recites the claims in the suit and the petition for compromise and grants a decree in the terms of the compromise which are then set out in full. The appellant's defence rested upon the ground that the compromise could not be given in evidence, firstly, because, treated as an ordinary contract, it had not been registered, and secondly, if it were regarded as a decree the decree was inoperative in relation to the lands in dispute, as they did not relate to the suit in which the decree sanctioning the compromise had been made.

Their Lordships of the Privy Council held that the document embodying the compromise did not require registration under Cl. (d), S. 17 (1), Registration Act as it was neither a lease nor an agreement to lease but that it purported to create a contingent right or interest in immovable property and required registration under Cl. (b) of S. 17 (1). The facts in

3. Ajimat Singh v. Kalwant Singh, (1906) 71 P R 1906=111 P L R 1907.

4. Ramdas v. Nadir Shah, 1919 Lah 60=69 I C 608=1 L L J 79.

5. Hemanta Kumari Debi v. Midnapur Zemindari, 1919 P C 79=58 I C 534=46 I A 240=47 Cal 485 (P C).

the case of *Hemanta Kumari Debi* (5) were very similar to the facts of the present case. In that case also the appellant was yet litigating with the Government when the compromise with Robert Watson & Co., was arrived at and it was not known whether the appellant would succeed in obtaining a decree against the Government. The appellant succeeded in her claim against the Government after the document in question had been executed, and still this document was held to have created a contingent interest in immovable property. We therefore hold that the agreements Exs. P. W. 6-A and P. W. 6-B are inadmissible in evidence for want of registration. The learned counsel for the respondent contended that the present suit by the plaintiff was in substance a suit for specific performance of a contract under the Specific Relief Act and that under the proviso to S. 49, Registration Act, the unregistered agreements could be received in evidence. We are of opinion that this contention is without any force. The plaintiff claims joint possession of the house in dispute as a joint owner and relies on the agreements in question as a piece of evidence in support of his claim. For the reasons given above, we accept this appeal, set aside the judgments and decrees of the Courts below and dismiss the plaintiff's suit. In view of all the circumstances, we order that parties shall bear their own costs throughout.

R.M./R K. *Appeal allowed.*

A. I. R. 1936 Lahore 1005

AGHA HAIDAR, J.

Bhagwan Das and another—Defendants—Appellants.

v.

Parabh Dial and another—Plaintiffs—Respondents.

Second Appeal No. 2304 of 1935, Decided on 25th March 1936, from decree of Senior Sub-Judge, Sialkot, D/- 21st October 1935.

(a) Deed—Admissibility — Document executed between strangers not parties to suit — Parties to suit cannot rely on it.

Documents executed between parties who are utter strangers to a suit are not admissible in evidence in proof of the title of the party relying upon them. [P 1006 C 1]

(b) Second Appeal — Question of fact—Finding should be based on legal evidence.

Second appellate Court attaches considerable importance to the findings of fact recorded by

the lower appellate Court but such finding should be based upon a proper appreciation of legal evidence on the record. A finding recorded by the lower appellate Court based wholly upon wrong assumptions would not be binding on the High Court in second appeal. A Judge, whose findings on questions of fact are final, must be wide awake. He should be in full possession of the whole evidence on the record before he can give a decision on a question of fact, knowing full well that great sanctity attaches to his decision when it comes to the High Court in second appeal. [P 1006 C 1, 2]

(c) Second appeal—Finding of fact—Finding based on inadmissible evidence is not maintainable—Question of admissibility not raised in lower Courts can be raised in second appeal.

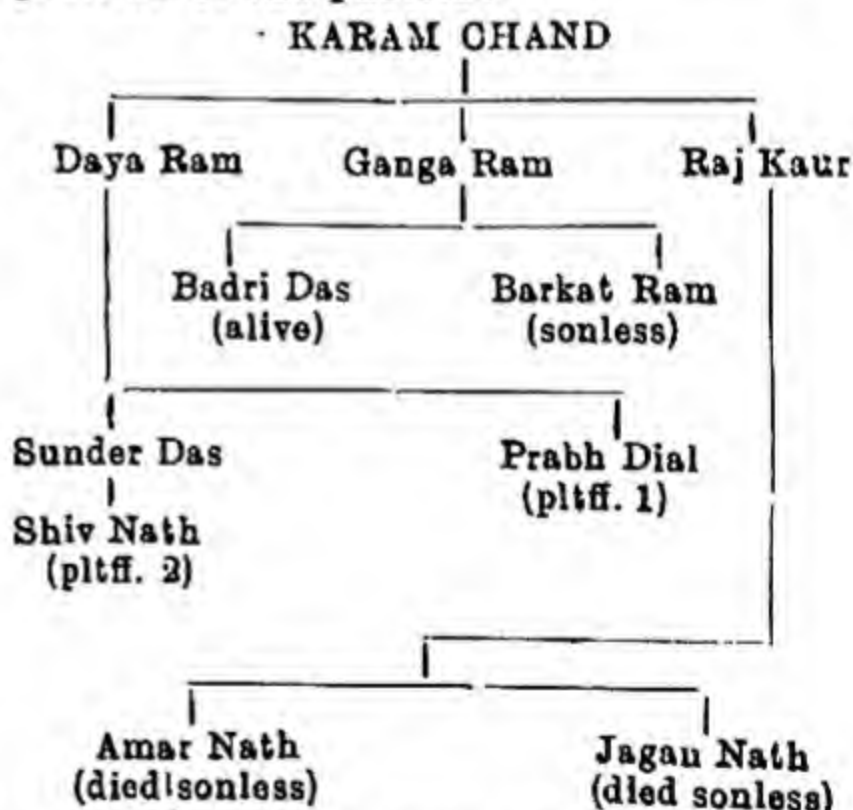
Even if the question of the admissibility of evidence is not raised in the lower Courts and particularly in the lower appellate Court, that question can be agitated at the stage of second appeal: 1927 Lah 448, *Disapproved but foll.*; 1924 All 703 and 845, *Approved but not Foll.*

[P 1006 C 2]

M. L. Puri—for Appellants.

Yashpal Gandhi and Asa Ram Agarwal—for Respondents.

Judgment.—This appeal arises out of a suit for possession of a certain site after removing the building materials standing thereon. The following pedigree table would be helpful in understanding the position of the parties:



The shop in dispute originally belonged to Karam Chand. The case for the plaintiffs is that there was a partition though there was no separation by metes and bounds and that the shop in dispute fell to the share of Daya Ram. The defendants are transferees from Badri Das and Barkat Ram and their case is that the shop belonged to Ganga Ram and from Ganga Ram it descended to his sons who were their transferors. Both the Courts below have concurred in decreeing the

plaintiffs' claim. The defendants have come up to this Court in second appeal. In his judgment the lower appellate Court has made reference to three documents, namely exhibits P. W. 3/1, P. W. 2/1 and P/3. Two of these documents are sale-deeds and the third is a rent deed. The parties to these documents were strangers to the present suit. In those documents the shop in dispute is described as belonging to Prabh Dial or Daya Ram, predecessor-in-title of defendants. The sale in favour of the defendants took place some time in 1917 and the case for the defendants is that they had rented the shop to Imam Din and Fazal Shah. The lower appellate Court referred to other evidence also, mostly oral, and came to the conclusion that the plaintiffs have succeeded in proving their title while the defendants have completely failed to prove that their predecessors-in-title were the owners of the shop. Mr. Mukand Lal Puri has argued that the finding of the Court below on the question of the plaintiffs' title is vitiated because the documents exhibits P. W. 2/1 and P/3 were not admissible in evidence inasmuch as they were between parties who were utter strangers to the present suit. This contention, in my opinion, is sound. At one time there used to be a conflict of judicial opinion on the question of the admissibility of such documents; but, so far as this Court is concerned, we may take it that it has been definitely held that such documents are not admissible in evidence in proof of the title of the party relying upon them. Mr. Mukand Lal Puri has further argued that the lower appellate Court has discarded the evidence of the rent deed on which the defendants relied in support of their possession of the shop purchased by them on the ground that Imam Din and Fazal Shah who were the tenants had not been placed in the witness box to swear whether they actually occupied the shop as defendant's tenants. Now Haidar Shah has been examined. He is the son of Fazal Shah. He has stated on oath that Fazal Shah was dead. This being so, it was impossible for the defendants to produce Fazal Shah in Court.

In view of the law on the subject, this Court attaches considerable importance to the findings of fact recorded by the lower appellate Court but such finding should be based upon a proper appre-

ciation of legal evidence on the record. A finding recorded by the lower appellate Court based wholly upon wrong assumptions would not be binding on this Court in second appeal. A Judge, whose findings on questions of fact are final, must be wide awake. He should be in full possession of the whole evidence on the record before he can give a decision on a question of fact, knowing full well that great sanctity attaches to his decision when it comes to the High Court in second appeal. The learned Judge has not acted according to this standard of judicial care and caution and has blamed the defendants who relied upon the rent deed for not producing a witness who was dead already. There is a Division Bench decision of this Court, 8 Lah 651 (1), the facts of which are practically on all fours with those of the present case. In that case the learned Judges upheld the decision of the learned Single Judge who, in circumstances analogous to those of the present case, remanded the case to the lower appellate Court for recording fresh findings after eliminating from consideration that portion of documentary evidence which was inadmissible. Sitting as a Single Judge that judgment is binding upon me, although my own view is that, so long as there is legal evidence in support of the finding of fact recorded by the lower appellate Court, that finding cannot be disturbed.

In this connexion S. 167, Evidence Act, is relevant. Furthermore, there are two decisions at least of the Allahabad High Court, 1924 All 709 (2) and 1924 All 845 (3), in which it was definitely laid down that if the question of the admissibility of evidence was not raised in the Courts below and particularly in the lower appellate Court that question cannot be agitated at the stage of second appeal. The view, of law as laid down in 8 Lah 651 (1), I must follow, though personally if the matter were *res integra* I would have followed the Allahabad decisions noted above. I therefore allow the appeal, set aside the judgment of the Court below and remand the case to that Court for disposal according to law. It would

1. Lajpat Rai v. Faiz Ahmad, 1927 Lah 448=103 I C 889=8 Lah 651=29 P L R 74.
2. Sat Narain Prasad v. Ram Autar, 1924 All 709=78 I C 221=22 A L J 153.
3. Radha Kishen v. Kidar Nath, 1924 All 845=80 I C 874=46 All 815=22 A L J 761.

eliminate these three documents completely from consideration and would make due allowance for the fact that Fazal Shah was dead at the time when the suit was tried. It must decide the case on the legal evidence as it stands. I must observe that, if the defendants-appellants had raised this question of the admissibility of the three documents mentioned above in the lower appellate Court, it might be that the result would have been different, or, at any rate, the Court would have been in a position to decide the case keeping that question in mind. This was not done and, under the circumstances, I would order that, so far as this Court is concerned, the parties shall bear their own costs.

B.D./R.K.

*Case remanded.***A. I. R. 1936 Lahore 1007**

AGHA HAIDAR, J.

Mt. Ghulam Aishan Bibi and others—
Plaintiffs—Appellants.

v.

Mohammad Sharif and others—
Defendants—Respondents.

Second Appeal No. 283 of 1936, Decided on 1st June 1936, from decree of Dist. Judge, Multan, D/- 15th November 1935.

(a) Limitation — Exclusion of—High Court rules—Second appeal—Delay in getting copy of trial Court's judgment permissible under S. 5, Limitation Act, though not under S. 12 of the Act.

Where under the rules of the High Court, an appeal would not be deemed to have been properly presented if the copy of the judgment of the trial Court does not accompany the copies of the judgment and decree of the lower appellate Court, the time spent in obtaining copy of such judgment should be excluded from the period of limitation under S. 5, Limitation Act, though it is not excluded under S. 12 of the Act: 1927 *Lah* 717 and 1928 *All* 416, *Rel. on.*

[P 1007 C 2]

(b) Limitation Act (1908), S. 12 — Time "requisite" — Applicant presenting application for copy with insufficient payment for costs—Further demand for deposit made—Delay of two or three days in making necessary deposit—No negligence on applicant's part — Delay construed as time requisite within meaning of S. 12, Limitation Act, and hence excused.

Where an applicant presents an application for copy of judgment with insufficient costs of preparing a copy, and when asked to pay still more for the requisite cost there is delay of three or four days, this delay of three or four days in making the deposit after the demand has been formally made cannot be treated as a result of negligence or carelessness and the time necessary for ascertaining the cost of preparing a copy is time "requisite" for obtaining the

copy within the meaning of S. 12, Lim. Act, and should be excluded: 1936 *Lah* 771, *Rel. on.*

[P 1008 C 1, 2]

Labh Singh—for Appellants.*L. M. Datta*—for Respondents.

Judgment. — According to the office report this appeal was filed seven days beyond time. The appeal itself was against the order of the District Judge, holding that the appeal before him was also barred by time. I take up the appeal preferred to this Court first. The judgment of the lower appellate Court was delivered on 15th November 1935. The plaintiff, who had been unsuccessful, applied for a copy of the judgment of the trial Court on 4th February 1936. This copy is necessary under the rules of this Court because in a second appeal it is essential that the copy of the judgment of the trial Court should be filed along with the copies of the judgment and decree of the lower appellate Court. On 5th February 1936 the plaintiff applied for copies of the judgment and decree of the lower appellate Court. On 8th February 1936, copies of the judgment and decree of the lower appellate Court were ready. On 15th February 1936, a copy of the judgment of the trial Court was ready. The appeal was filed on 24th February 1936. The question arises whether the appeal to this Court was within limitation.

As already mentioned, under the rules of the Court an appeal would not be deemed to have been properly presented if the copy of the judgment of the first Court does not accompany the copies of the judgment and decree of the lower appellate Court. It is perfectly true that S. 12, Lim. Act, does not make any mention of the judgment of the trial Court in second appeal and the time, which is excluded for the purpose of computing the period of limitation, is that which is taken up in the preparation of the copy of the judgment and decree appealed against; but, having regard to the rules framed by this Court, the appellant can claim the benefit of the provisions of S. 5, Lim. Act, and ask the Court for excluding from the period of limitation the time spent in obtaining the copy of the trial Court's judgment. It may be mentioned here that the application for copy of the trial Court's judgment was made on 4th February 1936, that is to say, a day before the application for copies of the judgment

and decree of the lower appellate Court was made. In this connexion 1927 Lah 717 (1) and 1928 All 416 (2) may be noted. In those cases the appellant was allowed the benefit of S. 5, Lim. Act, and the period spent in obtaining copy of the judgment of the trial Court was excluded. It is admitted that, if the period between 4th February, i. e., the day on which the application for copy of the judgment of the trial Court was made, and 15th February 1936, i. e., the day on which the copy of the first Court's judgment was ready is excluded, the appeal is within time. I would therefore, under the circumstances of the case extend the period of limitation under S. 5, Lim. Act, by excluding the period spent in obtaining the copy of the judgment of the trial Court. The next question is whether the appeal before the lower appellate Court was time barred.

The judgment of the trial Court was delivered on 8th May 1935, dismissing the plaintiff's suit. On 30th May 1935, the plaintiff applied for copies of the judgment and decree depositing a sum of Rs. 1-5-0 along with his application. The copying department retained that application and on 4th June 1935 demanded a sum of Rs. 15-5-0. This sum was paid on 8th June 1935. On 15th June 1935 the copying department made a further demand for the payment of Rs. 2-10-0 from the plaintiff-applicant. This sum was paid on 17th June 1935. The copies were ready on 19th June 1935 and were delivered to the plaintiff-applicant on the same day. The appeal was filed on 21st June 1935.

The learned District Judge has remarked in his judgment that the period between 30th May 1935 and 8th June 1935 cannot be condoned as the appellant should have paid along with his application for copies the probable value of preparing copies or Rs. 5. The learned Judge has also observed that the probable value of the copies, as calculated by the copying department, was Rs. 15-5-0. This figure might have been arrived at by the copying department after making use of their expert knowledge, but it cannot be said that the figure of Rs. 15-5-0 could have been computed by an ordinary liti-

gant when applying for copies and should have been paid by him. The observation of the learned District Judge regarding the deposit of Rs. 5 does not seem to be appropriate, because this applies only to the case when an application for copies is made through the post. From the dates given above it would appear that the fact that between 30th May 1935 and 4th June 1935 the copying department kept the application without taking any action, cannot be ignored.

We have also to consider that the method adopted by the copying department in demanding the copying dues in dribblets was very unbusinesslike and inconvenient. Ordinary litigants, who are generally poor villagers, do not carry about substantial sums of money like Rs. 15-5-0 in their pockets, and I do not think that the delay of three or four days in making the deposit after the demand has been formally made can be treated as a result of negligence or carelessness. Having regard to Rule 3 formulated in the recent Full Bench decision in 38 P L R 493 (3), the decision of the lower appellate Court seems to be incorrect. I therefore allow the appeal and, setting aside the judgment of the lower appellate Court, remand the case to that Court for decision on the merits. The appellant shall be entitled to have a refund of the court-fee paid on the memorandum of appeal. Costs here and hereinafter shall abide the event.

R.W./R.K.

Appeal allowed.

3. Kishore Chand v. Bahadur, 1936 Lah 771 = 17 Lah 429 = 38 P L R 493 (F B).

A. I. R. 1936 Lahore 1008

JAI LAL, J.

Mohammad Din—Plaintiff—Appellant.

v.

Municipal Committee, Sialkot—Defendant—Respondent.

Second Appeal No. 2240 of 1935, Decided on 25th May 1936, from order of Senior Sub-Judge, Sialkot, D/- 18th July 1935.

Punjab Municipal Act (13 of 1911), S. 49—Suit for injunction — Notice when necessary — Suit originally framed for temporary injunction but later amended for permanent injunction is not bad for want of notice.

When a suit is filed against a Municipal body for temporary injunction under S. 54, Specific Relief Act, it does not require a notice under S. 49, Punjab Municipal Act. A suit for mandatory injunction however does require a notice

1. George Gowshala v. Balak Ram, 1927 Lah 717 = 103 I C 498.

2. Banke Lal v. Bhola Nath, 1928 All 416 = 115 I C 890.

under S. 49, Punjab Municipal Act. But when a plaint asking for temporary injunction is later on amended by making the claim one for a mandatory injunction, even then the suit will not be bad for want of notice: 9 I C 844, *Disting.* [P 1009 C 2]

Bashir Ahmad—for Appellant.

Mohammad Amin—for Respondent.

Judgment.—The appellant instituted a suit against the Municipal Committee of Sialkot for an injunction under S. 54, Specific Relief Act, restraining the Municipal Committee from constructing a drain on land which was alleged by the plaintiff to belong to him. On the institution of this suit a temporary injunction was prayed for and was granted against the Municipal Committee, but the latter represented to the Court that the rainy season was arriving and that if the temporary injunction remained in force and the drain was not consequently constructed, great public injury might result. Thereupon, the trial Court cancelled the temporary injunction noting that if the drain was constructed and it was found that the Committee was not entitled to construct it, the same would be demolished. The drain was constructed by the Municipal Committee and the plaintiff, to meet the situation that had arisen by the order passed on the cancellation of the temporary injunction and by the construction of the drain, converted his suit by amending the plaint to one for a mandatory injunction against the Municipal Committee directing it to remove the drain. To this suit an objection was raised by the Municipal Committee based on S. 49, Punjab Municipal Act, that the suit was not competent without notice to the Municipal Committee. Now S. 49 provides that no suit shall be instituted against the Committee in specified instances until the expiration of one month next after notice in writing has been given to it; an express proviso however is added that nothing in the section shall apply to any suit instituted under S. 54, Specific Relief Act. Therefore as a condition precedent to the institution of the suit as originally framed, no notice was necessary.

But if originally a suit for a mandatory injunction had been instituted a notice would have been necessary. The trial Court decreed the suit. The Senior Subordinate Judge on appeal however rejected the plaint merely on the ground that the suit could not be instituted without a

notice under S. 49. He has not decided the case on the merits which he should have done in the peculiar circumstances of this case. On appeal by the plaintiff it is urged that the plaint having been amended in this case, and specially under the circumstances mentioned above, S. 49 which should be strictly construed does not apply to the facts of this case. It only applies to a suit in which notice is necessary and which is instituted without such notice. It is contended that in this case when the suit was instituted no notice was necessary and therefore S. 49 has no application. In my opinion this contention is well founded. 9 I C 844 (1) has been relied on before me by the learned counsel for the respondent. That judgment does not however apply to the facts of this case. In that case a suit was instituted before the expiry of 30 days from the date of the notice; subsequently the plaint was amended after the expiry of 30 days and an objection raised, that the suit must be deemed to have been instituted on the date on which it was first instituted, and as then 30 days from the date of the notice had not expired the suit was incompetent, was repelled.

It was held that in such circumstances the suit must be deemed to have been instituted when the plaint is amended. The facts of this case are distinguishable. The policy appears to be not to throw out suits on a technical objection unless such an objection applies strictly to the facts of the case. In my opinion in the present case it cannot be said that the suit when instituted was incompetent for want of notice. The amendment having been made on account of circumstances which arose by the order of the Court passed at the instance of the defendant-respondent, the plaintiff's suit cannot be defeated on the ground of an objection based on want of notice. I accept this appeal, set aside the order of the Senior Subordinate Judge and send the case back to him with direction to proceed with the appeal on the merits. The parties have been directed to appear before the Senior Subordinate Judge on 24th June 1936. The costs of this appeal shall abide the result.

B.D./R.K.

Case remanded.

1. Mahomed Yasin v. Municipal Committee, (1911) 110 P L R 1911=9 I C 844.

A. I. R. 1936 Lahore 1010

MONROE AND DIN MOHAMMAD, JJ.

S. C. Dhanjibhoy—Plaintiff—Appellant.

v. .

Secretary of State—Defendant—Respondent.

First Appeal No. 133 of 1935, Decided on 2nd June 1936, from decree of Dist. Judge, Rawalpindi, D/- 25th October 1934.

Land Acquisition Act (1894), Ss. 23 and 11—Tenure of vendor in land compulsorily acquired, uncertain—Vendor, mere licensee liable to be ejected at any time—Measure of his interest is amount of compensation he can claim if his license is determined.

Where the tenure of the vendor in the land compulsorily acquired by the Government, is uncertain and he is a mere licensee liable to be ejected at any time, the measure of his interest is the amount of compensation that he could claim if his license were determined.

[P 1011 C 1]

Where certain buildings situated in a Cantonment are compulsorily acquired by the Government and the only interest which the vendors have in the site on which the buildings are situate, is that of a licensee holding the land subject to one month's notice to quit, with the right to receive as compensation the value of the buildings and where the amounts awarded are the costs of new buildings of the same character at the Military Engineers Service rates, it is for the vendors to show that the amounts awarded are insufficient, if they alleged that the compensation has been assessed on wrong basis.

[P 1010 C 2; P 1011 C 1]

D. C. Ralli and S. C. Manchanda—for Appellant.

Ram Lal, R. C. Soni and Beant Singh—for Respondent.

Monroe, J.—These appeals have been brought against a single judgment of the learned District Judge, Rawalpindi, dealing with the cases in which he dismissed the claims of the appellant for an increase in the amount of compensation which had been awarded by the Collector for property of the claimants taken compulsorily under notification of the Punjab Government. In the first of these cases which relates to bungalow No. 206, Magdala Road, Rawalpindi, the Collector assessed the actual compensation at Rs. 15,300 which with 15 per cent for compulsory acquisition made in all a sum of Rs. 17,595. In the second case relating to bungalow No. 215 the actual amount of compensation was Rs. 16,920 which together with 15 per cent amounted to Rs. 19,458. Both the appellants were dissatisfied with the amount of compensa-

tion awarded to them which was awarded in respect of buildings only, first on the ground that the buildings were of a greater value and secondly on the ground that they were owners of the land on which the buildings stood and that compensation for the land should also have been awarded.

We shall deal first with the claim that the land on which the buildings stand is the property of the appellants. It is shown by the evidence produced by the Secretary of State that the Cantonment at Rawalpindi was formed from lands which were acquired by the Government and had previously formed part of three villages. The history of the two bungalows Nos. 206 and 215 was traced from the Cantonment Registers. The earliest Register which purports to show the persons in possession of the Cantonment property shows that bungalow No. 206 which was then numbered 95 as appears from the survey of 1865 was before March 1854 in the possession of one Captain Graham. The register shows the devolution of the property and that this bungalow came into the possession of Dhanjibhoy F. Commodore and another in 1880 and that the transfer was sanctioned by the Cantonment Authority. The same register contains the history of bungalow No. 215 then numbered 92: the first possessor was Captain A. Chichester and it passed into the possession of Bodh Raj Shah in 1888. The respondent has produced Bodh Raj Shah's application for the transfer to him and a declaration made by him that he held the land under Cantonment regulations. It may be noted that the two plots are near to one another and are situated in the very centre of the Cantonment. In view of these facts there can be no doubt that the only interest of the appellants in the sites is that given to them by the Cantonment Authority under the Cantonment Regulations—a license to hold the land subject to one month's notice to quit with the right to receive as compensation the value of the buildings.

On the second branch of the case, it has been argued for the appellants that the compensation has been assessed on a wrong basis and is too small. They are, it is claimed, entitled to receive the market value of the property compulsorily acquired, and an important element in determining the market value is the

amount of the rent received. The amounts which have actually been awarded are the costs of new buildings of the same character at Military Engineers Services rates, which amounts to a little more than the Public Works Department's estimate. It is for the appellants to show that these amounts are insufficient. Their evidence entirely fails to do this: and they have omitted to prove any facts which might have assisted us in arriving at a conclusion. They have assumed that the rent paid is to be attributed to the buildings, which are their property and no part of it to the sites and gardens, which are the property of the Government. No evidence has been given of the relative value of the sites and the buildings, nor has any method of apportioning the rent been suggested. The argument for the appellants amounts to this: the Military Authorities have given in similar cases 20 years' purchase of the rent and even have laid it down as a general proposition that 20 years' purchase of the rent is proper compensation: therefore 20 years' purchase should be paid in these cases. We should have very grave doubts whether at the time of this acquisition in 1932 any rack-rent would, in any circumstances, have been purchased by a prudent man at 20 years' purchase, but if such a price could have been expected, it could only have been expected when the tenure of the vendor was secure. In the present cases the tenure of the vendor is uncertain; he is a licensee liable to be ejected at any time and the measure of his interest is the amount of compensation that he could claim if his license were determined. That amount is fixed by the regulations at the value of his buildings. In the present cases the bungalows have been in existence for about 80 years and though it is alleged that some improvements have been made in recent years, there is no evidence of their cost. We have no material for determining the actual value of the buildings; but the manner in which the case has come before us relieves us from necessity of attempting any such determination. Whatever the value of these 80 years old buildings may be, it is much less than the cost of erection of similar new buildings, the amount which has been awarded; there is an addition of 15 per cent in each case for compulsory acquisition.

The learned Government Advocate has informed us that acquisition under the Land Acquisition Act, though more expensive, is preferred to determination of the license and ejectment, because it avoids difficulties of title and delay. From the arguments of the learned counsel for the appellants, it appears to us that the Military Department have in the past been extremely generous in making compensation and the appellants cannot be blamed for desiring to share in the spoils: but though they do not seem to realise the fact, they have in the present cases received more than generous compensation; a great part of the buildings is more than 80 years old and the compensation which has been awarded in these cases must far exceed the value of the property compulsorily acquired. We dismiss these appeals with costs.

R.M./R.K. *Appeals dismissed.*

A. I. R. 1936 Lahore 1011

CURRIE, J.

Gujjar Mal—Accused—Petitioner.

v.

Municipal Committee, Ferozepore City
—Opposite Party.

Criminal Revn. No. 233 of 1936, Decided on 28th April 1936.

Punjab Municipal Act (3 of 1911), S. 121 (5)—License granted on express condition of licensee doing certain things—Failure to comply with these conditions is in itself a breach of license.

A Municipal Committee gave a license to run an engine between 8 p.m. to 6 a.m. on condition that the licensee should install a silencer and not disturb people with noise. Health Officer reported that the engine was running in an objectionable manner by producing offensive and unwholesome noise. The President filed a complaint against the licensee:

Held: that the failure to comply with those conditions was in itself a breach of the license and the special authorization given thereunder and hence the licensee was liable to prosecution under S. 121 (5). [P 1012 C 1]

Jai Gopal Sethi—for Petitioner.

R. P. Khosla and Hem Raj Mahajan
for Govt. Advocate—for Opposite Party.

Order.—The petitioner carried on an Ice factory and Flour mills run by an oil engine in the limits of the Municipality of Ferozepore. For this he holds a license under S. 121, Punjab Municipal Act. Under the bye-laws of the Municipal Committee of Ferozepore, Notification No. 35689, dated 7th December 1928 it is provided in R. 3 (e) that a person

holding a license under sub-s. (1) of S. 121, Municipal Act, shall not permit any work to be carried on at the licensed premises which gives rise to offensive or unwholesome noise between eight o'clock at night and six o'clock of the morning unless he has been specially authorized in this behalf. The petitioner apparently has been endeavouring to obtain such permission and on 25th February 1935 the Committee adopted a resolution which is reproduced in the order of the learned Sessions Judge to the effect that a license should be granted on the condition either that an efficient silencer were erected or an electric motor installed which would not produce noise while the engine was running and that people residing in the neighbourhood should not be disturbed by its noise and vibrations. Subsequently the Health Officer found that the engine was working and producing offensive and unwholesome noise. A number of witnesses were produced to this effect and their evidence has been accepted by the learned trial Magistrate in preference to the theoretical evidence as regards the efficiency of the silencer fitted to the oil engine. Mr. Sethi argues in support of the reference that the permission having once been granted under bye-law 3, no prosecution would lie, and the only course would be for the Committee to revoke and cancel their permission. It appears to me, however, to be clear that the permission was strictly limited and that the failure to comply with those conditions is in itself a breach of the license and the special authorization given thereunder. It was further urged that it was for the Municipal Committee, and not the President, to launch the prosecution and decide whether the terms of the authorization had been complied with. This contention, in my opinion, has no force. It appears that the Committee has delegated powers to its President to initiate prosecution. In the present case the prosecution was ordered by the President on the report of the Health Officer. Once the prosecution has been launched, it is for the Court to decide whether or not a breach of the conditions has occurred. In these circumstances I see no ground for accepting the recommendation of the learned Sessions Judge and dismiss the petition.

D.S./R.K.

Petition dismissed.

A. I. R. 1936 Lahore 1012

DIN MOHAMMAD, J.

(Thakar) Sri Chand—Petitioner.

v.

(Chaudhari) Bashambar Nath and others—Opposite Parties.

Criminal Revn. No. 135 of 1936, Decided on 12th June 1936, from order of Dist. Magistrate, Gujrat, D/- 8th November 1935.

Criminal P. C. (1898), S. 145 (5) — In absence of denial by parties or persons interested there can be no question of cancellation of order passed under sub-s. (1).

A Magistrate made an order under sub-s. (1), S. 145 requiring the attendance of parties within a fixed time on a certain date for hearing evidence of their claims. The parties did not appear within the time fixed and the Magistrate consigned the case to the record-room. The applicant moved the District Magistrate who treated the order of the trial Magistrate as tantamount to the cancellation of notice, under sub-s. (5) and dismissed the petition :

Held : that the order of the District Magistrate was wrong. Sub-s. (5) applied only to those cases where any of the parties concerned in the dispute or any other person interested appeared before the Magistrate and denied the existence of the dispute. In absence of such denial sub-s. (5) did not come into operation at all. [P 1012 C 2 ; P 1013 C 1]

Muhammad Munir—for Petitioner.

Ram Lal Anand II — for Opposite Parties.

Order.—On 30th May 1935, Thakar Sri Chand presented an application under S. 145, Criminal P. C., which was taken cognizance of by a First Class Magistrate. The Magistrate examined the applicant on the same day and called upon him to produce documentary evidence, if any, in support of his allegations. It appears that some documents were produced by the applicant on 6th June on which the Magistrate made an order requiring the parties concerned to attend his Court and to put in written statements of their respective claims as contemplated by sub-s. (1), S. 145. These written statements were put in on 18th June and the Magistrate consequently adjourned the case for the evidence of the parties to 10th July 1935. On 24th June 1935 the necessary talbana was paid in by the applicant for the summoning of the witnesses. In the meantime the Court time was changed from 10 a. m. to 6 a. m., and as the parties and their witnesses were not present at 7-15 a. m., on 10th July, the Magistrate consigned the case to the record-

room. The applicant moved the District Magistrate against this order and the District Magistrate, while holding that the trial Magistrate could not dismiss the case for default, treated the order of the trial Magistrate as tantamount to the cancellation of notice under sub-s. (5), S. 145, Criminal P. C., and dismissed the petition. Against the order of the District Magistrate, Thakar Sri Chand has moved this Court. After hearing counsel for the parties I have come to the conclusion that the order of the District Magistrate is wrong. Sub-s. (5), S. 145 runs as follows :

Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed ; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-s. (1) shall be final.

It would thus appear that this subsection applies only to those cases where any of the parties concerned in the dispute or any other person interested appears before the Magistrate and denies the existence of such dispute, and if this is not the case, sub-s. (5) does not come into operation at all. In the present case, the only party that appeared before the Court was the applicant Thakar Sri Chand who had alleged that a dispute of the nature contemplated by S. 145 existed and on his statement the Magistrate had passed an order under sub-s. (1), S. 145, thus expressing his satisfaction as to the existence of the dispute and in the absence of any denial of the existence of the dispute, his order had become final as laid down by sub-s. (5), S. 145. The question of the cancellation of notice therefore did not arise at all. In these circumstances, I have no alternative but to allow the petition and remand the case to the trial Magistrate for disposal in accordance with law.

D.S./R.K.

Petition allowed.

A. I. R. 1936 Lahore 1013

TEK CHAND AND AGHA HAIDAR, JJ.

Emperor

v.

Harbans Lal—Respondent.

Civil Misc. No. 618 of 1935, Decided on 15th May 1936.

Legal Practitioner—Pleader's clerk writing false letter to client—Letter not proved to be written under pleader's instructions—Pleader held not guilty of improper conduct.

Where a pleader's clerk falsely wrote to the client that his revision petitions were filed and on inquiry on the client's application it was not proved that the letter was written by the clerk under the pleader's instructions:

Held: that the pleader was not guilty of improper conduct. [P 1015 C 1]

Ram Lal—for the Crown.

Badri Das and J. L. Kapur—for Respondent.

Order.—The charge against the respondent, Harbans Lal, Pleader, Gujranwala, is that he was engaged by one Kartar Singh of Vanike Tarar to file two criminal revision petitions in the Court of the Additional District Magistrate, Gujranwala, but he did not do so; that in reply to a post-card sent by Kartar Singh to him on 17th March 1935, his clerk Sunder Das falsely informed him, under the respondent's instructions, that the said revisions had been filed, and that these facts constituted improper conduct on his part and "reasonable cause" for his removal or suspension under S. 13, Legal Practitioners' Act. The proceedings were started on an application supported by an affidavit, submitted by Kartar Singh on 30th March 1935, to the District Judge, Gujranwala, who forwarded the papers to this Court with his report, dated 4th June 1935. Kartar Singh alleged that he had instituted two complaints against certain Police Officers in the Court of a Magistrate at Gujranwala and for prosecuting these complaints he had engaged the respondent as his Pleader. The complaints were dismissed by the Magistrate on 2nd March 1935. The same day he engaged the respondent to file revisions in the Court of the Additional District Magistrate. The fee for these revisions was fixed at Rs. 20 out of which Rs. 15 was paid at the time, and the balance of Rs. 5 was to be paid later. On 17th March 1935, he sent a reply pre-paid post-card (Ex. E) from his village to the respondent, expressing the hope that the revision petitions would have been filed and asking to be informed of the date by the return of post.

The post-card was delivered to the respondent on the 18th and the same day his clerk, Sunder Das, wrote back in reply that the "revisions had been filed" and asking Kartar Singh to come to

Gujranwala on 28th March 1935, with the expenses and the Pleader's fee. Kartar Singh averred that he reached Gujranwala on 28th and on enquiry discovered that the revisions had not been filed and that the statement in the post-card was false. The Pleader wanted more money from him, which Kartar Singh was not prepared to pay. Accordingly he got back the papers and presented the revisions within limitation through another Counsel. In a written statement filed before the District Judge, the respondent admitted that he had been engaged to appear for Kartar Singh in one of the complaints before the trial Magistrate; he denied that he had been retained in the second case before that Court. Out of the fee fixed for his engagement in the Magistrate's Court, Rs. 5 remained unpaid when the complaint was dismissed. He was then engaged to file petitions for revision in both cases for which a fee was fixed, but nothing was paid. Kartar Singh went to his village to bring money to cover the Pleader's fee and other expenses. He returned on the morning of 28th when the respondent wrote out the grounds for revisions and had them signed by Kartar Singh. Kartar Singh, however, declined to pay the fee fixed, and offered to pay Rs. 5 only, which was the balance outstanding out of the fee for appearance in the Court of first instance.

To this the respondent was not agreeable. Thereupon the engagement was cancelled and Kartar Singh took away the papers with a view to have the revisions filed through some other pleader. The respondent denied that the post-card (Ex. D) had been written by the Munshi under his instructions or that he had any knowledge of its contents. The Munshi, Sundar Das, was examined by the District Judge. He stated that the post-card had been written under the instructions of the respondent, but that, after writing the post-card, he did not show it to him. He further stated that the two revisions had been prepared and signed 20 days before the writing of the post-card. It is quite clear that the respondent had been engaged on a fee of Rs. 20 to file the petition for revision. It is also clear that he had not actually filed them till 28th March and the statement in the post-card written by his clerk on 18th (Ex. D) that the revisions

had been filed is incorrect. The only question for decision is whether this post-card (Ex. D) was written by the Munshi under instructions or with the knowledge of the respondent. As already stated, the statements of the respondent and the Munshi are at variance on this point. There are no other materials on the record which might throw any light on the point. Kartar Singh was very briefly examined by the District Judge, and it has not been possible to secure his attendance before us in spite of every effort made by the learned Government Advocate.

There is, however, one important matter in which Sundar Das made an obviously false statement before the District Judge. He stated that the revision petitions had been prepared and signed 20 days before he wrote the post-card on 18th March. This would make it, that they were written on 26th or 27th February. This, however, is incorrect, for the trial Magistrate had dismissed the complaints on 2nd March, and the documents filed before us to-day show that the application for copies of the judgments was filed on 2nd, and the copies were not ready till 9th March 1935. It is, therefore, clear that the revision petitions could not possibly have been prepared before that date. In these circumstances it is not possible to accept his word against that of the respondent. Nor does Kartar Singh appear to be a very reliable person. In his complaint to the District Judge and the affidavit filed in support of it, he stated that he had engaged the respondent to prosecute the complaints in two cases in the Court of first instance. The respondent alleged that he had been engaged in one complaint only. The documents filed before us show that his vakalatnama is to be found on the record of one case only, and not on that of the second.

This would show that he is telling the truth, while Kartar Singh is not. To discount the respondent's statement, that the revision petitions were prepared on the 28th, the learned District Judge has referred to the petitions Ex. A and Ex. B and has observed that the writing on the second page was cramped, and this circumstance indicated that Kartar Singh had signed blank papers which were subsequently written up. We have seen the original petitions but do not find any-

thing extraordinary in the writing, which would justify the inference made by the learned Judge. As already stated, Sundar Das has admitted that he did not show the post-card to the respondent after it had been written, and on the material before us, we are unable to accept his bare word that the false information in the post-card that the revision petitions had been filed, was made under the respondent's instructions. The learned Government Advocate frankly admitted that on the evidence before the Court, he was not in a position to press the matter further. We, therefore, hold that the respondent has not been proved to have been guilty of any improper conduct, and we dismiss the charge. There will be no order as to costs.

A.L./R.K. *Charge dismissed.*

A. I. R. 1936 Lahore 1015

CURRIE, J.

Giani and others — Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1695 of 1935, Decided on 25th February 1936, from order of Sess. Judge, Karnal, D/- 8th November 1935.

(a) Criminal P. C. (1898), S. 145 (6)—Mere fact that land is shamilat does not preclude Court from making enquiry and taking proceeding under S. 145.

Where the accused took exclusive possession of the shamilat land used as a gora deh:

Held: that the accused had no right to take exclusive possession to the detriment of the other persons who were entitled to and apparently were in the habit of using the land and that the mere fact that the land was shamilat did not preclude the Court from making enquiry and taking proceedings under S. 145; 1922 Lah 348, *Rel. on.* [P 1015 C 2]

(b) Criminal P. C. (1898), S. 439—Illegality and not mere irregularity—Still Court has discretion.

Even if illegality more than an irregularity has been committed, the Court has discretion to refuse to interfere in revision if substantial justice has been done: 5 P R 1906 Cr., *Rel. on.* [P 1016 C 1]

Fakir Chand—for Petitioners.

Shamair Chand for Govt. Advocate—
for the Crown.

Order.—On a report made by the police, the first Class Magistrate, Rohtak, attached certain land under S. 146, Criminal P. C. and took proceedings under S. 145, Criminal P. C. The second party,

the present petitioners, urged that the land was their exclusive property and occupied by their houses. It was shown however conclusively that the land was the shamilat of Thulla Salarani and used as a gora deh. Further, it was held that the possession of the second party was only a month or two old and that they had only set up possession a few days before the lodging of the report with the police. Accordingly, the Magistrate ordered under S. 145, Cl. 6, that the second party should give up possession by removing their fencing, etc., and filling the ditches and make the land fit for use for the proprietors of Thulla Salarani for common purposes as before.

A petition for revision was preferred before the learned Sessions Judge who dismissed it in a brief order. But from the grounds it is clear that the same position was there taken, viz., that the land in dispute was the exclusive property of the second party. In the present petition, there has been a complete change of front. Mr. Fakir Chand urges that the land is joint property and that therefore the petitioners have a right to take possession and S. 145 cannot be applied. The second point is that there is no definite finding that the petitioners forcibly and wrongfully dispossessed the other party. As regards the first point, it is clear that the mere fact that the land is shamilat does not preclude the Court from making enquiry and taking proceedings under S. 145, Criminal P. C.: vide 2 Lah 372 (1) and it is clear that as the land is gora deh the petitioners had no right to take exclusive possession to the detriment of the other persons who were entitled to and apparently were in the habit of using the land. It is true that there is no definite finding regarding the use of force in the dispossession of the opposite party; but it is urged on behalf of the respondents that where a number of men go and dig trenches and put up barbed wire fencing, it can be inferred that there is a show of force. In any case, it is urged that the circumstances of the case are such that the order of the Magistrate does not call for interference on revision. In this connexion reference is made to 5 P R 1906 Cr (2) in which it

1. *Malan v. Makhan Singh*, 1922 Lah 348=68 I O 65=28 Or L J 225=2 Lah 372.
2. *Aladya v. Emperor*, (1906) 5 P R 1906 Cr=4 Or L J 75=116 P L R 1907.

was held that even if an illegality more than an irregularity had been committed, the Court had discretion to refuse to interfere in revision if substantial justice had been done. In the present case, there is no doubt that substantial justice has been done in ordering the restoration of the status quo ante and probably a breach of the peace has been averted. In any case, the petitioners are not debarred from having recourse to Civil or Revenue Court to establish their rights, if any. In these circumstances, I decline to interfere with the order of the Magistrate and dismiss the petition.

D.S./R.K.

Petition dismissed.

A. I. R. 1936 Lahore 1016

TEK CHAND, J.

Sandhura Singh—Plaintiff—Appellant.

v.

Kehr Singh—Defendant—Respondent.

Second Appeal No. 212 of 1936, Decided on 8th May 1936, from decree of Dist. Judge, Montgomery, Lahore, D/- 23rd November 1935.

(a) Onus of proof—Evidence of both parties considered by Court—Question of onus is of no particular importance.

In a case even where there is a wrong allocation of onus, if both parties have led evidence bearing on the point and the Court has carefully considered it, the question of onus will be of no particular importance. [P 1017 C 1]

(b) Civil P. C. (1908), O. 7, R. 14 (2)—Suit on promissory note for cash consideration—Defendant denying receipt of consideration—Plaintiff, in answer, producing documents not included in list of documents filed with plaint—Adverse inference could not be drawn against plaintiff.

In a suit on a promissory note for cash consideration, the defendant denied the receipt of consideration and therefore the plaintiff, in answer, produced before recording of evidence bonds not included in the list of documents filed with the plaint:

Held: that in these circumstances no inference could be drawn against the plaintiff from the non-production of the bonds with the plaint or the omission from the list of the documents on which the plaintiff intended to rely, which list had also been filed with the plaint. [P 1017 C 2]

(c) Deed—Material alteration—Rule that document is void applies only to documents which are basis of claim and not to documents evidencing pre-existing liability.

A material alteration of a document by a party to it, after its execution without the consent of the other party, renders it void. But

this rule applies to those documents only which are the foundation of the plaintiffs' claim. It does not apply to documents which are merely evidence of the defendant's pre-existing liability: 25 Bom 616; 1926 Nag 209; 9 C W N 695 and 1926 Cal 831, *Rel. on.* [P 1018 C 1]

(d) Contract Act (1872), S. 25 (3)—Agreement under S. 25 (3) will be enforced if consideration is shown to be barred debt, even though no reference is made to it in document.

For a promise to pay a time barred debt to be a good consideration, it is not necessary that the debtor must expressly state that he was renewing a barred debt. For if the legislature had intended that the debtor should expressly state that he was renewing a barred debt, before such a debt could form valid consideration for promise under S. 25, it should have stated so explicitly in the statute: 33 Mad 159 and 1929 Rang 240, *Rel. on.* [P 1018 C 1, 2]

(e) Evidence Act (1872), S. 92—Promissory note reciting cash consideration—Promisee may prove that actual consideration was something different.

A promissory note stated that the entire consideration had been paid in cash, but the promisee subsequently stated that a part of the consideration was on account of the pre-existing debts due to him:

Held: that the promisee could prove that the actual consideration was something different from that recited in the document, but effect must be given to the real consideration and the contract falling under S. 25 (3) was no exception to this rule: 33 Mad 159 and 1929 Rang 240, *Rel. on.* [P 1018 C 2]

*Shamair Chand—for Appellant.**J. G. Sethi—for Respondent.*

Judgment.—The plaintiff-appellant, Sandhura Singh, brought an action against Kehr Singh, defendant-respondent, for recovery of Rs. 1,900 alleged to be due on foot of a promissory note dated 29th September 1931. The defendant admitted the execution of the pronote but pleaded want of consideration. He also raised a plea that the promissory note was not properly stamped and could not be made the basis of a suit. The trial Judge found that the promissory note was properly stamped and that the consideration had passed. He accordingly decreed the plaintiff's suit. On appeal by the defendant, the plea that the pronote was not properly stamped was given up. The learned Judge found against the plaintiff on the question of consideration and accepting the defendant's appeal, dismissed the suit. In the promissory note it is recited that the entire consideration, Rs. 1,400, had been received in cash by the promisor from the promisee. In his statement made in Court before the framing of the issues the plaintiff stated,

however, that Rs. 300 only had been paid in cash on the day preceding the execution of the pronote, and that the remaining consideration, Rs. 1,700, was in discharge of two bonds for Rs. 1,000 and Rs. 100 respectively which the defendant had executed in favour of the plaintiff's father on 15th September 1927, Exs. P 2 and P 3, and which were outstanding on the date of the execution of the promissory note. The defendant, on the other hand, stated that no consideration had passed at all for the pronote which, he alleged, had been executed in order to compel him to refrain from withdrawing a criminal complaint which he had lodged against a Sub-Inspector of Police who had made himself obnoxious to the people of this village and the neighbouring villages. He admitted that he had executed two bonds in favour of the plaintiff's father on 15th September 1927, but stated that he had repaid the amount due on those bonds and that nothing was outstanding against him on that account.

The trial Court placed on the defendant the onus of proving that the sum of Rs. 300 had not been paid, and finding that the onus had not been discharged allowed this sum. The District Judge, however, came to a contrary conclusion. Mr. Shamair Chand for the appellant has attacked this finding, but after hearing him I see no adequate ground for interference on second appeal with the clear finding recorded by the learned District Judge. It is no doubt true that the onus of this issue was on the defendant, but both parties had led evidence bearing on the point which has been carefully considered by the learned District Judge, and the question of onus is of no particular importance. The decision relating to this item, therefore, must stand. The learned District Judge has also found against the plaintiff with regard to the remaining portion of the consideration, i.e., Rs. 1,100, alleged to have been adjusted towards the bonds (Exs. P 2 and P 3), which were stated to have been outstanding in favour of the plaintiff's father against the defendant on the date of the execution of the pronote in question. As already stated, the defendant admitted execution of these bonds, but stated that he had repaid the amount due on them. He, however, produced no receipt in token of the alleged repayment, nor did he explain as to why he had allowed the bonds

to remain with the promisee or his son after they had been paid off. The promisee, Uttam Singh (P. W. 3), stated on oath that he had not received anything in discharge of the bonds and that he had got the pronote executed in favour of his son in lieu of the amount due on them. Accordingly, the trial Court had rejected the defendant's story, that he had discharged the bonds by making cash payments to Uttam Singh.

The learned District Judge has not dissented from this finding. He has however given his decision against the plaintiff disallowing this item on three grounds: (1) He has held that the bonds had not been produced with the plaint, nor were they included in the list of the documents relied upon by the plaintiff. The plaintiff however had instituted the suit on the pronote which he filed with the plaint. Subsequently, when the defendant in his written statement denied receipt of the consideration, the plaintiff in his statement before the framing of issues specifically averred that Rs. 1,100 out of the consideration for the pronote was the amount due on these bonds, and he actually produced them on 9th March 1935 before evidence began to be recorded. In these circumstances no inference can be drawn against the plaintiff from the non-production of the bonds with the plaint or the omission from the list of the documents on which the plaintiff intended to rely which list had also been filed with the plaint. (2) The second reason given by the learned Judge is that the bonds appear to have been materially altered in so far as the original amount due thereon was entered as repayable (*ind-ul-talab*) on demand, but subsequently the words '*ind-ul-talab*' were scored off and the words "*ek Sal tak*" (after one year) written therefor. The learned Judge seems to have been of the opinion that this alteration had been made by the plaintiff subsequent to the execution of the bonds with a view to show that the amount due thereon was still within limitation on the date on which the pronote was executed, namely, 29th September 1931. There is however no warrant for this assumption. The plaintiff applied to the trial Court for summoning the scribe and one of the attesting witnesses to prove that the alteration in the bonds had been made at the time of their execution but the Sub-Judge rejected the

application on the ground that the decision of the suit would be delayed. In the peculiar circumstances of this case, this obviously was not an adequate reason for refusal to summon the witnesses and in any case no inference against the plaintiff should have been drawn from the non-production of evidence as to the time when the alleged alteration was made.

The learned Judge also appears to have thought that the bonds having been materially altered the plaintiff could not be allowed to rely on them. This however is an erroneous view of the law. It is no doubt true that a material alteration of a document by a party to it, after its execution, without the consent of the other party, renders it void. But it is well settled that this rule applies to those documents only which are the foundation of the plaintiff's claim. It does not apply to documents which are merely evidence of the defendant's pre-existing liability: see 25 Bom 616 (1), 1926 Nag 209 (2), 9 C W N 695 (3) and 53 Cal 418 (4). Assuming therefore though for such assumption in my opinion there is no foundation on the record that the plaintiff or his father had altered the bonds without the consent of the defendant, the bonds could not in the circumstances be excluded from evidence. (3) The third ground which the learned Judge has given for rejecting the plaintiff's claim is also based upon the assumption that the bond had been altered subsequent to its execution, without the defendant's consent. In discussing this part of the case he has proceeded on the assumption that the amount due on the bonds was payable on demand and that they had become time barred three years from the date of their execution, i. e., on 15th September 1930, and therefore nothing was due thereon on 29th September 1931, when the pronote in question was executed. The learned Judge has conceded that under S. 25, Contract Act, the promise to pay a debt barred by the law of limitation constitutes good consideration, but he has observed that in order to do so, the debtor must expressly state that he was renewing a barred debt.

The learned Judge however has not cited any authority for this proposition which is not borne out by the wording of S. 25, and to support which Mr. Sethi is unable to cite any ruling of any Court in India. If the Legislature had intended that the debtor should expressly state that he was renewing a barred debt, before such a debt could form valid consideration for a promise under S. 25, it should have stated so explicitly in the statute. The question has been considered by the Courts in India in numerous cases and it has been held that the agreement under S. 25 (3) will be enforced if the real consideration is shown to be a barred debt, even though no reference is made to it in the document itself: see 33 Mad 159 (5) and 7 Rang 292 (6). The learned Judge therefore was in error in his reasoning for rejecting this item.

Mr. Sethi strongly put forward a new argument before me. He pointed out that whereas in the pronote it was stated that the entire consideration has been paid in cash, the evidence now led was that out of the consideration, Rs. 1,100 was on account of the amount due on the previous dealings between the defendant and the plaintiff's father as evidenced by the bonds Exs. P.2 and P.3. He contended therefore that this was a variation from the terms of the document and the plaintiff should not be allowed under S. 92, Evidence Act, to prove his present allegation. This contention again is without force and is sufficiently met by the ruling of the Madras High Court already cited in 33 Mad 159 (5) where it was held that a party to a contract may prove that the actual consideration was something different from that recited in the document, but effect must be given to the real consideration, and the contract falling under S. 25 (3) was no exception to this rule. The same rule was laid down in 7 Rang 292 (6), to which also reference has already been made. I must therefore hold that even if it be assumed that the bonds had been materially altered subsequent to their execution, either by the plaintiff or his father, without the knowledge or consent of the defendant, the amount due thereon formed a good consideration for the pronote in question. The

1. Atma Ram v. Umed Ram, (1901) 25 Bom 616=3 Bom L R 213.

2. Tapiram v. Jugal Kishore, 1926 Nag 209=92 I C 305=21 N L R 169.

3. Harendralal Roy Choudhri v. Uma Charan Ghose, (1905) 9 C W N 695.

4. Parbati Charan v. Amarendra Nath, 1926 Cal 531=96 I C 97=53 Cal 418.

5. Ganapathy Mudaly v. Muniswami Mudaly, (1910) 33 Mad 159=5 I C 754.

6. Abdulla Kin v. Maung Ne Dun, 1929 Rang 240=119 I C 738=7 Rang 292.

defendant's allegations that he had repaid the amount on the bonds was rightly rejected by the trial Court and Mr. Sethi made no attempt to re-agitate this plea.

I hold therefore that the pronote has been proved to be for consideration to the extent of Rs. 1,100, but that the remaining Rs. 300 has not been shown to have been paid. Accordingly the plaintiff is entitled to receive Rs. 1,100, with interest at one per cent per mensem from 29th September 1931 to the date of the suit or Rs. 1,496. I accept this appeal, set aside the judgment and decree of the learned District Judge and in lieu thereof pass a decree in favour of the plaintiff against the defendant for Rupees 1,496 with proportionate costs in all Courts.

D.S./R.K. *Appeal partly allowed.*

A. I. R. 1936 Lahore 1019

JAI LAL, J.

Mt. Sattan—Plaintiff—Appellant.

v.

Mt. Saidan—Defendant—Respondent.

Misc. First Appeal No 1298 of 1935, Decided on 11th May 1936, from order of Senior Sub-Judge, Lyallpur, D/- 18th April 1935.

Guardian and Ward—Appointment of guardian—Two parties claiming to be entitled to guardianship of person and property of minor—Dispute compromised—One party appointed guardian of property and other of person of minor—One party withdrawing suit instituted by him, relying on compromise—It is not open to other party to appeal against order of appointment—It can also be assumed that Court giving effect to compromise considered interests of minor.

The Court is not entitled to appoint a guardian of person of a minor on the compromise of the parties and it should independently decide what is best in the interest of the minor, but where a party to the compromise agrees to the appointment of the other party as the guardian of person of the minor, it is not open to him to appeal against the order making the appointment more so when the other party has, relying on the compromise, withdrawn a suit claiming certain property and would find it difficult to have it restored if the order appointing him guardian of person of the minor is set aside. Moreover it must be assumed that when the Court gave effect to the compromise, it considered that it was in the interest of the minor to appoint the other party as the guardian of his person: 1924 *Mad* 484, *Disting.* [P 1019 C 2]

Ram Lal Anand II—for Appellant.

Taj-ud-Din—for Respondent.

Judgment—One Mohammad Ali died leaving a will whereby he bequeathed his

property to his mother Mt. Sattan for life and after that to his nephew Jafar Ali a minor 12 years of age. It appears that this Jafar Ali is a son of Mt. Saidan by her previous husband Ahmad Ali brother of Mohammad Ali. After her death Mohammad Ali married her but subsequently divorced her. After the death of Mohammad Ali both Mt. Sattan and Mt. Saidan claimed to be entitled to the guardianship of the person and property of the minor. Mt. Saidan also had instituted a suit for a declaration that she was entitled to inherit the property left by Mohammad Ali as his widow. After some evidence had been recorded, the ladies compromised the dispute by declaring Mt. Sattan to be the guardian of the property and Mt. Saidan to be the guardian of the person of the minor. The Court gave effect to this compromise. One of the terms was that Mt. Saidan had to withdraw the suit that she had instituted claiming the property to be hers. This suit, she withdrew after the compromise.

Mt. Sattan has presented this appeal praying that the order appointing Mt. Saidan as the guardian of the person of the minor be set aside merely on the ground that the Court is not entitled to appoint a guardian on the compromise of the parties but that it should independently decide what is best in the interest of the minor. This broad proposition is correct but in the present case Mt. Sattan herself agreed to the appointment of Mt. Saidan. It is not open to her to appeal against that order. Moreover Mt. Saidan had withdrawn the suit which she had instituted relying upon the compromise and if the order appointing her as guardian of the person is set aside, she may find it difficult to have the suit restored. Moreover, I must assume that when the Court gave effect to the compromise it considered that it was in the interest of the minor to appoint Mt. Saidan as guardian of the person of the minor. 47 *Mad* 459 (1), cited by the appellant's counsel does not apply to the facts of this case, because in that case the Court had allowed an arbitrator appointed by the parties to nominate a guardian and thus had delegated its functions in favour of the arbitrator. In my opinion, therefore, this appeal is not competent, and on the

1. *Sami Chetti v. Adai Kalan Chetti*, 1924 *Mad* 484=84 I O 613=47 *Mad* 459=46 M L J 179.

merits, there is no force in it. I dismiss it with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1936 Lahore 1020

ADDISON AND ABDUL RASHID, JJ.

Mt. Fazal Nishan—Defendant—Appellant.

v.

S. Hukam Singh—Plaintiff and others,
Defendants—Respondents.

Letters Patent Appeal No. 25 of 1936,
Decided on 14th April 1936, from decree
of Jai Lal, J., D/- 4th December 1935.

(a) Evidence Act (1872), S. 115—Mortgagee having two mortgages against same property—Decree for sale in suit on second mortgage—Existence of prior mortgage mentioned in suit—Private purchase of property from mortgagor free from incumbrances and without mortgagee's knowledge and decretal amount deposited in Court—Mortgagee held not estopped from suing on prior mortgage.

A held two mortgages against the same property. He obtained a decree for the sale of mortgaged property in a suit brought on the second mortgage. Therein he clearly disclosed the existence of a prior mortgage. In the meantime the mortgagor sold the property to B privately and free from incumbrances and the decretal amount was deposited in Court:

Held: that as A had disclosed the existence of prior mortgage and as he did not know that the property was sold privately to B free from incumbrances, he was not estopped from suing on the prior mortgage: 21 All 309, *Disting.*

[P 1020 C 2; P 1021 C 1]

(b) Transfer of Property Act (1882), S. 67-A—S. 67-A not applicable to mortgage executed before 1st April 1930.

Section 67-A came into force on 1st April 1930 and therefore this section is not applicable to a mortgage executed before that date: 1931 Rang 208, *Foll.*

[P 1020 C 2]

Shuja-ud-Din—for Appellant.

Harnam Singh for *Hukam Singh* and
Allah Din Malik for *Fazal Ilahi*—for
Respondents.

Addison, J.—Hukam Singh held two mortgages against the same property the mortgagor in both being Mohammad Bakhs. He instituted a suit against Mohammad Bakhs on 4th June 1931 for sale of the mortgaged property on the basis of the second mortgage, which was of the year 1926, and in the plaint he disclosed the existence of a prior mortgage for Rs. 600, dated 3rd July 1924 his

rights in which he reserved. He obtained an ex parte decree and later a final decree for sale of the mortgaged property. When the proclamation of sale of the property was prepared, the Court Ahlmad failed to mention in it the existence of the prior mortgage of 1924 although in the application put in by the mortgagee under O. 21, R. 66, he again mentioned the existence of the prior mortgage just as he had done in the plaint. The property, however, was not auctioned by the Court. The present appellant before us, Mt. Fazal Nishan, in the meantime purchased the property privately from the legal representatives of the mortgagor, who paid the amount due under the decree into Court. As a result the decree was consigned to the record room as fully satisfied without the property being brought to sale through the Court. Hukam Singh then instituted the present suit on his mortgage of 3rd July 1924. It was dismissed by the trial Court and the appeal was dismissed by the District Judge on the ground that the plaintiff was estopped from setting up the prior mortgage. On second appeal to this Court a learned single Judge held that there was no estoppel and decreed the claim. Against this decision, Mt. Fazal Nishan has preferred this appeal under the Letters Patent.

The appeal must be dismissed. There is no evidence that the mortgagee Hukam Singh knew that the property was sold privately to the appellant free from encumbrances. The transaction had nothing to do with him nor is there anything to show that he knew anything about it. He had twice made quite clear the existence of the prior mortgage his rights under which he reserved. There was no legal duty cast on him to warn the purchaser, and, as has already been remarked, there is nothing to show that he knew that the house was sold privately free from encumbrances. No question of estoppel, therefore, can arise, and we are in agreement with the learned single Judge when he says that the record gives a clear indication of his bona fides in the matter. Further, S. 67-A only came into force on 1st April 1930 and the High Court of Rangoon has held in 131 I C 725 (1) that this section is not applicable to a mortgage executed before that date. We

1. *Ko Aung Bye v. Ko Po Kyaing*, 1931 Rang 208=131 I C 725.

are in agreement with this decision. This section applies the principle of consolidation to mortgagees, but it can have no effect on the present case as it was not in force at the time the mortgage in question was entered into. Further 21 All 309 (2) is not in point. It was held in it that a mortgagee who causes the mortgaged property to be sold in execution of a decree other than a decree obtained upon his mortgage, without notifying to the intending purchaser the existence of his mortgage lien, is estopped for ever from setting up that lien against the title of a bona fide purchaser. The sale in that case was by Court auction and it was obviously the duty of the mortgagee to notify the existence of his mortgage lien before having the property sold by the Court. In the present case there was a private purchase, the terms of which were not known to Hukam Singh. All that came to his knowledge was that there had been some sort of sale and that his decree was satisfied by the amount due under it being paid into Court, while he further knew that on two occasions he had clearly set out the existence of the mortgage now sued upon. For the reasons given we dismiss this appeal but make no order as to costs in it.

D.S./R.K.

Appeal dismissed.

2. Mahomed Hamidunnissa v. Shib Sahab,
(1899) 21 All 309=1899 A W N 87.

* A. I. R. 1936 Lahore 1021

JAI LAL AND ABDUL RASHID, JJ.

Maqsud Ahmad and another—Plaintiffs—Petitioners.

v.

Mathra Datt & Co. and others—Defendants—Opposite Parties.

Civil Revn. No. 636 of 1935, Decided on 7th July 1936, from order of Sub-Judge, 1st Class, Delhi, D/- 31st May 1935.

* Civil P. C. (1908), O. 7, R. 11 (a) — Note appended to an issue, in effect rejecting the plaint to the extent of interest as not showing cause of action — Note does not amount to rejection of plaint, there being no provision in the Code for rejection of plaint in part—Order therefore not being appealable, revision is only remedy.

Where in a suit for money including interest, the Court framed issues and appended a note to one of them to the effect that the plaint did not show cause of action regarding the claim for interest and rejected the plaint to that extent :

Held : there is no provision in the Civil P. C., for rejection of the plaint in part and note recorded by the trial Court did not therefore amount to rejection of plaint as contemplated by Civil P. C. The note therefore did not give a right of appeal. If no appeal lay, a revision would be the only remedy open to aggrieved party. [P 1022 C 1]

Held further : that in recording the note the Court must be held to have acted in the exercise of its jurisdiction illegally and with material irregularity, that the note decided the claim so far as interest was concerned and this note therefore came within the meaning of words 'case decided' as contemplated by S. 115 of the Code. The order in the note therefore could be attacked in revision. [P 1022 C 1]

Shuja-ud-din and Mohammad Amin—for Petitioners.

Bishan Narain—for Opposite Parties.

Abdul Rashid, J.—On 21st February 1935, Maqsud Ahmad and Marghub Ahmad instituted a suit against the firm Mathra Dutt & Co., for recovery of Rs. 8,626-7-6. In para. 5 of the plaint the plaintiffs stated that Rs. 5,060-5-0 on account of principal, and Rs. 3,566-2-6 on account of interest, at the rate of six per cent per annum, were due to them. There were a number of pro forma defendants also but the suit was only contested by the firm Mathra Datt & Co. The contesting defendant pleaded, inter alia that the plaintiffs were not entitled to any interest. On 29th April 1935, the trial Court recorded the statements of the counsel for the parties. No reference was, however, made in these statements to the claim of Rs. 3,566-2-6 on account of interest. On 31st May 1935, the trial Court framed five issues. Under issue 4 the Court appended a note to the following effect :

Note : It is not stated in the plaint why interest is claimed by the plaintiffs and as the plaint shows no cause of action regarding the claim for interest, the plaint must be rejected to that extent.

On 1st October 1935, the plaintiffs preferred a petition for revision to this Court. The main ground for revision was, that the Court was not entitled to reject the plaint in part, and that the order of the trial Court to that effect was illegal. On 9th October an appeal against the note of the trial Court, dated 31st May 1935,

and reproduced above, was filed in this Court. The grounds of appeal were on the same lines as the grounds for the petition for revision, and it was stated that a copy of the order appealed against as well as the vakalatnama had been attached to the petition for revision which had already been filed. The learned counsel for the respondent has taken a preliminary objection to the effect that no petition for revision is competent in the present case as the note recorded by the trial Court amounts to an order rejecting the plaint and is, therefore, appealable. I am of the opinion that this objection is without any force. The Court has not passed any definite order rejecting the plaint. Under one of the issues it has recorded a note that as the plaint does not disclose the reason for the claim for interest that claim would not be considered. There is no provision in the Civil Procedure Code for the rejection of a plaint in part, and the note recorded by the trial Court does not, therefore, amount to the rejection of the plaint as contemplated in the Civil Procedure Code. I am, therefore, of the opinion that the note to which reference has been made does not give a right of appeal. If no appeal lies a revision would be the only remedy available to the plaintiffs.

It was also contended by the learned counsel for the respondent that the note is in the nature of an interlocutory order, and therefore no revision is entertainable against such an order. In my opinion, the note decides the claim of the plaintiffs so far as interest is concerned, and therefore this note comes within the meaning of the words "case decided" as contemplated by S. 115, Civil P. C. It is therefore open to the plaintiffs to attack the order embodied in this note on the revision side. On the merits it is impossible to maintain the order of the trial Court. As mentioned above, there is no provision in the Civil Procedure Code for the rejection of a plaint in part and in recording the note the Court must be held to have acted in the exercise of its jurisdiction illegally and with material irregularity. I would, therefore, delete this note from the record of the trial Court. The case must be remitted to the trial Court for decision on the merits. The trial Court shall proceed with the case on the issues already framed unless the Court, on a

proper application being made by either party, decides to allow amendment of the pleadings or to frame any additional issues. This is a matter on which I refrain from expressing any opinion. For the reasons given above, I would dismiss the appeal, and accepting the petition for revision remit the case to the trial Court for adjudication on the merits. The parties will bear their own costs both in the appeal and in the petition for revision.

Jai Lal, J.—I agree.

P.R./V.V.

Order accordingly.

* A. I. R. 1936 Lahore 1022

ADDISON AND ABDUL RASHID, JJ.

Cheda Lal—Plaintiff—Appellant.

v.

Aijaz Hussain and others—Judgment-debtors—Respondents.

Letters Patent Appeal No. 124 of 1935, Decided on 5th June 1936, against judgment of Din Mohammad, J., D/- 20th June 1935.

* Civil P. C. (1908), O. 22, Rr. 12, 11, 8, 4, 3—Appeal from order in execution is not execution proceedings within meaning of R. 12—Death of respondent—Legal representatives not brought on record—Appeal abates.

The words "proceedings in execution" in O. 22, R. 12 mean proceedings provided for in Part 2 and O. 21 of the Code. They are proceedings in the Court which passed the decree or in the Court to which the decree has been sent for execution. An appellate Court may have to consider the propriety of the orders passed by these Courts, but the proceedings in the appellate Court cannot properly be described as proceedings in execution. They are separate proceedings, merely testing the validity of the order made by the executing Court. And as no distinction has been drawn in the Code between appeals in execution matters and appeals generally, and as provisions of R. 11 are without qualification or exception, Rr. 3, 4 and 8 do apply to appeals in execution matters, and an appeal from an order passed in execution in which legal representative of the deceased respondent is not brought on record within time shall abate: 1932 *Mad* 574; 1934 *Mad* 664; 1933 *All* 988 and 1934 *Oudh* 337, *Rel. on*; 1923 *Lah* 560; 1925 *Nag* 239 and 1929 *Pat* 565, *Dissent*. [P 1024 C 1, 2]

Jagannath Aggarwal and Mela Ram—for Appellant.

Nawal Kishore, R. K. Tandon and Mohammad Amin Sheik—for Respondents.

Addison, J.—In the course of an appeal to this Court against an order in

execution, one of the respondents, Mt. Mehr Sultan, died on 2nd October 1931, but no steps were taken to bring her legal representatives on the record up to 1st October 1934, when the appeal came on for hearing before a learned Judge of this Court. On that date the counsel who represented the respondents brought to the notice of the Court and the appellant's counsel that the lady had died some three years before and the Court gave the appellant one month's time within which the necessary application to bring her legal representatives on the record should be put in. In spite of this the application was not presented till 12th January 1935. When the appeal again came on for hearing, it was contended on behalf of the respondent that the application was barred by time and that the appeal had abated in toto inasmuch as the deceased respondent's interest was not divisible from the rest and the right to sue did not survive against the surviving respondents alone. The learned Judge who heard the appeal agreed with this contention, and holding that the appeal had abated in toto dismissed it. Against this decision the appellant has preferred this appeal under the Letters Patent.

On the merits there is no question but that the decision of the learned single Judge is correct. But a new contention was raised before us, namely that there could be no abatement under O. 22, Civil P. C., in the case of an appeal from an order in execution. The learned counsel appearing for the appellant cited three authorities to this effect. The first is a judgment of a learned single Judge of this Court in 1923 Lah 560 (1) in which a preliminary objection was raised that as the appellant and three respondents had died and no application to substitute their legal representatives had been presented in time, the appeal by and against them had abated and consequently the appeal must fail in toto. The learned Judge repelled this contention by observing that these were proceedings in execution of a decree and R. 12, O. 22 expressly excluded such proceedings from the operation of Rr. 3 and 4 of the same order. He further held that R. 11 did not help the respondents. There was no

other discussion of the question. A learned single Judge of the Nagpur Judicial Commissioner's Court took the same view in 86 I C 11 (2). All he said was that he considered that the provisions of O. 22, R. 4, read with R. 11, Civil P. C., would have been applicable to the case, had it not been for R. 12 of the said Code.

The same question was considered by a Full Bench of the Patna High Court in 9 Pat 372 (3). There two learned Judges took the view that by virtue of R. 12, O. 22, Rr. 3 and 4 did not apply to appeals arising out of an order passed in the course of proceedings in execution of a decree or order and that, therefore, such an appeal did not abate on the death of the respondent. The dissenting Judge, Das, held to the contrary that "proceedings in execution", as used in R. 12, O. 22, meant proceedings in the Court which passed the decree or in the Court to which it was sent for execution, and relating to the "execution, discharge or satisfaction of the decree," but they did not include proceedings in the appellate Court. As no distinction had been drawn in the Code between appeals in execution matters and appeals generally and as the provision of R. 11 was without qualification or exception, he held that Rr. 3, 4 and 8 did apply to appeals in execution matters. On the other hand a Division Bench of the Madras High Court in 55 Mad 1006 (4), held that the rules of abatement in O. 22, Civil P. C., applied to appeals against order made in execution proceedings as to other appeals and that an appeal against an order made in execution proceedings was not itself a proceeding in execution of a decree or order within the meaning of R. 12, O. 22 of the Code. This was followed by another Division Bench of the same Court in 1934 Mad 664 (5). The question has thus been settled so far as the Madras High Court is concerned. Similarly, a Division Bench of the Allaha-

2. Sarjabai v. Dhanraj, 1925 Nag 239=86 I O 11=8 N L J 9.

3. Hakim Syed Muhammad Taki v. Rai Fateh Bahadur Singh, 1929 Pat 565=122 I O 148=9 Pat 372=10 P L T 763 (F B).

4. Rajah of Kalahasti v. P. Jagannatha Rayanimgar, 1932 Mad 574=189 I O 409=55 Mad 1006=63 M L J 827.

5. Subhavarapu Gangunaidu v. Murru Muttenna, 1934 Mad 664=151 I O 777.

1. Mir Khan v. Sharfu, 1923 Lah 560=74 I O 577=5 L L J 168.

bad High Court in 55 All 509 (6) has also held that O. 22, R. 12, Civil P. C., does not exempt pending appeals from the operation of R. 8 of that order even though the appeals arise out of execution proceedings. Lastly, a Division Bench of the Chief Court of Oudh in 1934 Oudh 337 (7) followed the Madras and Allahabad view. O. 22, R. 11, runs as follows:

In the application of this order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, and the word 'defendant' a respondent, and the word 'suit' an appeal.

While O. 22, R. 12 is:

Nothing in Rr. 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

What, then, is the meaning of the words "proceedings in execution of a decree or order" in O. 22, R. 12? The procedure as to execution is given in Part 2 and O. 21 of the Code, and appeals from orders in execution proceedings are not dealt with in any of the sections dealing with execution. On the other hand, the procedure as to appeals is given in Part 7 and O. 41, etc., of the Code. In these provisions as to appeals there is no distinction drawn between appeals in execution proceedings and ordinary appeals. In particular, it is enacted in S. 108 of the Code that:

The provisions of Part 7 relating to appeals from original decrees shall, so far as may be, apply to appeals (a) from appellate decrees, and (b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

Having regard to this I think that the words "proceedings in execution" in O. 22, R. 12, mean proceedings provided for in Part 2, and O. 21 of the Code, that is they are proceedings in the Court which passed the decree or in the Court to which the decree has been sent for execution. An appellate Court may have to consider the propriety of the orders passed by these Courts, but the proceedings in the appellate Court cannot properly be described as proceedings in execution.

They are separate proceedings, merely testing the validity of the order made by the executing Court. Further Rr. 3, 4 and 8 apply in terms to suits, while R. 11 makes those provisions applicable to all appeals. It has already been shown that no distinction is made in the Code between appeals from orders in execution and appeals generally. R. 12 lays down that Rr. 3, 4 and 8 shall not apply to proceedings in execution of a decree or order and this is a necessary provision; for when a decree-holder dies, the execution proceedings come to an end; but it is open to the legal representatives of the decree-holder to commence fresh execution proceedings against the judgment-debtor; while, similarly, a decree-holder has a right to proceed against the legal representatives of a deceased judgment-debtor in a fresh execution proceedings, provided always that the fresh application is within the period of limitation of three years. But there is no provision in the Code for a succession of appeals in execution matters. There can only be the one appeal, which has to be kept alive under O. 22, R. 11, which provides for all kinds of appeals. From the structure of the Code it can safely be said that there is a procedure for suits, a procedure for execution and a procedure for appeals; and Rr. 3, 4 and 8 apply to suits by their own force and to appeals by force of R. 11, as it was put by Das, J. in 9 Pat 372 (3):

In my judgment, as no distinction has been drawn in the Code between appeals in execution matters and appeals generally, and as the provision of R. 11, is without qualification or exception Rr. 3, 4 and 8 apply to appeals in execution matters.

This means that an appeal from an order passed in execution cannot be held to be a mere continuation of the execution proceedings, as to hold this to be the case would be going against the Code of Civil Procedure and its design. For the reasons given I would dismiss this appeal with costs.

Abdul Rashid, J.—I agree.

B.D./R.K.

Appeal dismissed.

6. Chhanga Mal v. Ram Dularey Lal, 1933 All 388=144 I C 391=55 All 509=1933 A L J 706.

7. Hari Saran Das v. Har Kishen Das, 1934 Oudh 337=150 I C 425=11 O W N 917.

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